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

Table of Contents

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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 civil[2] and criminal areas[3] 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.

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[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 to 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 and 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, he 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

JUDGES

Judge Bert	Ayabe	First Circuit Court
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
Justice Sabrina	McKenna	Hawaii Supreme Court
Judge Edwin C.	Nacino	First Circuit Court
Chief Judge Craig	Nakamura	ICA
Judge Karen	Nakasone	First Circuit Court
Judge Rhonda	Nishimura	First Circuit Court
Justice Richard W.	Pollack	Committee member (Hawaii Supreme Court)
Chief Justice Mark	Recktenwald	Hawaii Supreme Court
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