

**Hawai`i State Bar Association
Committee on Judicial Administration**

2016 CRIMINAL LAW FORUM

Ali`iolani Hale
Supreme Court Building, Room 101

Wednesday, September 21, 2016

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2016 CRIMINAL LAW FORUM REPORT

INTRODUCTION

As described in the *Hawaii State Bar Association* (“HSBA”)’s *Board Policy Manual*, the Committee on Judicial Administration (“JAC”):¹

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 Bench-Bar Conference in 2013, the JAC decided to develop a Forum concept to focus on certain issues in the criminal areas² and civil areas³ separately. These Forums take place every other year, alternating with the Bench Bar Conferences.

OPENING REMARKS

Justice Simeon R. Acoba (ret.) welcomed and addressed the attendees and participants. He thanked the Judicial Administration Committee, the panelists, speakers, and attendees

¹ The HSBA Committee on Judicial Administration in 2016 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J. T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Hayley Y. C. Cheng; Dennis W. Chong Kee; Kahikino Noa Dettweiler-Pavia; Vladimir Devens; Don J. Gelber; William A. Harrison; James Kawashima; Edward C. Kemper; Carol K. Muranaka; Kyleigh F. K. Nakasone; Lester D. Oshiro; Audrey L. Stanley; and Kevin K. Takata.

² The Criminal Law Forum Committee members included Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Hawaii Supreme Court Associate Justice Richard W. Pollack; Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Hayley Y. C. Cheng; William A. Harrison; Brandon M. Kimura; Lester D. Oshiro; Audrey L. Stanley; and Kevin K. Takata. Audrey L. Stanley, Keani Alapa and Kyleigh F. K. Nakasone also served as Reporters.

³ The 2016 Civil Law Forum took place on Tuesday, September 20, 2016.

participating in this important event, and others who assisted in coordinating the forum. He mentioned that each year we have alternated between holding criminal forums and bench bar conferences. The Forum was organized with the intent of trying to cover important issues of present interest. This Forum concerned substantive law issues, pretrial detainment and reform, judicial proceedings, and the rights of the accused. Justice Acoba mentioned that the Conference of Chief Justices passed Resolution 3, "Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release," which considers the presumptive use of nonfinancial conditions of release, that are consistent with evidence-based assessment of flight and threat to public safety. He was very grateful to guest speakers, panelists, probation, Department of Public Safety ("DPS"), Honolulu Police Department ("HPD"), prosecutors, public defenders, private defense attorneys and guests from mainland, and Carol Miyashiro. He thanked Dawn Nagatani, Martha Hamada, and others who helped with the setup of the room for the Forum.

Chief Justice Mark Recktenwald remarked that the genesis of this event was last year's Bench-Bar Conference. The Bench-Bar conference was reinvigorated in 2012, and received a positive response from the bar. The judiciary seriously considers and studies the comments and issues raised at the conferences and forums. Action is undertaken, and these events have become an important part of how the judiciary operates.

What has been developed recently is that following a Bench-Bar Conference is a Forum, which focuses more deeply into particular issues. Chief Justice Recktenwald indicated that several issues would be discussed, with a focus on pretrial justice and possible reform in this area. He was honored to have the mainland guests attend the Forum. He noted that Arizona has been a leader in the area and welcomed Kathy Waters. He appreciated the attendance of Leland Moore and Carol Miyashiro, as well as the other panelists.

Chief Justice Recktenwald noted that it is an exciting time for those who work in the criminal justice system. In the national debate, there is considerable focus on criminal justice reform, many people coming together to find common ground, to develop initiatives all can support. One of those initiatives is justice reform. Hawai'i is one of 17 states that have undergone reform. When one looks at the Justice Reinvestment Initiative ("JRI"), one area of concern was the delay in the amount of time someone who comes into system and is unable to make bail and then ultimately can be released. The average period for the bail release is more than two months.

One of the recommendations from the JRI legislation is to have a quick risk assessment completed in a matter of days to move process along. Despite that, it seems that there are still delays in process. Chief Justice Recktenwald hopes that the discussion on this topic at the Forum would offer suggestions on reform.

Another important initiative is looking at the system of incarceration. The legislature adopted a resolution to study incarceration policies, improvements for the Hawai'i system and design, that is, what are the features of future facilities and what are the design objectives for such facilities. Justice Michael Wilson has been working on that matter, and Chief Justice Recktenwald appreciates his work on the questions of: how promptly the system operates and how quickly can we make decisions.

The question is: How quickly can decisions be made if we have the right information and how can we have the system optimized to have decisions made in the shortest time possible. Nationally, there has been an effort to look at who is in the system, goals of the system, effective community safety, and requisite court appearances by defendants.

Chief Justice Recktenwald explained that there should be a system in place where high-risk, dangerous defendants are dealt with in an appropriate manner, but with the low-risk defendants, detention should not occur solely because they cannot afford to make bail.

Studies have shown that a three-day pre-release is too much. Someone with a job, a single parent who is incarcerated, who is a low-risk, who is likely to appear, that three days in jail can mean the start of a cascading series of negative effects – loss of jobs, breakup of family units, homelessness, and the like. If incarceration is not serving public safety, or ensuring that people appear, we need to address the situation more promptly. In our county, thousands of people are kept in jail. Nonetheless, most must stay in jail because, to be blunt, they cannot afford to pay for their freedom.

I. CURRENT BAIL PROCEDURES

(Moderator: Hayley Cheng; Panelists: Judge Ronald Ibarra; Judge Randal G.B. Valenciano; Judge Joseph Cardoza; Judge Barbara Richardson; Mark Yuen, Deputy Prosecuting Attorney; Major Susan Ballard, Commander, Central Receiving Division ("CRD"); Shelley Nobriga of Intake Service Center ("ISC"))

There is a growing national trend to reevaluate, update, and restructure bail and pretrial release procedures to balance the concerns for public safety and court obligations, while maintaining the constitutional presumption of innocence and the right to reasonable bail. Hawaii's pretrial release procedures are not in concert with this national trend. The 2016 Criminal Law Forum sought to answer the question: Should Hawaii's policies and procedures be reexamined to ensure that defendants are afforded the least restrictive release terms consistent with statutory considerations regarding flight risk and danger?

A. SETTING OF BAIL

Who sets bail? What is the role of the police, prosecutor, and the court? What is the current practice? Is there a bail schedule? What information is obtained and utilized and what criteria is used to set bail? Is a bail report normally prepared before the initial appearance? Why does it take so long to obtain a bail hearing? Why is there a large discrepancy between the Circuits in the fixing of bail amounts?

The panelists considered current bail procedures. Hayley Cheng opened the discussion with the question of who sets bail.

PROSECUTORS: Judges set bail. There are two type of cases – custody and non-custody. In *custody* cases, the prosecutors play no role. The HPD detective speaks with the court, offers a recommendation, and the court indicates the request is either high, low, or approves the bail request. In *non-custody* cases, a prosecutor makes a recommendation to the court, which decides whether the bail amount is appropriate or not. The amount of bail is based on the type of offense, record of defendant, and potential flight risk. If it is a non-custody case there is generally a State assessment and finding of “no flight risk,” otherwise the person would be considered a “custody defendant.”

HONOLULU POLICE DEPARTMENT: CRD sets bail for misdemeanors and petty misdemeanors. All bail in felony cases are handled by the assigned detective and the court. In the case of misdemeanors and petty misdemeanors, CRD considers factors such as whether: (1) the person is on probation or parole; (2) the person has pending felony matters; (3) the person is transient; (4) it is a first offense; (5) force or a weapon was used; (6) HPD has had prior contact with the individual; and (7) the detainee’s candor when questioned (did the person lie to the intake officer).

HPD utilizes the following standard bail schedule: (1) a minimum of \$50.00 to a maximum of \$1,000.00 for petty misdemeanors; and (2) a minimum \$100.00 to a maximum of \$2,000.00 for misdemeanors. If the matter occurred in a “Weed and Seed” (federally designated) area, minimum bail is \$1,000.00 to a maximum of \$2,000.00 for a misdemeanor.

The matters for which HPD sets standard bail include DUI, domestic abuse, TRO violations and prostitution. CRD’s geographical area includes the Weed and Seed designated areas: Honolulu, District 5 (Kalihi), and District 3 (Pearl City). Except for Weed and Seed cases, if the charge is disorderly conduct, harassment, prostitution, or petty drug possession, HPD sets bail at a minimum of \$500.00. Maximum bail is set at \$1,000.00 regardless of previous contact or history.

INTAKE SERVICE CENTER: All circuits have an Intake Service Center (“ISC”). ISC staff report to the police stations at 4:00 a.m. to interview individuals who did not post bail. In preparing the report, ISC staff highlight key issues and facts about job, living situation, and family. In formulating an initial bail report, staff collects information, which includes Criminal Justice Information Service (“CJIS”) and National Crime Information Center (“NCIC”) checks. The staff must undertake a quick fact specific review, highlighting key risk factor issues for court consideration.

THIRD CIRCUIT- KONA: Pursuant to Haw. Rev. Stat. § 804-5, bail setting authority is given to the court for misdemeanor and felony offenses. The chief of police also has authority to set bail. The Kona court has had a bail guideline order since 1994. It is specifically a guideline, not a standard. This is to allow individuals to make bail and provide police a guideline, pre-first court appearance. Standard bail for a class B felony is \$2,000.00, for a class C felony – \$1,000.00. Bail can be denied for murder, attempted murder, and class A felonies. The court considers risk of flight and danger to the community.

When ISC reviews someone at the police station and does not obtain sufficient information on the defendant at that time, the court will undertake an independent bail study when a defendant makes his/her first appearance at court. There are factors, sometimes not contained in the ISC report, which the court prefers to see, such as financial resources and ability to pay. The court considers the financial status of the defendant when setting release conditions. If there are issues concerning indigent status, the court seeks to obtain a consensus from the parties as to the amount of bail, if any, which should be set. If all parties fail to agree to a specific amount or condition, then a full hearing on the matter is set.

FIRST CIRCUIT- DISTRICT: Detectives call the court only if extraordinary bail is sought, i.e. higher than what is “normal.” For custody status cases- \$11,000.00 is normal on class C felony matters, for non-custody cases, \$2,000.00 is normal. The court must consider the circumstances of offense and danger to other people. It is a fact-based decision, with bail amounts starting at \$11,000.00 but can go as high as a million, considering the criminal history, propensity to flee, number of arrests, convictions, and type of case. Sometimes detectives will ask what will the court set, what will the court give us? A lot of it is based on the years of experience being a “duty judge.” Newer, less experienced judges will ask, what bail amount do you want and why?

SECOND CIRCUIT: The court operates similarly with the other circuits in many respects. The court considers an arrestee’s ability - in petty misdemeanor and misdemeanor cases – to make bail in the shortest amount of time. The Second Circuit Court seeks to obtain a bail study for the initial appearance, to allow for a bail hearing to occur within 48 hours of arrest. Factors that are considered include nature of offense, ties to community, flight risk, residence, employment, prior record, and the like. At bail hearings, the court will discuss financial resources, and other factors, as well as alternatives to cash bail, when those alternatives present themselves. If the State and defense agree to an alternative to cash bail or pretrial incarceration, the parties will be asked to provide the court with a stipulation, and the individual will usually be released.

FIFTH CIRCUIT: The court does not utilize bail schedules. The court has a good working relationship with ISC. When someone is arrested, bail is set by the police department, felony information by the district court, and indictments by a reviewing circuit judge. After bail is set, there is a referral to ISC. For preliminary hearings, the goal is to obtain a bail report within one to two days. The problem that often arises is the inability to verify all necessary information for the report. In other situations, the court endeavors to get a report prepared within five days. In that five-day period, ISC has sufficient opportunity to verify all information.

The Judiciary had ISC do a presentation for the attorneys on risk assessment, to explain how bail is set utilizing ISC’s point system. Motions to reduce bail are seriously considered and reviewed. The court generally attempts to set low bails. Bail is usually established to set and impose conditions to the bail. The lowest bail the court will set pending sentencing is \$1.00. Thereafter, if the defendant gets into trouble pending sentencing, it clearly hampers the defendant’s ability to later argue for probation.

B. QUESTIONS

1. What is ISC doing to speed preparation of reports?

The ISC supervisors have been working diligently with its staff to observe the 4:00 a.m. custody review. It appears ISC has a positive working relationship with all courts and staff. The ISC staff works diligently to make good decisions concerning release.

Statistics for the fiscal year 2016:

- (1) First Circuit - average length of stay for pretrial felons – 86 days, with median stay of 42 days;
- (2) Fifth Circuit- average length of stay for pretrial felons – 59 days, with median stay of 22 days;
- (3) Second Circuit - average length of stay for pretrial felons – 52 days, with median stay of 8 days;
- (4) Third Circuit - average length of stay for pretrial felons – 36 days, with median stay of 10 days.

There are varying reasons for the differences amongst the circuits. For instance, the First Circuit has supervised release issues concerning sponsorship conditions. The Second Circuit has supervised release issues in combination with concrete conditions. Each circuit has its own type of problems, but using proactive measures, ISC is working together to bring down these median numbers.

2. Is supervised release (“SR”) given at preliminary hearings in other circuits?

ISC: One problem with considering SR at preliminary hearings is that ISC does not have sufficient time, in the short period given, to verify all information.

Fifth Circuit: If the State does not object, the court will sign off on supervised release orders. If the State objects, the court denies supervised release. If a defendant wants to pursue supervised release, the defendant must file a motion. At the hearing on the motion, the court can weigh the facts and evidence and decide whether to grant SR or not.

Third Circuit - Kona: Every quarter, the court has a meeting with everyone to review the pretrial jail population at Hawaii Community Correctional Center (“HCCC”). Sixty percent of total pretrial population is incarcerated. At the last legislative session, the warden was given authority to release inmates to ease overcrowding. The court rarely observes district court judges permitting felony defendants supervised release at the preliminary hearing stage. When there is no bail study, the court will conduct its own bail study. The court will first ask if the defense attorney has any objections to the questioning of his/her client. If not, the court will ask: (1) where the defendant lives; (2) his/her family situation; and (3) his/her work situation. The court will also conduct a quick bail study at arraignment, asking whether a defendant is working; when the police had an arrest warrant and contacted defendant, did he/she turn himself/herself in? If the individual turned himself/herself in, that speaks volumes to the court. If a defendant has a propensity to run, he/she

generally will not turn himself/herself in. The court will often conduct this mini-bail study pending ISC's formal bail study. The court notes that bail is to ensure presence in court and not as a plea-bargaining tool. There is a need to educate all the parties in the system as to this fact.

Second Circuit: Whenever bail studies are prepared, typically if the bail study recommends supervised release, then that recommendation will be followed, and release will be subject to the standard terms and conditions.

First Circuit – District: The court reviews Judicial Determination of Probable Cause (“JDPC”) affidavits every morning, weekends, and holidays. The court not only reads JDPC’s but confers with the detective if extraordinary bail is sought. Generally, the court does not have much information at the date of the preliminary hearing. The court is interested in learning more about the Third Circuit bench questionnaire. The court has reviewed the revised ISC reports recently and notes the system is working better.

II. THE PURPOSE AND HISTORY OF BAIL – IMPLICATIONS OF PRETRIAL BAIL REFORM

(Leland J. Moore, NIC Consultant)

Leland Moore appeared at the Forum on behalf of the National Institute of Corrections (NIC”). NIC is a non-profit center of learning, innovation, and leadership that shapes and advances effective correctional practice and public policy. Their website is: www.nicic.gov/.

Moore reviewed the history and purpose of bail and the historical course that pretrial release has taken to get us to the present-day concept of bail and pretrial release. His power point presentation can be found here: <http://www.ncja.org/sites/default/files/documents/Moore-Purpose-and-History-of-Bail.pdf>.

Understanding fundamentals of bail and no bail is essential to understand the scope of change. Given research, and consensus, a cashless bail system can be a high functioning approach to pretrial release and detention. A good primer on the history of bail: www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf.

Bail is a process of pretrial release. The purpose of bail is release. The purpose of a determination of no bail is to detain. Bail is not money, money is a condition of bail or release, or a limitation on freedom with a different purpose.

Bail is, and should be a binary decision. In early America, a broad right to bail was constitutionally mandated. Bail was a personal surety with no indemnification. An unsecured bond, with a promise to pay later, was the norm. People resided in communities where everyone knew one another. In 1800-1899 with the increase of personal movement, community knowledge declined. This led to the demise of personal sureties. It became easier to abscond without personal

sureties, and an increase in detention began. In as late as 1898, there was a presumption of release and bail.

Reform movement: Many jurisdictions are initiating bail reform. The issue of money and how money is a hindrance to the system of bail is the topic of discussion. There are zealous advocates who are suing jurisdictions who use money as the primary basis for release.

In Colorado, even though a task force did research on what bail meant and understood what history and law told them, they still had to obtain consensus on reform.

It is important to understand the research and studies that have been published. A good resource is: "Fundamentals of Bail, Money and Criminal Justice," and "Money as a Criminal Justice Stakeholder: A Judges Decision to Release or Detain a Defendant Pretrial" (www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf)

III. ESSENTIAL ELEMENTS OF A HIGH FUNCTIONING PRETRIAL JUSTICE SYSTEM

(Leland J. Moore, NIC Consultant)

"Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release." - Department of Justice, 2016.

Leland Moore discussed what stakeholders must look for in creating a highly functioning system. He covered the impact of moving to a pretrial justice system that relies on risk assessment to assist with pretrial release decision-making and demonstrated how risk management strategies can improve pretrial outcomes. These improvements are expected to increase the efficiency of the justice system while also providing a fairer, more just system for defendants and victims.

There are eight elements of an effective pretrial system:

1. Pretrial release and detention decisions are based on risk.
2. There is a statutory presumption of nonfinancial release, restrictions, or prohibition against the use of financial release, and detention without bail for only a limited and clearly defined type of defendant.
3. There is an array of release options available following or in lieu of arrest.
4. All defendants eligible by statute for pretrial release are considered for release, with no locally-imposed exclusions not permitted by statute.
5. Experienced prosecutors screen criminal cases expeditiously before initial appearance.
6. Defense counsel is engaged at first appearance.
7. There is a collaborative group of stakeholders that employ evidence-based decision making to ensure an effective functioning system.

8. There is a dedicated Pretrial Services Agency.

Essential to a proper decision is the use of “Evidence-based Decision Making” Principles:

- Principle 1: The professional judgment of criminal justice system decision makers is enhanced when informed by evidence-based knowledge.
- Principle 2: Every interaction within the criminal justice system offers an opportunity to contribute to harm reduction.
- Principle 3: Systems achieve better outcomes when they operate collaboratively.
- Principle 4: The criminal justice system will continually learn and improve when professionals make decisions based on the collection, analysis, and use of data and information.

Moore also discussed how release options can be utilized in lieu of arrest such as the use of summons and citations. Furthermore, the options following arrest must be reviewed and implemented such as:

- Delegated release authority
- Diversion
- Release on Own Recognizance (“ROR”)
- ROR to pretrial services supervision

Lastly is consideration of the Prosecutor “to do” List for Pretrial Bail Decisions which include:

- Review affidavit / LE reports
- Review PTS report with risk assessment
- Deciding on appropriate charges
- Speaking with victim for pretrial input
- Making hold / release recommendations
- Deciding what conditions of bond to request to address court appearance and public safety
- Speaking with defense counsel to see if bail agreement can be reached and submitted to the judge.

An NIC PowerPoint discussing these essential elements can be found:
<http://nicic.gov/Library/files/032719.pdf>.

IV. BAIL ALTERNATIVES AND REFORM MEASURES

(Justice Michael D. Wilson; Carol M. Miyashiro, Chief U.S. Pretrial Services Officer – Hawai’i;)

The federal pretrial system: requires the release of a defendant on “the least restrictive” “conditions, or combination of conditions” “that will reasonably assure the appearance of the

person” “and the safety of any other and the community.” 18 U.S.C. § 3142 et. seq. If the person is a flight risk or danger, he/she can be detained without bail. All other individuals are subject to release. The use of cash bail is very limited. The federal courts primarily use unsecured signature bonds and conditions as the basis for pretrial release.

A snapshot of the federal system of pretrial release shows: there are 93 federal judicial districts, which have Pretrial Services Offices (“PTS”). There are major differences in each PTS. The D.C. Pretrial Services Agency is like Hawaii’s PTS office. The initial appearance is usually held at 2:00 p.m. A Pretrial Services Officer (“PTSO”) usually interviews detainees between 12:00 and 2:00 p.m. The interview examines at community ties, background, citizenship, family members, resources, mental health issues, medical, prior treatment, prior probation, and the like. The PTSO runs record checks, verifies information, and prepares a report with recommendations the same day. By law, the government has a right to request a three-day continuance. If a person is detained, he/she is detained without bail.

History: The 1960 Bail Reform Act was a conduit of change. 6,000 people were released after the Act was established. Notwithstanding this mass release, the pretrial failure rate did not increase. The major impetus for reform: indigent defendants and people of color not being able to make bail. The Bail Reform Act required the federal pretrial services to look at other kinds of factors to determine whether to release defendants. Unfortunately, in 1984 with the adoption of the sentencing guidelines and the continued “War on Drugs,” pretrial release reform efforts were being eroded.

In 2009, the Alternatives to Detention (“ATD”) Study was developed. The study looked at one million federal defendants. The goal was to determine the “statistically significant and policy relevant predictors of pretrial failures (failure to appear and danger to community issues).” The result was the development of the “Pretrial Risk Assessment Tool” (“PTR”).

The PTR was developed as a standardized empirically-based risk assessment instrument for use by federal pretrial services. The use of a standardized instrument helped reduce the disparity in risk assessment practices and provided a foundation for evidence-based practices. It allowed for the development of policy that provided guidance to pretrial services agencies regarding release and detention recommendations, including the use of alternatives to detention.

The PTR was developed by capturing data collected from all the persons charged with criminal offenses in the federal courts between October 1, 2001 and September 30, 2007 (approximately one million defendants) who were processed by federal pretrial services.

The PTR is an objective, quantifiable instrument that provides a consistent and valid method of predicting risk of failure to appear (“FTA”), new criminal arrest (“NCA”), and revocations due to technical violations (“TV”) while on pretrial release. The PTR comprises of 11 scored and 9 un-scored items that are divided into two categories: criminal history and other. The scored items are prior felony convictions, prior FTAs, pending cases, offense type, offense severity, age, residence status, employment, education, substance abuse, and citizenship status.

The PTRA is an actuarial instrument, which means it gives the probability of failure for a given group of defendants and not any particular defendant. The PTRA was validated using the data mentioned above, as well as a construction and validation sample. A panel of experts also reviewed the instrument. Concurrent validity was assessed based on its correlation with another known predictor of risk, the Risk Prediction Index (“RPI”). PTRA validity was confirmed through review by an expert panel and officers in the federal pretrial services.

Current Federal Practice: Cash bond is limited in use and the individual is required to only post what cash he/she possesses. The federal system uses unsecured bonds, personal recognizance, signature bonds, agreements to forfeit, property bonds, collateral bonds, surety bonds, and cash bonds. Location monitoring (“RF,” “GPS,” “Soberlink” and “Voice verification”) tools are frequently used. PTS uses “Electronic report forms” for low-risk individuals, which requires an individual to send a report once a month.

Correctional Justice: Justice Wilson urged a systemic reform of the present system of incarceration of Hawaii’s inmates. It was noted that now is the time to make such changes, as the fiscal responsibility of building new prisons and the toll that it takes on the community, are issues that the society is now grappling with. The following statistics were enlightening:

- The new Oahu Community Correctional System (“OCCC”) is projected to have 600 beds. The cost of the facility will be \$600 million, which would equal \$1 million dollars per bed.
- Total inmate population of OCCC = 1,398
- Present pretrial population OCCC = 569
- The incarceration rates in the world compared to Hawai’i:
 - United States – 707 per 100,000
 - Russia – 471 per 100,000
 - Hawai’i – 405 per 100,000
 - China – 119 per 100,000
 - Norway – 72 per 100,000

Hawaii’s per capita inmate population is higher than that of many other countries, and the inmate population is predominately Hawaiian.!

A task force has been established to consider the staggering cost of incarceration. A Department of Justice brief set forth in detail, as courts have long recognized, incarcerating individuals based on poverty violates the Fourteenth Amendment. Bail reform needs to focus on flight risk and safety, and not upon financial ability. When individuals are arrested for failure to make payments they cannot afford, their rights are violated because of unlawful bail and bond practices.

An institutional review, via a task force, to bring about appropriate change was urged.

V. REFORM MEASURES IN ARIZONA

(Panel: *Kathy Waters, Administrative Offices of the Courts -Arizona; Leland J. Moore J.D.*)

In an August 16, 2016 report commissioned by Arizona Supreme Court Chief Justice Scott Bales, the state Task Force on Fair Justice for All made a series of sweeping recommendations to the Arizona Judicial Council including reforms to make the state's pretrial justice system more fair and effective. Among other reforms, the report calls for eliminating the use of cash bond as a means to secure a defendant's appearance for a future court date, and recommends the expanded use of the Arnold Foundation's risk assessment tool to determine pretrial release decisions.

The Arizona task force was charged with formulating best practices recommendations for making release decisions that protect the public but do not keep people in jail solely for the inability to pay a cash surety (bail). The courts, the Department of Justice, and many criminal justice stakeholder groups, and foundations throughout the United States are joining in pretrial justice reform efforts with the goal of eliminating a "money for freedom" system, often based on the individual charge — not on the risk the defendant poses—and replacing it with a risk-based release decision system. The goal is to keep the high-risk people in jail and release low- and medium-risk individuals, regardless of their access to money. Even short pretrial stays of 72 hours in jail have been shown in national and a local Arizona study to increase the likelihood of recidivism.

It was noted that pretrial incarceration can cause real harm, such as loss of employment, economic hardship, interruption of education or training, and impairment of health or injury because of neglected medical issues. Requiring a defendant to post money to get out of jail does not ensure that the person will be more likely to return to court nor does it protect public safety. Indeed, in analyzing more than 750,000 cases, a study financed by the Laura and John Arnold Foundation found that in two large jurisdictions, "nearly half of the highest-risk defendants were released pending trial." Some of the highest-risk individuals are likely to have access to money to post a cash surety. Communities are better served by assessing the risk defendants pose and their likelihood of appearing for their future court hearings.

Arizona courts already use a risk-based release system for juveniles. A juvenile may be held in detention if the juvenile will not be present at any hearing, or the juvenile is likely to commit an offense injurious to self or others. There is a "no money for freedom system" in the juvenile court. Kathy Waters seconded Leland Moore's essential elements of a pretrial justice system and recommended collaboration of the stakeholders early in the process.

Both Ms. Waters and Mr. Moore offered their continued assistance to Hawai'i as we consider and possibly develop our own evidence based pretrial release program.

Kathy Waters noted that the full report of the Arizona Task Force can be found at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>.

VI. BREAKOUT SESSIONS

Participants met in four small groups to discuss important questions concerning several common bail topics. Each group had a moderator who was tasked with reporting back to the entire Forum, following the individual sessions.

The separate groups discussed following questions:

- (1) Does our system of pretrial release need reform?
- (2) What are the goals regarding pretrial release/detention?
Are they to: (a) maximize release? (b) maximize court appearance? (c) maximize public safety? or (d) are they all important?
- (3) Should cash bail (i.e. posting money, bond, or property) be used as a condition of release?
- (4) What alternative conditions of release do you think should be utilized?
- (5) Should we form a task force to review the concerns raised regarding our present pretrial release/detention system?

There was uniformity in response to the first question. All participants believed that we need reform. The second question was not nearly as uniform. There seemed to be more consensus on maximization of court appearances and public safety, but a divergence when it came to “maximizing release” with law enforcement and defense seemingly in opposite camps. Development of better risk assessment tools were advocated. The level of offense and the nature of the crime weighed into the discussion.

There was spirited discussion on the question whether cash bail should be used as a condition of release. Many participants believed that money should be in the release equation.

All participants believed that alternative conditions of release should be considered and utilized. Home intoxilizers, ankle bracelets, automated phone systems, and signature bonds were offered as potential alternatives to incarceration.

A. RECOMMENDATION

The current pretrial release procedures appear to be inadequate due to the lack of timely bail studies and reports, lack of alternate release conditions for those who cannot afford monetary bail, and lengthy pretrial incarceration for those who have not been provided hearings. The consensus of the breakout session participants was that the formation of a task force to review pretrial release procedures would be appropriate.

VII. CUSTODY DEFENDANTS

(Moderator: Audrey Stanley; Panelists: Renee Sonobe Hong, Director DPS, Shelley Nobriga of Intake Service Center; Judge Shirley M. Kawamura;).

The articulated concern was that criminal practitioners generally maintain tight court schedules and there is “down time in court” due to custody defendants not being brought to court in a timely manner. This contributes to inefficiency and counter productivity, which then leads to frustration. Eliminating down time in any form, assists the court, the parties, and the Department of Public Safety. The attorneys believe that trying to find a common ground between the courts and counsel as to the setting of hearings on busy days involving custody defendants should be explored i.e., setting afternoon versus morning hearings.

The panelists indicated that generally there were no issues concerning the movement of custody defendants. DPS, Intake, and the court all believed that, for the most part, custody defendants were being brought to court in a timely manner with very few glitches. The panelists welcomed any future problems regarding this issue to be brought to their attention.

VIII. PROBATION

(Moderator: Hayley Cheng; Panelists: Gerald H. Oyasato, Supervisor District Court Probation; Judge Barbra Richardson)

Attorneys have indicated that the First Circuit District Court has a common practice of placing all convicted and deferred defendants on formal probation for petty misdemeanor and misdemeanor offenses -- even when offenses do not involve aggravating circumstances or programming issues such as: thefts/ shoplifting offenses; trespass (“Stairway to Heaven,” closed park, Waikiki beach parks, and the like); open container offenses; sales of liquor to minor offenses; and nuisance cases. It is believed that this practice places an unnecessary and unwarranted burden on the Probation Division. Accordingly, a review of this practice may be appropriate with the courts considering possible alternatives to formal probation such as unsupervised probation or straight fines.

The Probation Division believes that probationers in petty and misdemeanor cases are simply monitored for new offenses, which are reported to the court. Of the monitored misdemeanor cases, most common ones are assault in the third degree, prohibitions, and theft in the third degree. The Probation Division is finding that judges are not sentencing people to probation for the relatively minor offenses. Most of the cases that are placed on probation are administratively supervised. Probation meets with the defendants, explains what they need to take care of, and contacts them before court if there are problems. If the defendants commit new offenses, then Probation would meet with them to address the issues.

For those granted a deferral for a petty misdemeanor or misdemeanor, how many times, on average is a defendant to check in? Probation Division responded that petty misdemeanants, check-in once. After that, future check-in is by phone. There is generally no difference in supervision between a deferral and probation. Any difference in supervision would be based upon a specific risk level.

First Circuit District Court: Judges have met and discussed the shortening of probationary periods and deferral periods. In the First Circuit, shortening deferral or probation periods are the norm if an individual has complied before the probation period ends.

Third Circuit -Kona: A deferral defendant's risk level is generally lower on average than risk levels for those persons placed on probation. Therefore, monitoring of deferrals would naturally be less intensive than with those on regular probation.

IX. PROOF OF COMPLIANCE ISSUES

(Moderator: Audrey Stanley; Panelists: Judge Joseph E. Cardoza; Wendy A. Hudson, Maui P.D. Supervisor).

There are ongoing concerns with the court's practice of setting multiple periodic Proof of Compliance ("POC") review hearings where there appears to be no necessity for the hearings. This includes the setting of POCs every three months, even after a "Free Standing Order" has been filed regarding the restitution as well as the monitoring of court fines, which may have already been sent to collections. The criminal bar welcomed discussion and review of this practice.

The Second Circuit Court does have periodic review hearings regarding proof of compliance issues. It is generally the only way to nudge individuals along to completion. The court does not believe the reviews are onerous and finds that the hearing helps to resolve issues. The Drug Court and HOPE models work and the Hope/Drug Court examples of sanctions. The review hearings are doing a service to those individuals being reviewed.

The Public Defender's Office believes that there are far too many POC reviews. The office believes that review hearings should not be utilized to bully individuals. Such hearings should be initiated solely by Probation and not the court since Probation is monitoring and supervising the individual. The Public Defender's Office noted that there is no empirical data that suggests that these periodic reviews work and they find the reviews onerous, difficult to staff, and sets defendants up for failure, and ultimately the issuance of bench warrants.

X. CONCLUSION

The majority of the conference centered on Hawai'i's pretrial justice system and whether the system needed review, reassessment and possible reform. The speakers on this topic were knowledgeable and well received. The participants were asked to consider several questions concerning pretrial release, as noted above, in a break-out session. The response to those questions made clear the need to consider possible review and reform of Hawai'i's pretrial justice system.

The formal recommendation of the committee was to convene a Task Force to review Hawai'i's Pretrial System and prepare a report to the judiciary and legislature for review and possible action.

The overall response to the forum was extremely positive. The participants at the 2016 Criminal Law Forum gave the forum high marks. Here is a sampling of the comments for the Forum:

- *I greatly enjoyed the opportunity to discuss these issues with all the parties relevant to the practice of criminal law. I feel that these forums give us an opportunity to have candid discussions in an informal setting. Thank you for the opportunity to participate.*
- *A great conference again; worth every penny I spent getting there!*
- *Thank you for hosting this topic. It is in the national arena, and our community needs information and education to learn how we can best use our resources to improve public safety for our citizens.*
- *Today's conference highlighted the fact reform of our current pretrial processes is needed. As a pretrial practitioner, it is so refreshingly hopeful to see the judiciary taking interest in this topic. I look forward to more discussion, collaboration, and planning relating to pretrial reform. Mahalo for the invite.*
- *Knowing the direction and focus of our jurisdiction is important. With that information, the ability to make appropriate bail decisions and arguments is improved. In the long term, knowing each stakeholder will be included in formulating our new approach is reassuring.*
- *When meeting to discuss issues and ideas for improvement, it may be beneficial for each circuit to meet as a group, as well as for us all to meet in mixed groups. The circuits are so diverse that meeting only in mixed groups doesn't allow each circuit to work on solutions which may be implemented in the short term while the larger framework is constructed. Meeting in mixed groups helps share ideas and bring awareness to other issues, so it is also beneficial, but circuit-focused groups may encourage more immediate action. Thank you for the opportunity to participate. It was very informative. Also, it is reassuring to see movement is being made to address bail and its host of issues and concerns.*

LIST OF 2016 CRIMINAL LAW FORUM PARTICIPANTS

JUDGES

Judge R. Mark	Browning	First Circuit Court, Family Court
Judge Joseph	Cardoza	Second Circuit Court
Judge Jeffrey	Crabtree	First Circuit Court
Judge William	Domingo	District Court, First Circuit Court
Judge Lisa M.	Ginoza	Intermediate Court of Appeals
Judge Ronald	Ibarra	Committee member
Judge Shirley M.	Kawamura	Committee member (First Circuit)
Judge Edward	Kubo	First Circuit Court
Judge Christine	Kuriyama	First Circuit Court
Judge Lono	Lee	District Court, First Circuit Court
Judge Katherine	Leonard	Intermediate Court of Appeals
Justice Sabrina	McKenna	Hawaii Supreme Court
Chief Judge Craig	Nakamura	Intermediate Court of Appeals
Justice Richard W.	Pollack	Committee member (Hawaii Supreme Court)
Chief Justice Mark E.	Recktenwald	Hawaii Supreme Court
Judge Catherine H.	Remigio	Committee member (District Family Court)
Judge Barbara	Richardson	District Court, First Circuit Court
Judge Randal G.	Valenciano	Committee member (Fifth Circuit)
Justice Michael	Wilson	Hawaii Supreme Court

COURT ADMINISTRATORS

Sandy	Kozaki	CCA, Second Circuit Court
David	Lam	CCA, Fifth Circuit
Cheryl	Marlow	DCCA, First Circuit Court
Lester D.	Oshiro	Committee member (CCA, Third Circuit)
Colin	Rodrigues	DCCA, Second Circuit Court
Cheryl	Salmo	DCCA, Third Circuit
Dawn	West	DCCA, Third Circuit
Marsha	Yamada	Second Circuit Court

ATTORNEYS

Keani	Alapa	Law Office of Vladimir Devens
Matthew	Arakawa	Dept. of the Prosecuting Attorney

Susan	Arnett	Office of the Public Defender
William	Bagasol	Office of the Public Defender
Major Susan	Ballard	HPD Commander, Central Receiving Division (Panelist)
Bill	Bento	Off. of the Public Defender
David	Bettencourt	Attorney at Law
Myles	Breiner	Law Office of Myles S. Breiner
Jason	Burks	Law Office of Jason R. Burks
Brian	Costa	Costa & DeLacy
Wendy	DeWeese	Office of the Public Defender (Kona)
Adrian	Dhakhwa	Dept. of the Prosecuting Attorney
Gilbert	Doles	Attorney at Law
Kirsha	Durante	Office of the Public Defender
Chad	Enoki	Chung & Ikehara
Byron	Fujieda	Dept. of the Prosecuting Attorney (Maui)
Richard	Gronna	Attorney at Law
Brook	Hart	Law Office of Brook Hart
Jeffrey	Hawk	Hawk Sing & Ignacio
David	Hayakawa	Law Office of David Hayakawa
Randall	Hironaka	Miyoshi & Hironaka
Timothy	Ho	Office of the Public Defender
Wendy	Hudson	Off. of the Public Defender (Maui)
Kauanoe	Jackson	Dept. of the Prosecuting Attorney (Kona)
Megan	Kau	Deeley King Pang & Van Etten
Richard	Kawana	Attorney at Law
Katherine	Kealoha	Dept. of the Prosecuting Attorney
Andrew	Kennedy	Public Defender (Kona)
Robert	Kim	Attorney at Law (Kona)
Brandon	Kimura	State of Hawaii Judiciary (Supreme Court)
Justin	Kollar	Office of the Prosecuting Attorney (Kauai)
Sandra	Labuguen	Intake Service Center
Marcus	Landsberg, IV	Landsberg Law Office
Ronnie	Lemn	Intake Service Center (Kauai)
Ben	Lowenthal	Law Office of Philip H. Lowenthal (Maui)
Kelcie	Makaike	Intake Service Center (Big Island)
Clarissa	Malinao	Office of the Public Defender
Andrew	Martin	Dept. of the Prosecuting Attorney
Carol M.	Miyashiro	Chief U.S. Pretrial Services Officer
Leland J.	Moore	Panelist, National Institute of Corrections
Landon	Murata	Dept. of the Attorney General
Charles	Murray	Dept. of the Prosecuting Attorney (Kona)

Jamie	Nakano	Office of the Public Defender
Jeffrey	Ng	Office of the Public Defender (Hilo)
Shelley	Nobriga	Panelist
Robert	Olson	Olson & Sons (Big Island)
Stanton	Oshiro	Law Office of Stanton C. Oshiro
Tommy	Otake	Attorney at Law
Gerald H.	Oyasato	Supervisor, District Court Probation
Jeen Hee Kwak	Pang	Dept. of the Prosecuting Attorney
Andrew	Park	Urbanc Willard Park & Kim
George	Parrott	Dept. of the Prosecuting Attorney
Mitchell	Roth	Dept. of the Prosecuting Attorney (Kona)
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Kimberly	Taniyama	Dept. of the Prosecuting Attorney (Kona)
Noel	Tipon	Bilecki & Tipon, LLLC
Jack	Tonaki	Office of the Public Defender
Chris	Van Marter	Dept. of the Prosecuting Attorney
Kathy	Waters	Panelist, National Institute of Corrections
Kori	Weinberger	Dept. of the Prosecuting Attorney (Kona)
Kristine	Yoo	Dept. of the Prosecuting Attorney
Mark	Yuen	Dept. of the Prosecuting Attorney

COMMITTEE

Justice Simeon R.	Acoba, Jr. (ret.)
Hayley	Cheng
William A.	Harrison
Carol K.	Muranaka
Audrey	Stanley

**Hawai`i State Bar Association
Committee on Judicial Administration**

2016 CIVIL LAW FORUM

Ali`iolani Hale
Supreme Court Building, Room 101

Tuesday, September 20, 2016

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**Hawai`i State Bar Association
Committee on Judicial Administration**

2016 CIVIL LAW FORUM REPORT

INTRODUCTION

As described in the *Board Policy Manual of the Hawaii State Bar Association* (“HSBA”), the Committee on Judicial Administration (“JAC”)¹

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 Bench Bar Conference in 2013, the JAC decided to develop a Forum concept to focus on certain issues in the civil² and criminal areas³ separately. These Forums take place every other year, alternating with the Bench Bar Conferences.

WELCOME

Steven J.T. Chow, co-chair of the JAC, welcomed attendees and thanked them for their participation in this important event. He also thanked Chief Justice Mark E. Recktenwald, panelists, JAC members, and Judiciary staff for their hard work and assistance. The Forum serves as a venue to address topics of interest in civil practice. Attendees were encouraged to ask questions and provide input in order that the discourse would engender improvements to the practice of law in the areas discussed.

¹ The HSBA Committee on Judicial Administration in 2016 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J. T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Hayley Y. C. Cheng; Dennis W. Chong Kee; Kahikino Noa Dettweiler-Pavia; Vladimir Devens; Don J. Gelber; William A. Harrison; James Kawashima; Edward C. Kemper; Carol K. Muranaka; Kyleigh F. K. Nakasone; Lester D. Oshiro; Audrey L. Stanley; and Kevin K. Takata.

² The Civil Law Forum Committee members included Steven J. T. Chow, co-chair; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; Fifth Circuit Court Judge Randal G. B. Valenciano; Dennis W. Chong Kee; Kahikino Noa Dettweiler-Pavia; Vladimir Devens; Don J. Gelber; James Kawashima; Edward C. Kemper; Carol K. Muranaka; and Kyleigh F. K. Nakasone. Kahikino Noa Dettweiler-Pavia and Kyleigh F. K. Nakasone also served as Reporters.

³ The 2016 Criminal Law Forum took place on Wednesday, September 21, 2016.

OPENING REMARKS

Hawaii Supreme Court Chief Justice Mark E. Recktenwald extended thanks to the Forum's organizers, presenters, and attendees. He observed that the alternating Forums and Conferences play important roles in identifying challenges and opportunities with respect to the relationship between the bench and bar. Restarting in 2013, the Bench-Bar Conference has helped to shape a variety of rules concerning, *inter alia*, pro hac vice appearances, telephonic appearances, discovery, and personal electronic device usage. Chief Justice Recktenwald confidently stated that the Bench-Bar Conference and Forum process helps to shape the course of the Judiciary and produces tangible initiatives. Chief Justice Recktenwald also noted that the Judiciary's commitment to the Civil Law Forum was reflected in the attendance of many circuit court judges, district court judges, and court administrators from across the state. Supreme Court Justices Richard W. Pollack and Sabrina S. McKenna were also in attendance. The Civil Law Forum builds on the Bench Bar Conferences by allowing the Judiciary and bar to discuss issues in greater depth.

Reflecting on his experiences with the Conference of Chief Justices, Chief Justice Recktenwald noted the national shift towards civil justice reform. The conference, through its Civil Justice Improvement Committee, has spent several years analyzing data sets related to civil justice reform across the country. The findings indicate that high value tort and commercial litigation constitute only a small proportion of the civil justice workload while minor value contract cases constitute a majority of the civil calendar. These trends highlight the need for improved judicial case management through a triage process wherein new cases are categorized as either (1) streamline, (2) complex, or (3) requiring a high degree of judicial management. Chief Justice Recktenwald invited input from the bar about this concept of judicial case management and its applicability to Hawaii courts and cases.

Chief Justice Recktenwald noted that Hawaii's judiciary has already undertaken efforts aimed at streamlining the judicial process through the application of multi-tiered and specialized courts. Nevertheless, he pointed out that the Judiciary is cognizant of the constant need to assess the effectiveness of its programs and processes in light of the needs of court users.

Chief Justice Recktenwald concluded by recognizing First Circuit State Court Judge Derrick H. M. Chan as the chair of the special committee to implement and administer the Judicial Performance Program under Hawaii Supreme Court Rule 19. He encouraged attorney involvement in that process as an integral aspect of improving our civil justice system.

I. LEGISLATIVE UPDATE

(Robert S. Toyofuku and Bert S. Sakuda)

Robert Toyofuku explained how bills are documented, e.g., "HD1" means that a bill has been amended in the House; "SD1" means that a bill has been amended in the Senate, and that "CD1" referenced conference drafts. He also noted that in recent years, the number of bills introduced to legislation has dramatically reduced. Historically, the number of bills introduced used to be in the thousands.

Summaries on the following bills were presented:

HB254 Relating To Medicines is a bill that deals with generic medicines including biologics (medication manufactured in living cells) and biosimilars (substituted versions of medication similar to generic medication). The legislature believed that regulation was needed in response to heavy lobbying and high consumer demand. The bill was included in this presentation because of its liability aspect, which states that pharmacists assume no greater liability when they dispense biosimilars over biologics. This adds a notice requirement for situations in which pharmacists substitute biosimilars that are not identical to brand name drugs.

HB260 Relating To Insurance establishes provisions relating to transportation networking companies (“TNCs”). Toyofuku noted that TNCs, like Uber and Lyft, want to be regulated and take a proactive stance regarding legislation because they want to make sure that their business models are sanctioned by the state. Previous legislation that was proposed in 2015 sought regulation from the PUC, but did not pass. Legislation proposed in 2016 was much narrower, focused primarily on insurance concerns, and delegated the responsibility of regulating TNCs to the counties. Such legislation aimed to address insurance concerns that personal insurance policies were inadequate for the commercial work in which TNC drivers were engaged. It also addressed concerns that were brought up by taxi companies who argued that TNCs were acting unfairly and operating with virtually no government regulation. It was noted that Uber principals, for example, operate within two defined time frames including “Period 1” and “Period 2.” Period 1 starts when the phone application is turned on. The driver is logged on but has not engaged any passengers. At this point, the driver will have coverage of \$50,000 per person, \$100,000 per occurrence, and \$ 25,000 property, plus their personal policy, as secondary coverage. “Period 2” begins when the driver engages/accepts the passenger’s request for a ride and goes to pick him/her up. Minimum coverage goes up to \$1 million, personal and property, in aggregate, with no applicable personal insurance. Passengers keep their own personal policies.

Audience members were asked to raise their hands if they had an Uber, Lyft, or other similar TNC application on their cell phones. Many raised their hands. When asked how many agreed to all the terms and conditions of the application, including the liability waiver and indemnification agreement, almost all hands were lowered. However, it was noted that, if you have an Uber app, you (knowingly or not) have agreed to its liability waiver and indemnity provisions. In response, new bill provisions were proposed to make those terms and conditions void and unenforceable.

It was also noted that the Honolulu city council passed regulations for this bill on August 3, 2016 and is now in process of amending certain provisions, which, as written, are not enforceable. Thus, the effective date will likely be extended to sometime in the future, possibly around January 2017.

HB1101 Relating To The Traffic Code was proposed to prohibit the use of certain types of motor vehicle wheels that are considered dangerous, in particular, fixtures to the wheels that extend or protrude at least four inches beyond the rim. Attorneys should keep this in mind for personal injury cases.

HB1046 Relating To Wrongful Imprisonment establishes the redress for wrongful conviction and imprisonment to insure that wrongfully convicted individuals may file petitions for monetary relief. In order to recover, petitioners must be convicted and sentenced, have served prison time, found actually innocent, or, if pardoned, found actually innocent. The statute of limitations is two years, and compensation damages are capped at \$50,000 per year, plus an additional \$100,000 for egregious cases. It was noted that this bill does not address traditional methods of redress through tort law and that attorneys' fees may not exceed \$10,000 or more than 25% of whatever the circuit court awards to the petitioner. These clauses are problematic because of the high cost of litigation and the fact that it might easily cost over \$10,000 to prosecute the claim. Considering the fact that the average amount of time a wrongfully imprisoned person serves in jail is fourteen years, the group was asked to think about whether a cap on damages is fair for this cause of action and if it would adequately compensate the petitioner.

HB1705 Relating To Motor Vehicle Insurance allows drivers to carry electronic versions of proof of insurance.

HB1753 Relating To Mopeds strengthens regulations regarding mopeds. Among other things, this measure: (1) requires the issuance of a moped number plate and tag or emblem upon payment of fees; (2) prohibits a person from operating a moped that is not in good working order on any highway; (3) extends to mopeds certain police powers regarding the inspection of vehicles believed to be unsafe or without required equipment; and (4) subjects mopeds to annual certificate of inspection requirements. This bill arose mainly because of noise complaints. The problem with this bill is that safety checks often do not include an inspection of engine noise levels.

HB2017 Relating To Workers' Compensation Treatment Plans establishes provisions relating to treatment plans under workers' compensation law and allows a physician to transmit a treatment plan to the employer by mail or facsimile, provided that a physician shall send a treatment plan to an address or facsimile number provided by an employer. This bill also requires an employer to allow a physician to transmit a treatment plan to an employer by mail, facsimile, or secure electronic means beginning January 1, 2021.

HB2049 Relating To Transportation establishes a roads commission within the department of transportation to review all previous studies on disputes regarding private roads. Every time there is legislation on private roads there is a request for immunity and certain roads that were never dedicated remain privately owned, but, unclaimed and unmaintained. Thus, the question is, who is supposed to maintain and repair the roads and who is liable? This question arises over private roads that are abandoned and other roads that are in "limbo" where ownership is unclear and neither the state nor city will claim them. It was noted by a participant that the state has passed laws giving the roads to the city, whether the city wants them or not. The problem is that there are over 100 miles of unclaimed roads and fixing them will cost billions of dollars. This bill will set up an advisory legislative body to determine ownership of private roads. This is a major problem because there are over 400 private/unclaimed roads in the City and County of Honolulu alone.

HB2279 Making Appropriations For Claims Against The State, Its Officers, Or Its Employees gives appropriation to the department of the attorney general for the purpose of satisfying claims for legislative relief to persons, firms, corporations, and entities, and for claims against the State or its officers or employees for the overpayment of taxes, or for refunds, reimbursements, payments of judgments or settlements, or other liabilities. It was noted that in 2015, claims against the State amounted to \$11 million. If the legislature does not approve the amount, then the claims will not be funded.

HB2329 Relating To Consumer Protection amends provisions relating to limitation of actions under antitrust provisions. The purpose and intent of this measure is to clarify that the State is not subject to a period of limitations for claims pursuant to chapter 480, Hawaii Revised Statutes. This measure preserves the right of the State to seek redress for harm done and deter future bad conduct by persons who would seek to take unfair advantage of Hawaii consumers. No limitation periods in chapter 480 will run against the State.

HB2350 Relating To Foster Children amends provisions under the Department of Human Services law. It replaces the term “foster boarding home” with “resource family home” and the term “foster parent” with “resource caregiver.” This bill insures qualified immunity to foster parents whose foster children are injured while participating in extracurricular cultural or social activities, provided that the authorization is in accordance with the federal reasonable and prudent parent standard.

HB2494 Relating To Blood Glucose Monitoring deals with insulin and self-administration. It amends provisions relating to self-administration of medication by students and administration in emergency situations and gives protection/immunity to students and trained staff when administering medications, however, there is an exception for qualified healthcare professionals.

HB2395 Relating To Telehealth is a bill regarding communication between doctors and patients by means other than in-person consultation.

HB1585 Relating To Guardianship amends provisions relating to guardianship and prohibits a guardian, without authorization of the court, to restrict the personal communication rights of an incapacitated adult ward, including the right to receive visitors, telephone calls, and personal mail, unless deemed by the guardian to pose a risk to the safety or well-being of the ward.

HB2298 Relating To The Uniform Fiduciary Access To Digital Assets Act enacts a uniform law on estate planning for digital property.

HB1668 Relating To The Use Of A Dog In Judicial Proceedings allows service animals to assist in judicial proceedings.

Finally, the panelists noted that bills attempting to regulate the judicial system, selection, and/or appointment are introduced about every five years. Such proposed legislation arose this

year and were not passed. It was also noted, however, that some form of judicial elections, as opposed to merit-based systems, are used in a majority of other states.

II. ELECTRONIC DISCOVERY

(Dennis W. Chong Kee, moderator; U.S. Magistrate Judge Barry M. Kurren; Second Circuit State Court Judge Peter T. Cahill; Glenn T. Melchinger)

Glenn Melchinger presented an informative slide show with the prefatory questions: What is electronically stored data? How do we preserve it? Why do we care? Electronically stored data, or ESI, is dynamic, changing, and is updated every day. Litigators have to ask themselves, how do they preserve the data? Is it required? Is it important? ESI is affected by social media, mobile information, and the internet. It contains personal and professional information; it is searchable, complex, and comes in so many forms, e.g., emails, social media messaging; and all these items are subject to discovery requests. Practitioners must advise their clients about data volume and metadata, and whether they need to find out if someone received a certain email. If they did, did they open that email? Did they know about its content? Did they have knowledge or did they not? There are so many issues arising in this area and it comes up in every litigation context. If all this information is compared to an iceberg, we are just at the tip of the information. The volume of data beneath the surface includes mobile networks, GPS networks, image servers, bank databases, and navigation routers. So why is ESI so important? Many times, the so-called, “smoking gun” is found in ESI, which includes unguarded statements made by witnesses or clients who do not think about filtering their comments in emails or tweets or on Facebook. Exculpatory evidence will often be found in those candid communications.

Spoliation is also an issue that practitioners need to deal with. ESI is subject to alteration. You can delete an email or message, or you can change them. These changes are sometimes searchable and discoverable.

Melchinger also stated that ESI is different because law firms can be sued for their conduct during the electronic discovery or e-discovery process. McDermott Will & Emery was sued in 2011 for disclosing privileged and confidential information as part of the e-discovery process for failure to supervise vendors and contract attorneys. In another case, Cleary Gottlieb associate’s mistake added 179 contracts to an agreement to buy the Lehman Brother’s assets. In another case, redacted PDFs disclosed secrets that were hidden under layers of texts on PDFs.

Other trending issues include cyber-attacks; ransomware; social media and other non-email messaging and communications; information stored on mobile devices; sanctions, including FRCP 37(e); smaller cases and proportionality versus need; TAR/CAR/predictive coding; keyword search terms vs. other modes of expression; data volume and proportionality, internal e-discovery processes; focused requests; and encryption.

Litigation holds require parties to preserve potentially relevant evidence whenever litigation is “reasonably anticipated.” This means that you should know what kind of ESI you have, where it is, who you need to speak with about it, when, and why and how to preserve it. A response team should include management, IT, and legal. Parties should suspend routine deletion schedules and other destruction of documents.

Judge Cahill informed the group that, although rare, discovery disputes over ESI have come before him in the Second Circuit. One problem is that there is too much technical talk for jurors and judges to comprehend the real issues in dispute. Another problem is that attorneys frequently want to file the subject document under seal. But what happens when the parties are in open court and the judge has a question about a document? Judges cannot be expected to close the courtroom to the public frequently. State courts do not have the support or capacity to protect the information to the extent that the parties desire.

Judge Kurren admitted that he was not a fan of the federal rules when they were originally proposed, but, now, believes that the rules are helpful. Federal court judges have few problems dealing with e-discovery disputes, largely because the federal rules require early disclosure and encourage parties to cooperate and pay attention to these issues early. Federal court judges are also actively managing cases in order to prevent discovery disputes. Judge Kurren stated that he believed early case management was a shared responsibility and that the rules are helpful because they require early discussions regarding discovery, preservation of materials, early disclosures, and thoughtfulness on the part of the attorneys. These requirements are all designed for more effective case management.⁴ When asked about spoliation sanctions, Judge Kurren explained that the rules only allow sanctions for willful destruction, not negligence.

The panel shared their opinions on whether state courts should adopt rules similar to federal court rules. Melchinger stated that he believed early case management is helpful. He noted that a positive element about the federal rules is that they require parties to disclose whether or not they are withholding information, and why. However, he can envision complications, including the many different reasons why it may be difficult to know what your client has or does not have. For example, you could have a client with multiple custodians of records. Judge Cahill noted that state courts do not have the same rules, but there are also no prohibitions if the state courts chose to include certain guidelines in their orders. He also noted that parties should only come to courts after they have discussed everything and absolutely cannot resolve the issue on their own. Judge Cahill further advised practitioners to thoroughly look through their own clients' materials for the so-called "smoking gun." E-discovery starts with your own clients and knowing what information they have, what information can or should be produced and what information needs to be withheld. Judge Kurren agreed with Judge Cahill's comments and also encouraged attorneys to treat scheduling conferences as an opportunity to address ESI issues with the court and opposing counsel. The panel's consensus was to address issues early in the case.

Regarding sanctions, Judge Kurren stated that most judges are reluctant to order sanctions. In his career, he could not recall a judge ever dismissing an action as a sanction. However, Judge Kurren noted that cost sharing is now allowed by rule and that it is a positive tool that can be used by the courts. Judge Cahill noted that he has no problem with the rules as they are, but he, also, does not like to award sanctions. In most cases, he will reserve a parties' request for sanctions and address the issue at the end of the case after the merits have been addressed.

⁴ It was noted that federal dockets are not as voluminous as state court dockets, and, therefore, case management is more difficult for state court judges.

Attendees were also asked to think about non-parties and their involvement in potential e-discovery disputes. Questions to consider are: What happens when you need information from non-parties, like Yahoo, or Internet Explorer, who refuse to provide the information? What about the issue of proportionality? Proportionality is a topic that should be addressed at the beginning of every lawsuit, especially because innocuous discovery requests can easily cost thousands of dollars. Discovery is expensive. Both attorneys and judges should be cognizant of the value of a case before they engage in or order discovery.

One attendee asked the panelists if they have experienced discovery disputes over predictive coding searches. Judge Kurren answered in the affirmative. He suggested a proactive approach so that disputes do not arise. When the attorneys know they have a big case with lots of documents and ESI, they should have a meeting where they attempt to agree on search methods and terms at the outset of litigation. If the parties cannot agree to search terms, then they should retain a third party to assist them and share in the costs. Judge Cahill advised practitioners in the group to think about how they would try the case if they were actually going to trial. Matters to be addressed are: Do you really need that information? Would it be helpful to a juror? He noted that jurors are very smart and should not be underestimated. In his experience, jurors usually pinpoint the issues immediately. Practitioners should ask themselves if they really need that document for trial before spending thousands of dollars litigating discovery disputes.

III. ARBITRATION CONCERNS

(Second Circuit State Court Judge Joel E. August (ret.); James Kawashima; Louis L.C. Chang; Mark Bernstein)

Judge Joel E. August introduced the topic by reciting the language of Hawaii Revised Statute (“HRS”) § 658A-12, Disclosure By Arbitrator, as follows:

- (a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
 - (1) A financial or personal interest in the outcome of the arbitration proceeding; and
 - (2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

The key components of this statute include: (1) the requirement that arbitrators do a reasonable inquiry and (2) report any known facts that a reasonable person would consider likely to affect impartiality, (3) including financial or personal interest in the outcome of the arbitration

and (4) existing or past relationships. It was noted that the language in this statute raises a multitude of questions/concerns, including, *inter alia*, what constitutes “reasonable inquiry” and what types of relationships require disclosure. Recent court decisions fail to provide clarity. It was also noted that this statute states that a court “may” vacate an award if the arbitrator did not disclose a fact as required. This is contrary to the language in HRS § 658A-23, which states that upon motion, a court “shall” vacate an award if there is evident partiality by an arbitrator. HRS § 658A-23 Vacating award, is as follows:

- (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: . . .

(1) There was:

- (A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

Because the statute says, “shall vacate,” the concern among practitioners and arbitrators is – what constitutes “evident partiality?”

Louis L. C. Chang provided an executive summary of *Nordic PCL Construction, Inc. v. LPIHGC, LLC*, 136 Hawai'i 29, 358 P. 3d 1 (2015) and *Noel Madamba Contracting LLC v. Romero*, 137 Hawai'i 1, 364 P.3d 518 (2015) by first noting the seminal United Supreme Court case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 301 (1968). A divided Supreme Court articulated three differing positions on the standard of evident partiality: (1) an appearance of bias, (2) proof of substantial interest, and (3) rebuttable presumption. The majority in *Commonwealth Coatings* adopted the appearance of bias standard for proving evident partiality.

In *Nordic Construction*, the Hawaii Supreme Court stated that the failure of an arbitrator to disclose facts that a reasonable person would consider likely to affect that arbitrator's impartiality in and of itself constitutes “evident partiality” under HRS § 658A-23(a)(2). The case of *Madamba* reiterated that ruling. Thus, the ongoing focus of any appeal of an arbitrator's ruling will be the potential significance of the undisclosed past, present or near future relationship. Pursuant to these cases, “an appearance of bias” is enough to support evident partiality. Unfortunately, these decisions have made practical problems for arbitrators. Panel members and attendees alike agreed that the decisions do not provide clarity or instruction on what exactly must be disclosed, e.g., what types of relationships, how far back, what constitutes “past relationships,” and what types of relationships and personal or financial interests would a “reasonable person” consider “likely to affect impartiality.”

It was also noted by some attendees that this standard is contrary to the intent and purpose of arbitration, including an efficient and final adjudication of the merits. Now, any party who is unhappy with the result of an arbitration decision could conduct an online search to look for possible remote relationships that were not previously disclosed and file an objection.

Mark Bernstein stated that the real question attorneys should be asking is, “are we going to get a fair shake from this person?” and that’s all. If the answer is yes, then you agree to have that arbitrator serve. If the answer is no, then you simply do not agree.

Other issues for consideration include: What about retired judges who serve as arbitrators? Do they have an existing or past relationship with everyone who has ever made a court appearance before them? What about social relationships? What about professional relationships? Do they need to be disclosed? (It was opined that these are the types of issues that are open because the Hawaii Supreme Court has not explained the types of facts that are “disclosure worthy.”) What about concurrent work, or, in other words, work that happens when an arbitrator is handling one case and is asked to do another case for the same party, or attorney, or attorney’s law firm. It may appear that the relationship would have no effect on the arbitrator’s ability to fairly adjudicate, but if the arbitrator is requested to work on a second case, there appears to be another contract for employment. This is an issue that attorneys should be mindful of, because arbitrations can last for months from the initial selection to the issuance of a decision.

The cases of *Narayan v. Ritz-Carlton Development Co., Inc.*, 135 Hawai'i 327, 350 P.3d 995 (2015) and the United States Supreme Court reversal of that decision in *Ritz-Carlton Development Co., Inc. v. Narayan*, 136 S.Ct. 800 (Mem), 193 L.Ed.2d 701, 84 USLW3197 (2016) were discussed. The issue in *Narayan*, was whether an arbitration clause within documents relating to the sale of high-end condominiums was enforceable under Hawaii contract law. The Court stated that, under Hawaii law, there are three criteria which form the bases of an enforceable arbitration agreement:

- 1) It must be in writing;
- 2) The parties' intent to arbitrate disputes must be unambiguous; and
- 3) There must be bilateral consideration.

The primary ruling of the Hawaii Supreme Court was that, because some of the underlying documents relating to the sale of the condominiums referred to the courts as the venue to decide certain disputes between the contracting parties, there was sufficient ambiguity as to the intent to arbitrate such that the arbitration agreement clause was unenforceable. Toward the end of her opinion, Justice Nakayama also found that the subject arbitration clause was both substantively and procedurally unconscionable. The offensive substantive aspects dealt with, among other matters, severe restrictions on discovery and the elimination of punitive damages as a form of relief.

When the U.S. Supreme Court vacated the *Narayan* decision on January 11, 2016, it directed the Hawaii Supreme Court to look at the U.S. Supreme Court's decision in *DIRECTV, Inc. v. Imburgia*, 577 U.S. ----, 136 S.Ct. 463, ---L.E.2d ---- (Mem) (2015). That decision essentially holds that, pursuant to the Federal Arbitration Act, states are required to treat

arbitration contracts the same way they treat any other contract.⁵ We will have to wait and see how the Hawaii Supreme Court deals with this.

In answering the question, how should arbitrators and practitioners handle the practical problems that arise from these relatively recent decisions, it was suggested that, in addition to the arbitrator's disclosures, the arbitrator could ask the attorneys if they are aware of any matters or relationships that should be disclosed. Arbitrators should also conduct thorough background and conflict checks before agreeing to serve.⁶

IV. EXPERTS AND DISCLOSURE

(Steven J.T. Chow, moderator, Second Circuit State Court Judge Peter T. Cahill, First Circuit State Court Judge Gary W.B. Chang, U.S. Magistrate Judge Barry M. Kurren, Howard G. McPherson, Jeffrey H.K. Sia)

Judge Barry Kurren provided background on Federal Rule of Civil Procedure Rule 26 with respect to disclosure of expert testimony and its application in Hawaii's federal courts. Although the rule mandates that disclosures are to be made no later than ninety days prior to the trial date, in practice, Hawaii federal courts expect expert disclosures to be made between four and five months in advance of the trial date. While not in favor of the rule when it was first proposed, Judge Kurren expressed that his appreciation has grown for it because of the clarity and uniformity that the rule promotes.

Judge Kurren shared some of the past problems encountered in application of Rule 26. Written reports under the rule can be cumbersome depending on the issues addressed, requiring significant effort by the expert with extensive assistance from counsel. Additionally, problems would often arise with respect to the classification of treating physicians, who often do not address the same issues or do so in the same manner as experts. Communication between experts and attorneys under Rule 26 was also a significant point of contention as it was discoverable, prompting further litigation and related costs.

Fed. R. Civ. Pro. Rule 26 was amended in 2010 to address many of the issues noted by Judge Kurren. Treating physicians who would testify about diagnosis, treatment, causation or

⁵ It was noted that Justice Ginsberg wrote a blistering opinion essentially saying that the courts are favoring arbitration over litigation and that courts have been doing so for the past thirty years. The result is that the "little guy" is being denied his day in court.

⁶ One of the attendees asked the panel if these decisions were applicable to arbitrators in the Court Annexed Arbitration Program ("CAAP"), especially because many arbitrators are practitioners who have been practicing for decades. In the legal community, it appears that many attorneys are acquainted with each other and have worked with and/or against each other in previous cases. Although the panel stated that the decisions would likely be applicable to CAAP, further research indicates that *Nordic* and *Madamba* are likely not applicable to CAAP arbitrators because CAAP is governed by the Rules of the Hawaii Supreme Court, is not a voluntary process, and parties have an automatic right of appeal. It was also noted that the rules only allow objections when the party or attorney did not know about the relationship prior to agreeing to that arbitrator. Decisions will not be vacated for an undisclosed fact that a party or attorney already knew about.

prognosis may be considered expert witnesses but need only prepare a summary report of such opinion. Communications between attorneys and experts, as well as draft reports, were carved out of discovery. Nevertheless, “communications” did not extend to materials provided by attorneys to experts. Nor did it apply to communications regarding expert compensation and identified assumptions that an attorney provided and the expert relied upon.

Overall, Judge Kurren found that the uniformity of Rule 26, as amended, decreases litigation because the expert report essentially serves as a “catch-all.” If an expert’s testimony contradicts or strays outside of the report, it is generally excluded. If a report is inadequate or tardy, the most common penalty is striking the witness and report entirely.

Presenting the plaintiff’s counsel’s perspective, Howard G. McPherson applauded Rule 26 for its predictability and believed that it should be adopted in the state courts as a method to promote just and speedy resolution of conflicts. McPherson observed that the predictability promoted by Rule 26 in terms of the scope of evidence often impacts the value of the case for settlement purposes. McPherson stated that Rule 26 provides for sufficient play and adjustment with respect to expert testimony and that the state court’s adoption of Rule 26 would not usurp the traditional prerogative of state court judges.

In response to a question regarding the status of third party complaints under the rule, Judge Kurren offered that he will often first consult with the parties at the trial setting conference. Often, however, the most straightforward resolution is for the court to establish alternate deadlines.

From the defense counsel’s perspective, Jeffrey H. K. Sia voiced his dislike of Fed. R. Civ. Pro. Rule 26 and lamented disingenuous attorneys who habitually abuse the system as the impetus for rules aimed at promoting uniformity such as Rule 26. Sia felt the harshest impact of Rule 26 falls upon litigants who are paying out-of-pocket given the costliness of expert witnesses in general. He reasoned that most cases are settled without the actual need for an expert. Hard deadlines like those set under Rule 26 force a party to retain an expert early on, concomitantly imposing an early and significant financial burden. Rule 26 sometimes controls the viability of a claim and forces settlement in terms of the cost of expert witnesses versus the actual value of the claim.

Sia pointed out that there is a fundamental disparity in the amount of time a defendant has to consider its case as opposed to a plaintiff, who may have ruminated on the matter for months or even years before bringing the claim. Furthermore, a defendant may not know that an expert is needed until the plaintiff discloses its own experts. Sia saw present flexibility as a strong counter to Rule 26. The rule is rigid in terms of deadlines, whereas the bar in Hawaii is generally cooperative and extensions are routinely agreed upon. At the same time, courts are well aware of practitioners’ styles and habits. Therefore, the prerogative to set deadlines should remain with the state court’s sound discretion. Finally, in terms of disclosure, Sia prefers full discovery over the circumscriptions imposed by Rule 26.

McPherson was critical of the fact that expert disclosures are required too early in the pretrial process under Rule 26. However, as also noted by Judge Kurren, Rule 26 does not

preclude the parties from stipulating or otherwise agreeing to the extension of deadlines. Judge Kurren added that the early disclosure requirements under Rule 26 are an effective tool to prevent the case from languishing.

Judge Chang has developed his own method of ensuring timely expert witness disclosure in his trial setting status order, which he developed after several years of trial court experience. His order requires disclosure of expert witnesses 180 days prior to the trial setting. The order mandates submission of summaries rather than full reports as required under Rule 26. However, if a party bears the burden of proof and will employ an expert, the opinion must be disclosed 130 days prior to trial. The final naming of expert witnesses under Judge Chang's order and court rules, must be made 120 days prior to the trial setting.

Judge Chang explained that he is religious about adherence to these deadlines and imposes appropriate sanctions if attorneys fail to disclose expert witnesses in accordance with his order or otherwise fail to meet the order's deadlines. Notwithstanding his order, Judge Chang had no opposition to the adoption of Rule 26 by state courts, so long as the rules are followed and enforced.

Judge Cahill suggested that there should be some flexibility with respect to deadlines for expert witness disclosures depending on the nature of the case. In some instances, setting expert disclosure deadlines closer to trial aids in the settlement process, and he will conduct settlement conferences prior to disclosure deadlines if the circumstances warrant it. Judge Cahill advised practitioners that although reports may not be required, absent the rule, reports can be beneficial when expert testimony is in doubt. Judge Cahill noted that he has had two civil trials in the past four years, and experts have been held to the opinions that they previously disclosed.

In conclusion, a majority of the panel recognized the many benefits afforded by Rule 26, including uniformity of deadlines and efficient resolution of cases, and therefore, it may be beneficial for the Judiciary to consider adopting a similar rule in state court.

V. CIVIL JUSTICE REFORM

(Edward C. Kemper, Don J. Gelber)

Edward C. Kemper summarized the legion of various deadlines and orders that litigants must navigate in the state circuit court trial process and noted that the pretrial process in the state district court process is significantly truncated. Given the more expeditious nature of litigation in the district courts, Kemper posed the question whether jurisdictional limits should be raised, or, alternatively, whether the circuit courts should have the option of applying district court pretrial and trial procedures to cases involving lesser amounts in dispute.

With respect to the possibility of applying district court pretrial and trial procedures in the circuit courts, Kemper noted that multiple exceptions would likely apply. In response to questions, Kemper shared that it is currently unclear how many cases would be affected using the district court pretrial and trial procedures, and further research would provide guidance on the value and nature of cases that would be most suitable. Ultimately, however, the intent of such a

proposition is to achieve a quicker disposition of cases. Attendees offered relevant considerations, including the fact that district court caseloads are already significant.

Citing the fact that the circuit courts currently have 12,700 cases pending with approximately 4,300 new cases filed each year, Don J. Gelber introduced the prospect of imposing mandatory early mediation as a method to reduce case backlog and to encourage settlement of cases. The mandatory mediation system employed by the Judiciary of the Commonwealth of the Northern Marianas Islands (“CNMI”) was discussed. Under CNMI rules, mediation acts as a pause on determinative litigation, discovery, and other pretrial matters. Mediators are accredited by the CNMI Supreme Court and receive compensation at an hourly rate approved by the CNMI Supreme Court. If mediation initially fails, the court can mandate continuation of the process unless it feels the effort would be fruitless.

Some attendees stated that they were fine with the rules as they are and questioned the background of this topic. Attendees wanted to know if complaints were being made or if there were studies indicating a need for these types of reforms, i.e., raising jurisdictional limits, adopting expedited pretrial procedures, and mandatory mediation. Some conference participants believed that, if district court pre-trial procedures were to be permitted in circuit court cases, it should only be permitted in cases where the amount at issue is \$100,000 or less. With respect to mandatory early mediation, some district court participants were of the view that mediation of district court cases should not be mandatory because district court cases generally are expeditiously resolved and early mediation posed an undue burden given the amount at stake in most district court cases.

Examples of successful programs in Hawaii were shared. These include the circuit court CAAP program, neighborhood-based mediation centers, a condominium dispute mediation program, the district court mediation program supported through a judiciary contract with the Mediation Center of the Pacific.

VI. CONCLUSION

Justice Simeon R. Acoba (ret.) concluded the Forum by extending his thanks to all participants and attendees and expressing his hope that the proceedings were educational for all involved.

After the conclusion of the Forum, high marks were given by the participants at the 2016 Civil Law Forum. The following comments are a sampling of the participation:

- *I was very impressed with the quality of the presentations throughout the day, the open dialog between counsel and jurists, and would welcome the opportunity to participate again in the future.*
- *Mahalo to all who participated in the planning and execution of the forum. It was a great opportunity to get updated on the law, as well as meet other members of the bar and bench.*

- *The forum was excellent. Everything ran smoothly and the panel speakers were great. I learned a lot. Thank you.*
- *Overall, it was well organized, speakers were good, and topics were timely.*
- *Overall, this was the best bench-bar to date.*
- *The panels on electronic discovery and arbitration concerns were very helpful at presenting frank insights from seasoned practitioners and sitting judges.*

2016 CIVIL LAW FORUM PARTICIPANTS

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Judge Peter	Cahill	Second Circuit Court (Panel speaker)
Judge Jeannette	Castagnetti	First Circuit Court
Judge Derrick	Chan	First Circuit Court
Judge Gary	Chang	First Circuit Court
Judge Hilary B.	Gangnes	First Circuit, District Court
Judge Lisa	Ginoza	Intermediate Court of Appeals
Judge Ronald	Ibarra	Committee member (Third Circuit)
Judge Barry	Kurren	Magistrate (Panel speaker)
Judge Katherine	Leonard	Intermediate Court of Appeals
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Judge Edwin C.	Nacino	First Circuit Court
Chief Judge Craig	Nakamura	ICA
Judge Karen	Nakasone	First Circuit Court
Judge Rhonda	Nishimura	First Circuit Court
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