

Hawai'i State Bar Association
Committee on Judicial Administration

2020 CRIMINAL LAW FORUM

Friday, October 23, 2020

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Note: Some events may have transpired since the writing of the report, and therefore, the report describe the events were current as of the time the report was written.

I. INTRODUCTION

As described in the *Hawai'i State Bar Association ("HSBA") Board Policy Manual*, the Committee on Judicial Administration ("JAC")¹:

Maintains a close relationship with the judiciary on matters of mutual concern to 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, 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 separately focus on certain issues in the areas of criminal,² civil,³ and family law.⁴ These Forums take place every other year, alternating with the Bench-Bar Conferences.

The Criminal Law Forum's mission for 2020 was to understand the ways in which the Judiciary has attempted to respond, and to determine what best practices may be

¹ The HSBA Committee on Judicial Administration in 2020 comprised of the following co-chairs and members: Hawai'i Supreme Court Associate Justice Simeon R. Acoba (ret.), Co-Chair; Steve Chow, Co-Chair; Judge Robert Kim, Judge Blaine J. Kobayashi, Judge Brian Costa, Judge Ronald Ibarra (ret.), Judge Rowena A. Somerville, Judge Randal G. Valenciano, Hayley Cheng, Dennis Chong Kee, Kahikino Noa Dettweiler, Vladimir Devens, Kirsha K.M. Durante, William A. Harrison, Edward C. Kemper, Dyan Mitsuyama, Carol K. Muranaka, Kyleigh F.K. Nakasone, Lester D. Oshiro, Shannon Sheldon, Audrey E. Stanley and Kevin Takata.

² The Criminal Law Forum subcommittee members included Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Hayley Y. C. Cheng, Kirsha K.M. Durante, William A. Harrison, Judge Ronald Ibarra (ret.), Third Circuit Court Judge Robert Kim, Second Circuit District Court Judge Blaine J. Kobayashi, Lester D. Oshiro, First Circuit Court Judge Rowena A. Somerville and Kevin K. Takata.

³ The 2020 Civil Law Forum took place on October 30, 2020.

⁴ The 2020 Family Court Forum took place on September 25, 2020.

implemented by judges, attorneys, and other interested parties to further the provision of justice in our criminal courts.

On Friday, October 23, 2020, the 2020 Criminal Law Forum was conducted on a virtual Zoom platform. Participating remotely were 16 judges, 10 court administrators, 5 guests, and 98 attorneys. A complete list of participants is included at the end of this report.

The JAC acknowledges the generous support of Hawai'i Supreme Court Chief Justice Mark E. Recktenwald for the use of the Supreme Court's Zoom platform, as well as the Supreme Court's staff - Daylin-Rose H. Heather and Kanani Kawika - who were instrumental to the Forum through their technical support and assistance.

II. WELCOME AND OPENING REMARKS

The Criminal Law Forum opened with remarks from the following distinguished individuals:

- Hawai'i Supreme Court Justice Simeon R. Acoba (ret.) who serves as the Co-Chair of the JAC welcomed the attendees and explained that in this Forum series, judges, lawyers, and other interested parties are able to share their knowledge and experiences in order to maintain the viability of our legal system through this unprecedented time. He also thanked everyone for participating in this virtual forum.
- Hawai'i Supreme Court Chief Justice Recktenwald expressed his gratitude to the JAC for putting on the Forums and past Bench-Bar Conferences. He stated that these Forums and Bench-Bar Conferences have been a valuable source of input

from the bar and other stakeholders, which the judiciary seriously considers in mapping out future discussion for the courts.

Chief Justice Recktenwald mentioned pretrial reform as a notable example of important ideas generated by these Forums and conferences. From that work, the Criminal Justice Research Institute was formed to collect better data and conduct in-depth analysis to achieve better outcomes in the criminal justice system. He asserted that the Judiciary is committed to providing “even-handed justice” to all groups in the community and essential steps have already been taken to address racial equity through efforts such as bail reform and implicit bias training for judges and judicial staff.

Chief Justice Recktenwald noted that the business of the court changed because of COVID-19 (“COVID”) and as of September 2020, more than 27,000 cases were heard remotely statewide. Jury trials, which present unique safety challenges, were postponed until the fall and were being relaunched in November 2020 on the neighbor islands and in December 2020 on Oahu.

Chief Justice Recktenwald said that an area of continued focus is the intersection of criminal justice and mental health. As a result of a mental health summit held in 2019, Act 26, which became law in September 2020, provides that non-violent defendants who are charged with petty misdemeanors are directed into proper community-based treatment. He expressed his gratitude to the participation of all attendees in this “important program.”

III. JUDICIARY'S RESPONSE TO COVID

A. Technology and Platform Choices

Danielle Hirsch of the National Center for State Courts ("NCSC") expressed that the national consensus is that Zoom is the preferred platform for court use. The public is most familiar with Zoom, Zoom does not require a download, and it is user-friendly.

Zoom has also been found to be more flexible and agile than other platforms. Previous concerns about security have been alleviated and Zoom has become more versatile. Zoom is also the platform of choice for most law firms and attorneys.

1. Individual Circuit's Responses/Status

The District Court of the First Circuit has predominantly adopted Zoom. The Circuit Court of the First Circuit is attempting to transition completely to Zoom by July 2021 but continues to use WebEx pursuant to its contract with WebEx and Cisco. Nonetheless, Zoom appears to be the preferred platform in the First Circuit Courts.⁵

The District and Circuit Courts of the Second Circuit use WebEx as their platform. One explanation for the continued use of WebEx is the need to interact with certain state agencies, such as the Hawai'i State Hospital, which are configured for WebEx.

The Circuit Court of the Third Circuit prefers the use of Zoom. However, WebEx continues to be used most often.

Information on how to access both Zoom and WebEx can be found on the Judiciary's website. The United States District Court for the District of Hawai'i also uses Zoom.

⁵ The First Circuit Courts transitioned to Zoom in December 2020.

2. Security Concerns When Using Virtual Platforms

Application updates for the various platforms have largely addressed and alleviated security concerns. Disruptive behavior can often be resolved through the use of the mute function and video host controls. Mainland courts have used clerical staff to police improper use.

Some of the attendees expressed concern with Webex when dealing with confidential attorney-client conversations during virtual proceedings. Unlike Zoom, Webex does not have “breakout rooms,” so attorneys must use cellphones to communicate with clients. In the First Circuit, confidential communications are difficult when clients are in custody.

3. Widespread Use of Virtual Platforms

Status hearings, arraignments, bail hearings and motions, evidentiary hearings, preliminary hearings, and dispositive motions have all been accomplished virtually both nationally and here in Hawai‘i. Texas conducted civil jury trials with significant COVID precautions in place. These precautions involved medically recommended spacing, plexiglass and protective gear, use of larger venues, etc. It was found that enormous preparation was necessary to conduct virtual jury trials.

The Circuit Court of the First Circuit has conducted every manner of proceedings except jury trials.⁶ Courts on the neighbor islands have similarly conducted a mix of remote and in-person proceedings. The court must follow Rule 43 of the Hawai‘i Rules of Penal Procedure when determining if a defendant can appear via video or if their

⁶ Since the conclusion of the Forum, jury trials have resumed.

presence is required. The general public is allowed access to court proceedings via live streaming.

Similar to most jurisdictions throughout the United States, Hawai'i courts do not allow recording of proceedings. Written warnings are posted on court websites notifying participants of this policy. However, there are some users who want the courts to allow recordings. Some reasons against recording are misuse of the recordings, i.e., tampered with, modified or used inappropriately. There are also serious safety concerns involved in certain types of cases such as TROs, family court matters, etc. Courts have produced flexible responses to protect vulnerable victims during live streaming of testimony (i.e., child witnesses). Other jurisdictions carve out certain parts of the proceeding to make them inaccessible to the public. There is ongoing dialogue in many jurisdictions about this issue. Moreover, the court is responsible for maintaining the official recording of the proceeding - the "record of the case." A transcript of the recorded proceeding is available upon request from the court reporter.

Questions have arisen as to what happens if a defendant refuses to consent to appear remotely. A First Circuit Court Judge noted that over 90% of defendants who appear before him consent to remote proceedings. Circuit and District courts statewide, allow for "blended" proceedings, e.g., attorneys and clients may choose to appear remotely or in person. In the District Court of the First Circuit, preliminary hearings are conducted remotely. Due to an inadequate number of cameras available in each courtroom there are some limitations. Multiple cameras are necessary to allow for the visual presence of all parties in the proceeding.

The Judiciary currently lacks sufficient funds to equip each courtroom as needed and has assembled a committee to address this issue. To help alleviate this concern, the courts have allowed attorneys to provide laptop computers and cameras to assist witnesses.

A secondary problem with preliminary hearings in the District Court of the First Circuit is the significant time constraints involved with the use of the single room at OCCC configured for video access. Each inmate is limited to an hour of remote conference use to allow for other inmate cases.

4. Benefits or Drawbacks of Virtual Proceedings

Hawai'i courts have noticed some immediate benefits of virtual technology through increased court attendance and participation. Participants are not required to leave work, do not have to expend valuable time traveling to and from court, and do not have to incur expenses such as parking. These reasons support the increased use of remote technology after the pandemic subsides. Hawai'i courts hope to review use and functionality statistics to determine which type of proceeding or matter is better suited to this new virtual technology.

B. Scheduling of Virtual Proceedings

(Panelists: Kevin Takata, Esq., Moderator; Danielle Hirsch, National Center for State Courts (“NCSC”); Judge Sherri-Ann L. Iha; Judge Paul Wong)

1. Spacing of Cases Instead of Waiting Rooms

Attorneys and their clients have voiced concerns regarding “down time” spent in virtual waiting rooms. All courts seek to stagger cases instead of requiring individuals to remain in virtual waiting rooms for long periods of time. The District Court of the First Circuit uses a main room to check in participants and the online greeter will admit the

participants into the breakout room when their case is called. The District Court of the First Circuit is also considering assigning an alphabetical letter to arrange the order in which each participant logged onto Zoom. Using this method will allow the courts to give preference to those who arrive early.

2. Staggering Virtual Court Appearance Times

Courts across the country that have large dockets were required to change their practices because of COVID. Courts are trying to be sensitive to individuals with limited bandwidth and data. A First Circuit Court Judge uses a staggered calendar to try to save time. This becomes complicated, however, for custody defendants who are afforded very limited time. Therefore, custody defendants appearing from OCCC via video are given priority to manage such time constraints. In the First Circuit, court congestion is exacerbated because of the 60,000 COVID related emergency order citations which have been issued.

C. Centrally Located Video Rooms/Kiosks/Centers for Those in Need of Technological or Financial Assistance?

1. Litigants Without Access to Technology

There is a national movement to set up kiosks for financially limited individuals who lack access to computers and technology. The intent is to provide access mainly in courthouse lobbies. However, kiosks have also been strategically placed in other facilities such as libraries and YMCAs.

Other jurisdictions have considered unique technological solutions to help the courts with public access. In Michigan for example, judges work with police departments to provide defendants with smartphones to participate in arraignments from police cell

blocks.

In line with the technological innovations occurring nationwide, Hawai'i, through the Hawai'i Judiciary's Access to Justice initiative, has created a map of free Wi-Fi and broadband "hotspots" accessible by individuals to meet their court appearance obligations. The map is available on the eCourt Kokua website. The Hawai'i Law Library has also set up a kiosk for attorneys and the public to gain access to remote hearings.

2. Limiting Need for Personal Appearance

The Circuit Courts and District Courts have differing needs. District Courts serve a larger volume of clients. Circuit Courts manage the more complex cases. The Judiciary is working on expanding access to technology for all types of cases.

A number of jurisdictions have procured iPads and other tablets to assist jurors with *voir dire* and to allow for mobile court appearances. Those defendants and parties who do not have access to technology or a device, but are able to comply with court screening policies, may still appear in person. While on Zoom, court staff are able to communicate with attorneys via a "chat box."

The First Circuit Court judges personally thanked the Hawai'i criminal bar for its flexibility and cooperation in meeting the demands of mobile appearances while the Court continues to grapple with the COVID-19 pandemic. The First Circuit Court noted that for the most part, all parties have been very cooperative in this effort.

D. Coordination of Ancillary Services: (How are the ancillary services responding and adapting to the COVID pandemic?)

(Panelists: Kevin Takata, Esq. Moderator; Judge Matthew Viola; Judge Shirley Kawamura; Brooke Mamizuka, Supervisor (ACS); Debbie Tanakaya, Esq.; Ann Datta, Esq.; Dr. Run Heidelberg, Administrator of Hawai'i State Hospital ("HSH"); Ted Sakai (Former Director DPS))

1. Adult Client Services Branch

Adult Client Services Branch (“ACSB”) is attempting to engage clients despite COVID. The ACSB personnel have been meeting with clients outside the courthouse, on the Plaza level of the First Circuit Court, or in the ACSB office space with appropriate barriers in place. In late April, the ACSB attempted a reopening plan. Unfortunately, that plan could not take place due to a surge in new COVID cases. The ACSB is now working toward limited in-person meetings with proper sanitation and protection measures in place.

The ACSB’s “fall back” plan has always been to use telephones. The ACSB utilizes a combination of in-person, Webex, and telephone contacts with probationers. Presently, due to COVID restrictions, the First Circuit ACSB limits its drug testing procedures to participants in specialty courts. The Fifth Circuit Courts and ACSB are performing urinalysis testing on a regular basis. Third Circuit is also continuing to perform urinalysis testing of defendants.

For those defendants who lack access to a phone or technology, ACSB’s community partners i.e., Waikiki Health, Institute of Human Services, and other homeless service providers assist probationers/defendants with maintaining contact with ACSB. Probation officers are also engaging in domestic intervention via Zoom. ACSB has determined that Zoom works well in assessing issues of compliance. Zoom assists probationers by limiting traffic, parking, and lobby wait times. Probation officers have commented on how Zoom often provides for better conferences between probationers and ACSB.

With regard to the First Circuit HOPE Probation program, probationers are required to call into ACSB instead of being drug tested. ACSB is also employing a once a week contact requirement for probationers. The high-risk probationers are given more attention and supervision than low-risk probationers. Currently, there are no immediate sanctions imposed due to the pandemic and overcrowded conditions at OCCC.

ACSB is also using Webex or telephone conferences to review the terms and conditions of probation with defendants. ACSB reports this procedure has been working well.

2. Specialty Courts (Hawai'i Drug Court, Mental Health Court, Veteran's Treatment Court)

In October 2020, specialty courts--such as the Hawai'i Drug Court, Mental Health Court and Veteran's Treatment Court--began limiting drug testing of defendants and instead relying on treatment facilities to conduct drug tests of program participants. Domestic Violence Intervention classes are available using Zoom, and there appears to be increased compliance with class attendance on Zoom.

Regarding drug treatment courts, access to and transportation from OCCC are the biggest hurdles for obtaining admission assessments in the First Circuit. Assessments are difficult to conduct via video. Additionally, the extensive paperwork needed for admission is much more difficult to complete when assessments are not done in person. Some admissions hearings into specialty courts have been done from OCCC remotely, but paperwork still must be completed. Fortunately, the current assessment backlog is not too significant. Staff members from treatment courts are undertaking assessment

interviews while defendants are in the cellblock. Since March 2020, 20 to 25 people have been admitted into Drug Court in the First Circuit.

In the Third Circuit, admissions to specialty courts appear to be similar to pre-pandemic levels. The Third Circuit Courts have adapted well by using electronic monitoring apps on cell phones to monitor defendants. The Third Circuit Courts and ACSB have set up appropriate barriers and sanitization procedures to conduct in-person meetings. Treatment courts in the Third Circuit are also moving more towards Zoom sessions.

Mental Health Court has had some difficulty with admissions because of the COVID traveling and quarantine requirements for Oahu-based doctors who travel to the neighbor islands to conduct examinations. Neighbor island courts have approved Zoom examinations of defendants, as well as allowed the review of centralized electronic records to assist doctors in their exams.

Specialty courts are known for higher frequency of in-person hearings. The First Circuit Drug Court is consistently participating in remote hearings. The court does conduct in-person hearings as it deems necessary. There are approximately 50 to 60 review hearings a week. After the issues involving the pandemic subside, the First Circuit Drug Court is considering the possibility of allowing compliant participants to continue to appear remotely as an incentive for good conduct. The supervision of probationers is moving more towards electronic monitoring using a “Life360” cell phone monitoring application.⁷ Additionally, the First Circuit Drug Court is setting up more sanitizing efforts

⁷ “Life360” is touted as a “family locator & GPS Tracker” phone application. When downloaded, onto a cell phone, the app uses GPS to locate the cell phone at all times.

and Zoom online treatment programs for participants. The Fifth Circuit conducts all hearings remotely. These remote hearings include reviews and petitions. Occasionally, the court requires individuals to physically appear in court.

3. The Immediacy of Sanctions

Sanctions have been limited to extreme violations. However, the First Circuit Court continues to issue bench warrants in cases where extreme violations are alleged. A recent suggestion is to employ other types of sanctions such as increased check-ins, additional therapy, etc. The First Circuit Court also now seeks to utilize more incentives in place of sanctions, as the pandemic has been a great learning experience for all participants. In short, courts are more flexible about resorting to jail as the default sanction.

In-person hearings are primarily held in the Third Circuit. The parties understand that jail sanctions are the last resort. Community service and other alternative sanctions such as loss of privileges, phone removal etc., seem to be working well and all involved parties have been pleasantly surprised with the results of using these alternative sanctions.

4. H.R.S. Chapter 704 and Mental Health Issues

The doctor's ability to meet with clients for examinations required under H.R.S. Chapter 704 (Penal Responsibility and Fitness to Proceed) has been one of the most problematic issues. The Hawai'i State Hospital ("HSH"), Kauai Community Correctional Center ("KCCC") and the Hawai'i Community Correctional Center ("HCCC") began using

the “telehealth” program⁸ early in the COVID-19 pandemic and have had success with it. However, the Maui Community Correctional Center’s (“MCCC”) telehealth connection has proven to be problematic, in part, due to the concrete composition of the facilities.

At all facilities, the physicians are only able to conduct two interviews a day, three days of the week (six interviews a week) due to the limited time each facility has available. The HSH is trying to work with the wardens of the various facilities to increase this access. OCCC is the facility with the most significant backlog.

5. Lack of Access to Inmates at the Department of Public Safety (“DPS”)

Former DPS director Ted Sakai believes that the foregoing problems are based on two factors: (1) the condition of the aging facilities; and (2) the concrete facilities at MCCC that impede the ability of the center to accommodate a viable telehealth connection. MCCC may need to move the telehealth location to a different site at the facility to appropriately accommodate a viable connection. Moreover, Mr. Sakai indicates that for security reasons, prisons are generally averse to anything which connects the facility to the Internet. He indicates the need to advance the State’s approach in this area because facilities nationwide are increasing their use of such technology with no adverse safety concerns.

Mr. Sakai also believes each facility must increase its inmates’ access to their attorneys even during meal and lockdown times, which may lead to an earlier resolution of their cases. DPS recently contacted the Administrative Judge of the First Circuit to

⁸ Telehealth is the use of digital information and communication technologies, such as computers and mobile devices, to access health care services remotely to manage health.

indicate that they would increase access during mealtime and lockdowns. The First Circuit Administrative Judge proposes that a landline be set up at every module to alleviate the concern of moving inmates around the facility. There have been no problems with scheduling evaluations of non-custodial inmates.

The facilities on the neighbor islands are much more conducive to the use of telehealth as they do not appear to have the same systemic concerns as the First Circuit. The current phone system at OCCC has video capability; therefore, DPS may not have to purchase a new system as the present system can be upgraded to meet current needs.

Mental Health examiners' access to medical records at OCCC has been a concern. However, there is now a system in place for examiners to review records online at the DPS office. ACSB compiles the necessary records for the examiners. One of the challenges ACSB faces is obtaining access to Honolulu Police Department records for higher level cases.

On the Big Island, examinations present challenges when the examiners are from Oahu. The Third Circuit is seeking to alleviate some of these problems by allowing the use of Zoom for interviews, as well as by having private Hilo doctors examine defendants in person. Attorneys are "theoretically" able to have video access to inmates but again, such access is extremely limited. Concerns have also been raised regarding the timeliness of transferring the defendant to the HSH when transfer orders are issued. The Third Circuit Court has not had transfer delays when the Court commits the individual to the HSH.

The Attorney General ("AG") states that a federal injunction requires transfers to be made within 72 hours. However, if a person presents a COVID risk, the AG will ask

for a stay of such transfer. The HSH has procedures to isolate patients found positive for COVID. New patients/transfers are generally required to remain in a designated area outside of the general population for ten days. While the HSH has no problem receiving a patient positive with COVID-19, sheriffs who transport the patient are required to quarantine 14 days after such transport. Needless to say, sheriffs have not been willing to transport these patients.

6. Fitness Restoration Classes

Fitness restoration classes are still occurring at the HSH. Treatment teams have adapted by using platforms such as Zoom. Hawai'i hospitals have adapted well, and courts have not seen any delays. The Department of Health has maintained the quality of services during the pandemic.

The First Circuit Administrative Judge suggests that, even after the pandemic, the court will seek to keep conditional release reviews virtual unless there is a specific reason for in-person appearances.

E. Constitutional, Statutory, and Rule Changes to Accommodate Hearings (The need for amendments in applicable statutes and rules to meet the needs of COVID appearances and hearings)

(Panelists: Hayley Cheng, Esq., Moderator; Judge Shirley M. Kawamura; Judge Kenneth Shimozone; Judge Darolyn Lendio; Rick Sing, Esq.)

1. Rules 11 and 43 of the Hawai'i Rules of Penal Procedure ("HRPP")

The Hawai'i Penal Rules Committee was tasked with amending Rules 11 and Rules 43 of the Hawai'i Rules of Penal Procedure ("HRPP") to accommodate the use of technology (via video and telephone) to conduct court hearings. To comply with the recent Supreme Court case law (*State of Hawai'i v. Pierre Hernandez*, 431 P.3d 1274 (Haw. 2018)) the amendment to the rules addressed how the Court can conduct an "on-

the-record” colloquy with a defendant when he or she is not physically present in the courtroom.

The necessary changes were relatively simple rule changes. For example, “video appearances” at court hearings were considered “appearances” under the rules. Also, criminal forms K (waiver of right to jury trial) and L (change of plea) were updated and uploaded to the Supreme Court website for public review and comment.⁹

2. Hawai‘i Supreme Court

The Hawai‘i Supreme Court has responded to the impact of COVID on court closures and distance requirements and restrictions. HRPP Rules 5, 6, and 10 were modified by temporary court orders which are under constant review and revision based upon the Governor’s Emergency Proclamations. These rules limit or suspend time requirements for certain proceedings and hearings and postpone or reconfigure the composition of the grand jury. All court orders and amendments can be found on the Judiciary website. The present rules still require the court to conduct a preliminary hearing.

The implementation of remote video hearings guarantees only one preliminary hearing per day. Hybrid preliminary hearings have been the source of some difficulty. Hybrid preliminary hearings involve defendants in custody, prosecutor and defense counsel, and witnesses appearing remotely or in-person. Hybrid preliminary hearings present the challenge that both defense counsel and his or her custody client have limited or no ability for confidential communications with each other during the hearing. Another

⁹ On February 3, 2021, the Hawai‘i Supreme Court issued an order amending form K and adapting form L.

concern involves the ability for all parties to observe a witness and/or defendant's physical demeanor when appearing and testifying during the hearing.

At present, because of the delays surrounding COVID, the filing of bail motions is approved by the District Court of the First Circuit instead of deferring such motions for consideration by the Circuit Court. The court has found that multiple-person hearings with interpreters are possible so long as all parties comply with the COVID-restricted distances and appropriate facial coverings.

3. Family Court

Family court proceedings in Courtroom 8D involve domestic abuse, harassment, violation of order for protection and temporary restraining order, and assault cases. The court will consider motions to appear remotely in Courtroom 8D for non-substantive matters. Witnesses testifying must remove their facial covering so that the parties can observe their faces. Prior to testifying, witnesses are instructed to have no contact with others or discuss the case and cannot use written materials when testifying. Victim Witness Advocates can be present in the courtroom to support testifying witnesses. Grand juries in the First Circuit have not been impaneled. Under consideration, with the Attorney General's approval, is to impanel the grand juries at the Neal Blaisdell Center.¹⁰ A review of a questionnaire posed to potential jurors may also be considered to resolve jurors with excuses prior to in-person sessions.

¹⁰ On January 6, 2021, the First Circuit Court empaneled 6 grand jury panels of 12 at the Hawai'i Convention Center.

F. Jury Trials, Bench Trials, Motions, and Other Hearings (What is being done to balance the backlog of proceedings and trials with the constitutional rights of the accused?)

(Panelists: William Harrison, Esq., Moderator; Associate Justice Simeon Acoba (ret.); Paula Hannaford-Agor (NCSC); Judge James Ashford; Judge Kenneth Shimozono; Judge Paul Wong; Stephanie Char, Esq.; and Jeffrey Ng, Esq.)

1. Constitutional Issues

When courts are involved in virtual proceedings, the paramount issue is the right to confrontation. All jurisdictions are struggling with this constitutional right. Some jurisdictions allow witnesses to testify only wearing a face shield. However, personal protective equipment interferes with a defendant's right to confrontation, i.e., face to face confrontation, by severely hampering observations of a witness's facial expressions making it extremely difficult to judge a witness's credibility. Face coverings also muffle the witness's words making the words difficult to understand. An attorney's ability to communicate with the participants in the courtroom, including jurors and their clients, is challenging with face coverings. This compromises an attorney's ability to fully evaluate prospective jurors' comments, demeanor, and credibility.

The Judiciary is keenly focused on preserving constitutional rights. As a result, the Judiciary suspended criminal jury trials until proper safety concerns have been addressed that do not impact an individual's constitutional rights to a fair and impartial trial.¹¹ The courts must consider the significant impact on constitutional rights in remote preliminary hearings. Accordingly, the court has set forth procedures to assist in providing defendants with these constitutional rights.

¹¹ Since the Criminal Law Forum in October 2020, jury trials have been conducted in the First and Third Circuits. The First Circuit Court resumed jury trials on December 14, 2020.

Remote hearings have addressed some problems and, unfortunately, created others. During virtual hearings, while witnesses do not have to wear a mask, they must be monitored closely by the court to ensure that their testimony is not impacted by outside or improper influences. The court is working on providing access to computers and locations at the courthouse for those who do not have their own technology to remotely appear or those who cannot follow instructions and separate themselves from outside influences.

2. Right to Counsel

Concerns about a defendants' right to counsel often arise during remote hearings because of the inability to have confidential communications and during in person hearings because of the requirement to maintain physical distance in the courtrooms. Mainland courts have tried to address this issue using technological solutions such as ear buds, white noise, and headsets. However, these social distancing guidelines and attempted solutions compromise the ability of counsel to humanize their clients.

Moreover, defense attorneys are required to develop an attorney-client relationship with their clients while incarcerated. This requires multiple visits with clients over time. The current inability to visit with clients at OCCC clearly impacts the opportunity for a meaningful attorney client relationship.

3. Jury trials: Effect of A New Normal (Can we realistically protect the rights of all parties in a COVID era court proceeding?)

The courtrooms in the First Circuit are presently not set up for jury trials under

COVID-19 restrictions.¹² In Hawai'i, the attorney and defendant are required to remain 6 feet apart per the Center for Disease Control ("CDC") guidelines. If the attorney and defendant request a more in-depth conversation, then the court may accommodate such a request by allowing the use of a hallway or jury room.

Courts have considered the use of clear acrylic and clear plastic transparent face masks. Circuit Court judges have not tested such masks, so they are unsure of its effectiveness. The courts have researched two types of clear masks - the type used in the health care setting and a lower quality mask more equivalent to a cloth mask. The courts have reached out to the State epidemiologist for advice on the propriety and use of clear masks instead of cloth masks. The courts are waiting to hear back from the medical experts.¹³

As a result of the retrofitting of courtrooms, the use of virtual platforms and the COVID restrictions in jury trial settings, there is a need to amend the present jury instructions or generate new ones. For example, a jury instruction should be given to witnesses who testify remotely that their testimony must not be influenced by outside elements.

4. Refreshing Witness's Testimony/Presenting Exhibits Via Video?

Remote proceedings present significant issues when attorneys attempt to refresh a witness's testimony with documents or to present exhibits to the parties via camera. Courts addressed these issues using "screen share" features on remote platforms. The

¹² Since this Forum, the Second Circuit has completed a jury trial with COVID-19 protections in place. The United States District Court has also completed a jury trial. The First Circuit will begin jury trials in January 2021.

¹³ The First Circuit provides clear plastic masks for witnesses that testify.

courts have also asked all parties, in advance of the hearing, to share exhibits and documents with one another and the court prior to the hearing. The advanced circulation of exhibits and documents facilitates the introduction of such items into evidence. The court requires the parties to redact personal information from such exhibits or documents prior to sharing materials with the parties. The court is still struggling with procedures to authenticate exhibits remotely. Federal court rules mandate that parties prepare binders of exhibits prior to hearings. Under virtual platforms, the parties need to ensure that observers to court proceedings do not see a proposed exhibit unless and until it has been made public by receiving the exhibit or document into evidence.

5. Jurors and Ensuring a Fair Cross-Section of the Community

There has been much discussion on ensuring that jurors represent a fair cross-section of the community. Due to safety concerns, the first and most glaring question that has arisen is “will jurors really want to serve?” In some jurisdictions that question has already been answered and the resounding response is “yes!” The response to requests for jury service has been remarkably good. Some jurisdictions are utilizing virtual jury selection processes to ensure more people can participate in jury trials. Jurors who fear interaction with other people can remain at home and participate in the process remotely.

The Hawai'i courts are sending out questionnaires ahead of time to pre-screen jurors using informational flyers which include the safety measures the judiciary utilizes to protect all parties to court proceedings. Court questionnaires allow jurors to list reasons why they cannot serve as jurors, such as being full-time students, caregivers, having pre-existing medical conditions, etc. Of the 500 questionnaires sent out at the end of July in the First Circuit, approximately 120 - 140 of the jurors said they could not serve. That

response, however, did not take into consideration the surge of cases in August. The Circuit Court is still not sure what the panels will look like and whether they will represent a fair cross section of the community.¹⁴

Other jurisdictions limit the number of prospective jurors who appear in court to address the concerns of size and crowd control related to jury selection. Therefore, those jurisdictions have turned to remote *voir dire*. However, this procedure has its drawbacks as it slows down the entire process. Each Hawai'i Circuit has its own plan for jury selection. In Hawai'i, there are no plans for conducting remote *voir dire*. All prospective jurors will be summoned to appear in person.

The First Circuit Court jury selection will take place at the District Court on Alakea Street. As a result of limited courtroom capacity, the District Court can handle only two jury selections a day, for a maximum of 10 jury trials a week. Some mainland courts have considered limitations on peremptory challenges, while other jurisdictions are decreasing jury sizes from 12 to 6 people. A decrease in jury pool size is not possible in Hawai'i as criminal jury trials have a mandate of 12 person juries.

Some jurisdictions are considering time limits on trials. Those courts are using every available minute of the court day for a trial by not scheduling other matters on the court docket. This appears to assist with the limited number of trials during COVID. However, if a court limits the amount of time which can be utilized for bench conferences, presentation of evidence or other processes of trial, this becomes problematic and potentially raises constitutional concerns and issues.

¹⁴ That question may have been at least partially answered.

The Chief Judge of each circuit sets forth the COVID procedures in their individual circuits. The Chief Judges will make those decisions concerning their calendars based on the circumstances surrounding their dockets. There is a major concern for custody defendants because COVID delays caused severely restricted access to trials for those defendants.

Hawai'i courts continue to grapple with the issues surrounding the need for speedy public trials. There is limited space for spectators under the distance requirements to observe jury trials. The First Circuit Court presently has room for three members of the public at Kaahumanu Hale. The court is still discussing the possibility of virtual access to jury trials.

Concerns have arisen as to how the judiciary will deal with possible COVID exposure should this arise during a jury trial. After consultation with an epidemiologist, the First Circuit decided that it will consider the issue on a case-by-case basis. Some levels of exposure may allow for a case to proceed. Whenever there is an exposure, the court will consult with two epidemiologists to determine if the exposure can be ameliorated and to seek guidance on whether such proceedings may be continued.

IV. BREAKOUT ROOM DISCUSSIONS

Participants and judges were separated generally by individual circuits and placed in 6 Breakout rooms (First Circuit (2 rooms), Third Circuit - Hilo, Third Circuit - Kona, Fifth Circuit, and Second Circuit) to facilitate small group discussions. Each Breakout room had a judge and moderator from that specific circuit to lead the discussion.

Initial questions posed to the Breakout room participants were the following:

Within the context of COVID-19, what is working and what is not working? What

should be kept? These questions were meant to start or stimulate discussions in each room. However, participants were permitted to discuss any topics or issues surrounding the main theme of the forum they believed were most important to their room.

A. Recap of Break Out Sessions

(Panelists: Hayley Cheng, Esq., Moderator; Judge Robert Kim; Judge Blaine Kobayashi; Judge Darolyn Lendio; Judge Henry Nakamoto; Judge Rowena Somerville; and Judge Randall Valenciano)

Moderators from each of the breakout rooms provided the entire Forum with a recap of the discussions had in each room. Some similar topics were discussed in each room. There appeared to be several common threads which are summarized as follows:

- Use the Zoom platform because it was considered the best platform
- Hold virtual proceedings for most non-substantive hearings as an effective response to the COVID pandemic
- Continue virtual proceedings post COVID
- Improve coordination between DPS and the court regarding inmate participation in remote hearings.
- Increase the number of video rooms at the prisons and increase use times.
- Implement procedures and technology to assist with communications between attorneys and clients during remote preliminary hearings and other virtual court proceedings.
- Make better use of attorney time and waiting rooms during Zoom proceedings.
- Establish better procedures for multi-defendant cases and interpreter participation in remote hearings.
- Ensure the integrity and correctness of Zoom and Webex hearing transcripts.

V. LIST OF PARTICIPANTS

Bench/Judicial Participants:

Chief Justice Mark E. Recktenwald, Justice Simeon R. Acoba (ret.), Chief Judge Lisa M. Ginoza, Judge James Ashford, Chief Judge R. Mark Browning, Judge Ronald Ibarra (ret.), Judge Sherri Iha, Judge Shirley Kawamura, Chief Judge Robert Kim, Judge Blaine Kobayashi, Judge Darolyn Lendio, Judge Trish Morikawa, Judge Henry Nakamoto, Judge Ken Shimosono, Judge Rowena Somerville, Chief Judge Randal Valenciano, Judge Matthew Viola, and Judge Paul Wong.

Bar/Attorney Participants:

Marissa Agena, Edward Aquino, Chad Au, William Bento, Jonathan Burge, Jason Burks, Erika Candelario, Kat Caswell, Eric Chang, Stephanie Char, Hayley Cheng, Steven Chow, Anne Clarkin, Suzie Collins, Carolina Miranda Constanzo, Ann Datta, Craig De Costa, Ernest Delima, Gilbert Doles, Jessica Domingo, Kyle Dowd, Kirsha Durante, Jacquie Esser, Malia Ferreira, Darcia Forester, Stephen Frye, Byron Fujieda, Richard Gronna, Kelsi Guerra, Catherine Gutierrez, William Harrison, Lee Hayakawa, David Hayakawa, Emlyn Higa, Cameron Holm, Wendy Hudson, Jon Ikenaga, Anna Ishikawa Jackson, Kauano Jackson, Tracy Jones, Tiffany Kaeo, Shannon Kagawa, Haaheo Kahoolalahala, Matt Kajiura, Alen Kaneshiro, Megan Kau, Andrew Kennedy, Alan Komagome, Marcus Landsberg, Rebecca Like, Ben Lowenthal, Frederick Macapinlac, Clarissa Malinao, Lesley Maloian, Lynn Costales Matsuoka, Tiara Maumau, Megan McDonald, Melinda Mendes, Kyle Mesa, Dyan Mitsuyama, Tracy Murakami, Carol K. Muranaka, Landon Murata, Charles Murray, Jeffrey Ng, Steven Nichols, Robert Olson, Jason Onishi, Thomas Otake, Jeen Kwak Pang, Michael Park, Michelle Puu, Melanie Ragamat, Ramsey Ross, Christopher Rothfus, Tyler Saito, Chase Sakai, Danielle Sears, Keith Shigetomi, Richard Sing, Andrew Son, Matthew Sylva, James Tabe, Daylan Kealii Takahashi, Kevin Takata, Debbie Tanakaya, Napoleon Taylor, Suzanna Tiapula, Gavin Tom, Jerry Villanueva, Kelden Waltjen, Zachary Wingert, Jennifer Winn, Annaliese Wolf, Jaymie Yamamoto, and Kristen Yamamoto.

Panelists (Others not previously listed):

Paula Hannaford-Agor, Dr. Run Heidelberg, Danielle Hirsch, Brook Mamizuka, and Ted Sakai.

Court Administrators and Judiciary Staff:

Michelle Acosta, Daylin-Rose Heather, Kanani Kawika, Jan Kagehiro, Darryl Nakasone, Lester Oshiro, Cheryl Salmo, and Dawn West.

Hawai'i State Bar Association
Committee on Judicial Administration

2020 CIVIL LAW FORUM

Friday, October 30, 2021

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Note: Some events may have transpired since the writing of the report, and therefore, the report describe the events were current as of the time the report was written.

I. INTRODUCTION

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

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.

The coronavirus disease (“COVID-19”) pandemic and resulting social distancing measures resulted in a remote format for the 2020 Civil Law Forum (“Civil Law Forum”) through the Zoom virtual meeting platform. The Civil Law Forum focused on the pandemic’s effect on the administration of justice and the steps the Hawai’i State Judiciary is taking to balance the demands on the judicial system while accommodating and protecting the health, safety, and welfare of practitioners and the public.

The JAC acknowledges the generous support of Hawai’i Supreme Court Chief Justice Mark E. Recktenwald for the use of Judiciary’s Zoom account. The JAC is grateful to Daylin-Rose H. Heather and Kanani Kawika of the judiciary, who provided the guidance, support, and dedication in making this virtual Civil Law Forum possible.

II. WELCOME AND OPENING REMARKS

The Civil Law Forum opened with welcoming remarks from the following distinguished individuals:

- Steven J.T. Chow, who is the Co-Chair of the JAC. Mr. Chow welcomed and thanked all Civil Law Forum participants.

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- Hawai'i Supreme Court Associate Justice Simeon R. Acoba (ret.), who is the Co-Chair of the JAC. Justice Acoba thanked everyone involved in the Civil Law Forum and shared brief thoughts on how COVID-19 may leave its mark on the practice of law in Hawai'i.
 - Hawai'i Supreme Court Chief Justice Mark E. Recktenwald. Chief Justice Recktenwald spoke briefly about the positive impact the JAC's forums and Bench-Bar Conferences have made in providing the judiciary with input from the bar. In this time of COVID-19, he emphasized, collaboration between the bench and the bar is essential. As part of his remarks, Chief Justice Recktenwald noted the following:
 - Since the implementation of the Governor's executive orders related to COVID-19, the judiciary has pivoted from in-person to remote conduct of hearings. This change is both unprecedented and transformative, as evidenced by the remote conduct of approximately 20,000 hearings in September 2020 alone.
 - Jury trials were scheduled to resume on the neighbor islands in November 2020. The Judiciary has worked closely with the State of Hawai'i's Department of Health, national judicial organizations, and the federal courts to develop robust reopening plans that incorporate stringent social distancing and sanitation parameters.
 - The court's criminal calendars have been inundated by quarantine violation citations. Over 60,000 citations have been handled by the courts of the First Circuit alone.

- The Judiciary's resources have been constrained by an 8.6% reduction in its operating budget this year.
 - An influx of landlord-tenant actions is expected once the state's moratorium on evictions is lifted. The judiciary is planning accordingly by expanding alternative dispute resolution options.
 - The Judiciary's information management systems, including the online filing of documents in civil matters have been critical to supporting remote capabilities and reducing the overall number of in-person transactions at the courthouses.
 - Given the significant events of the past year, the implementation of various court rules developed through the work of the Judiciary's Civil Justice Improvement Task Force will likely be delayed from the originally intended January 1, 2021 date.
- HSBA President Gregory Frey. Mr. Frey thanked all in attendance for making the Civil Law Forum a success.

III. CIVIL LAW FORUM TOPICS

A. Update: JEFS Implementation

Judge Gary W.B. Chang provided an update on the status of the Judiciary Electronic Filing and Service (JEFS) system.

- The implementation of the JEFS system pre-pandemic has proven a tremendous support in the Judiciary's efforts to maintain efficient operations under the constraints of the COVID-19 quarantine and social distancing requirements.

- With the civil JEFS system in place, the Judiciary Information Management System Committee has focused its efforts on developing JEFS for the Family Courts with a target implementation date of 2022.
- The Judiciary continues to fine tune the JEFS system and pending issues include making documents more accessible via the notice of electronic filing that is sent to parties when a document is filed. Currently, rather than being able to access the subject document via a link in the notice, the user must access their JEFS account. The Judiciary is exploring solutions while keeping in mind the security concerns related to unintended third-party access to court records.
- Concerns have been raised about the detail and quality of support provided to users by the JEFS support/help desk. The Judiciary is mindful of the critical role that support plays in maximizing the usefulness of the JEFS system and will emphasize this internally.

B. Technology

The panel addressed the Judiciary's application of technology in response to the limitations on in-person contact necessitated by the COVID-19 pandemic.

- The Judiciary's biggest technological adjustment in response to the pandemic has been the manner in which hearings are conducted through web-based video conferencing in place of in-person appearances.
- The Judiciary uses both Cisco Webex and Zoom video conferencing platforms. Webex was already in place throughout the Judiciary prior to the pandemic and the Judiciary turned to it as an immediate alternative and solution to the

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- pandemic's in-person restrictions. Zoom will eventually be adopted as the primary platform because of its advantages in accommodating multi-person conferencing of the type necessitated by court proceedings and also for its friendlier format for end users. Although both platforms are currently being used for court hearings, the Judiciary will effectuate a complete switch to Zoom as its primary platform for court proceedings by July of 2021.
- Although there have been no jury trials since the first government-ordered COVID-19 quarantine and related physical restrictions, the Judiciary aims to restart them in the neighbor island circuits in November 2020. Judges and court staff on the neighbor islands have been working diligently to develop safe practices that ensure proper social distancing and implement sanitary measures given the interaction between people necessitated by a jury trial. The First Circuit is planning to restart jury trials by December 14, 2020.
 - While several civil bench trials have been conducted remotely since court staff returned to the various courthouses, the return to civil jury trials will follow a successful return of criminal jury trials. Civil calendar judges are planning for a return of jury trials in the early part of the new year.
 - Parties eager for a civil jury trial should consider stipulating to a jury of less than twelve people (as the applicable statutes and rules allow). A reduced jury will aid in social distancing measures and is likely to be calendared sooner.
 - Public access to civil bench trials is being accommodated by occasional recordation and posting to YouTube. Public access can also be

accommodated by submitting a request to the trial court in advance and the court will send the requestor a link to the proceedings.

- A request to record a proceeding (application for extended coverage) must be done in advance and may be granted at the discretion of the court in which the recording is requested. Otherwise, court rules prohibit the outside recording of a proceeding to prevent conflicting records as the official record of the court is kept by the court reporter. All courtrooms have an audio system that is tied into the Webex or Zoom platform so that even if the parties and attorneys are not physically present, the court reporter can use the official recording to prepare a transcript of the proceedings.
- Although most hearings are entirely remote, there are some blended hearings where one of the parties is physically present. Court staff, including the judge, court clerk, and law clerk/bailiff are usually present in the courtroom but also have remote capabilities from chambers if needed.
- Despite the general practice of conducting hearings remotely, the court can conduct an in-person hearing by permission of the chief judge or lead civil judge if it believes that doing so is essential. Otherwise, as of October 16, 2020, examination of judgement debtors and garnishment return hearings may be conducted in person. Foreclosure motions to confirm sale hearings need to be done in-person because of the large number of individuals who may want to attend to reopen the bidding process. In general, a request to conduct a hearing in person is more likely if it involves few participants and the issues to be addressed are straightforward.

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- If a party is unable to access the web, the court has discretion to allow participation by telephone.
 - Although Webex and Zoom may be unwieldy in the event that a large number of observers are allowed, using other platforms such as YouTube are not feasible due to the requirements of the Americans with Disabilities Act including closed captioning.
 - In the court's experience, witness appearances via the web can be beneficial because participants are generally able to get a better view of the witness through their webcam.
 - Technical issues arise in web-based hearings and the courts have come to expect them on occasion as technological skills and equipment reliability varies amongst users. If problems arise, the parties should contact chambers via an alternate method to attempt collaborative troubleshooting. Courts have adopted some best practices that are listed on the Judiciary's public website, including proper use of the muting function, use of headphones for better reception, and logging in early (10 minutes prior to a hearing). Some courts even offer practice sessions on logging in to a hearing via the web.
 - Additional best practices recommended by the courts include ensuring that your device is operating on the latest version of software, using good lighting, using a neutral background, minimizing background noise, muting your microphone until it is your turn to speak to reduce feedback, identifying yourself when you talk, having your camera set at eye level, avoid talking over others,

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- and wearing appropriate court attire as if you are making an appearance in-person.
- As a general admonition, remote hearings will be the norm until the circumstances of the pandemic improve to the extent that greater in-person proceedings and contact is possible. However, even thereafter the Judiciary expects that remote hearings are here to stay and will continue to be a facet of practice. It behooves all attorneys to become versed in remote technology in order to represent their clients effectively.
 - Expect delays. Some courts set their hearings at the same time and parties must simply wait until their case is called. Even if hearings are not stacked, court staff will generally add fifteen minutes to each hearing to account for delays. As parties become more adept at technology, hearings will flow more smoothly and at a faster pace.
 - There is no basis to any perceived bias against a party who decides to appear remotely versus a party who appears in-person. Attorneys are expected to be prepared and competent however they decide to attend, and it makes no difference to the court whether their appearance is in-person or remotely.
 - The Judiciary is working on a more efficient and streamlined web page that allows users to better access court records and hearings.
 - The Judiciary is focused on ensuring that its servers are secure and protected from hacking. There has been no report of Zoom “bombing” or unauthorized participation as in other jurisdictions. Remote participation has been largely cooperative and respectful.

- Hawai'i Rules of Civil Procedure Rule 16.1(b) has been suspended to accommodate the remote conduct of hearings to the maximum extent possible. Even prior to the pandemic, Chief Justice Recktenwald envisioned a more extensive use of remote hearings across the courts. Remote participation will not replace in-person hearings once the threat of COVID-19 is fully addressed, but the Judiciary envisions web-based hearings as a fundamental and continuing component of the post-pandemic return to normalcy.

C. Pro Se Litigants/District Court Challenges

The panel addressed the effects of pandemic restrictions on pro se litigants and challenges faced by the district courts in the time of COVID-19.

- The first circuit district courts initiated remote hearings with criminal matters with the help of technologically skilled staff and volunteers in May 2020.
- The court began by designating the main Zoom meeting room as the check-in room/lobby while breakout rooms were used as courtrooms to conduct the actual hearings.
- Many elderly pro se litigants sign in and participate with the assistance of more technologically savvy family members or friends. Additionally, court staff are available to help pro se litigants troubleshoot so that up to the present time, none of the judges have experienced an occasion where a pro se party has not been able to participate in a hearing remotely.
- All parties are warned to sign in with a device that is capable of allowing them to be shown to the hearing participants as there have been occasions where an individual impersonating a pro se party has attempted to appear without

- their camera enabled. Parties are also admonished to be properly attired for their appearance.
- The court allows observers to participate in the proceedings if they communicate with the bailiff in advance that they will be doing so.
 - The court has found that even homeless litigants and witnesses have been able to participate in remote hearings by a web enabled device such as a smart phone.
 - Participation in the traffic calendar is high and participants are generally satisfied with remote access.
 - Court staff try to provide litigants with an indication of how long it will take for their matter to be called and they have discovered that communication is important. Pro se participants have become angry and disruptive when they were unaware of the time frame for having their matter heard.
 - Overall, remote pro se attendance appears higher than during in-person, pre-pandemic proceedings.
 - From June until August, the court had been slowly re-opening to in-person participation in pretrial conferences and small claims matters. Temporary Restraining Order proceedings were never suspended because of the potential criminal ramifications. These hearings were always done completely in-person with a general limit of five hearings during the morning session and five during the afternoon session to allow for proper social distancing. In August, however, the spike in COVID-19 cases drove the court to once again shut down all proceedings other than Temporary Restraining Order matters. By mid-

October, the court had once again opened for pretrial conferences in Honolulu district court.

- Notwithstanding a moratorium on evictions, landlord-tenant matters have been heard if there is a health and safety issue or criminal activity is involved.
- All “country courts” (all district courthouses other than Honolulu) are anticipated to be reopened on November 16, 2020 to in-person return and answer hearings except that small claims matters will only proceed remotely. If the daily amount of COVID-19 cases stays flat or falls, the court hoped to reconvene trials in December of 2020 (but hybrid and fully remote trials are still under consideration).
- When in-person trials resume, the bailiffs will enforce social distancing practices, including limiting the amount of people in the courtrooms at any one time.
- Safety measures within the courtrooms include plexiglass barriers surrounding the judge, clerk and witness stand, health status inquires of all who enter the courtroom, including temperature checks. If an individual arrives with an elevated temperature, his or her hearing is continued and all participants are excused. In addition to social distancing enforcement, court staff disinfect the witness stand for every witness that testifies. The witness waiting rooms are closed because there is no capacity to sanitize them as needed.
- In addition to the strain on resources that the influx of over 60,000 quarantine violation citations caused, the court is wary of the flood of summary possession actions that may be on the horizon given the temporary moratorium on

- evictions. The legislature has estimated that up to twenty thousand complaints for summary possession may be filed once the moratorium is lifted. The court understands that it does not have the capacity to handle such a flood of civil litigation and so a stakeholder working group has been convened to divert as many cases as possible to alternative dispute resolution and other options short of litigation. Some of these include granting CARES funds to tenants in need and engaging legal volunteer organizations to assist with lease modifications.
- Although small claims hearings are anticipated to resume in the county courts on November 16, 2020, the court continues the practice of referring demands for trials to mediation. The Mediation Center of the Pacific is prepared for an anticipated influx of backlogged cases by increasing its volunteer staffing.
 - The quarantine violation citations under HAW. REV. STAT. § 127A have inundated the court and the Judiciary is working collectively to input citations into court records. Hawai'i Rules of Penal Procedure Rule 48 make these matters a priority and there has been a significant impact on the civil calendar in terms of staffing and the availability of courtrooms.
 - The court continues to work on issues related to resuming civil trials in the near future. Time appears to be the most significant concern as the remote conduct of trials generally takes longer. In district court, time is precious because of the sheer volume of cases.

D. Jury Trials

The panel addressed the effects of pandemic restrictions on civil jury trials, including the preparations and conditions required for their resumption.

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- The Judiciary has developed reopening plans, including resumption of jury trials, in close consultation with the Hawai'i State Department of Health and in accordance with the Centers for Disease Control guidelines. The Department of Health will remain available for immediate consultation in the event of a COVID-19 exposure or other urgent COVID-19 related public health matter.
 - Masks must remain in proper use at all times by all who enter the courthouses; provided that witnesses will be provided with a disposable clear face mask when they testify. The Judiciary has specific mask requirements, including a prohibition on vented masks and bandanas as masks. Clear masks may be acceptable depending on the design
 - Hand sanitizer dispensers are mounted throughout the first circuit courthouse.
 - The second, third, and fifth circuits anticipate resuming jury trials soon. The second circuit has made preparations for summoning potential jurors to appear on November 16, 2020 for a single criminal trial. The court will consider expanding to two concurrent trials thereafter. Because civil jury trials have the potential to include multiple parties, the court will start with criminal jury trials and gauge capacity to include civil jury trials thereafter. The court does not have a jury pool. Potential jurors are summoned for individual cases and will be asked by a questionnaire ahead of time whether they are able to serve for at least one week. If a potential juror responds that they are not able to serve, they must state a reason. The questionnaire is returned to the court and the presiding judge decides whether the reason stated (such as infection with COVID-19) warrants an excuse.

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- The first circuit's preparations include temporarily relocating its jury pool room to the Honolulu district courthouse to accommodate social distancing requirements. The court hopes to screen out those with acceptable excuses from service, including COVID-19 infection by way of a pre-summons questionnaire. The questionnaire may be completed and returned by regular mail or online. In a departure from normal practice, the court intends to screen the questionnaire ahead of time to excuse COVID-19 compromised potential jurors before they report to the courthouse. Reporting prospective jurors will have their temperature screened and be asked questions related to potential COVID-19 infection. Multiple pools will be staggered at 9:00 a.m. and 9:30 a.m., well after the courthouse's 7:45 a.m. opening rush. During voir dire, attorneys and all other participants, including potential jurors, will be restricted to their seats in order to maintain acceptable social distance. An occupied seat will be sanitized each time a potential juror is excused. During breaks, potential jurors will be asked to exit the courtroom one row at a time. Attorneys are not allowed to wander into other courtrooms unless they are conducting relevant court related business.
 - The jury trial courtroom set up in Ka'ahumanu Hale has been reconfigured. Eight of the fourteen chairs have been removed from the jury boxes to accommodate social distancing requirements. Those eight jurors will be seated in the gallery with appropriate spacing. Given this configuration, attorneys will be permitted to face their backs to the judge in order to communicate to the jury.

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- The seating limitations in Ka‘ahumanu Hale encourage parties in civil trials to stipulate to less than twelve jurors. Parties may agree to any number of jurors less than twelve, with the advantage that six jurors and one alternate may be able to fit in the same area, resolving the concern of having jurors at the attorneys’ backs. Additionally, fewer jurors reduce potential COVID-19 exposure.
 - Despite the possible need to use the gallery for jurors, some space will be available for observers (except during jury selection). The court may also allow remote observation of the proceedings via Zoom and the courtrooms have cameras positioned so that observers will not be able to see the jurors.
 - The second circuit courtrooms have also been reconfigured. A video screen has been installed to project the view of a testifying witness so that even jurors who are seated further away than normal will have an improved view. During breaks, the jurors will remain in the courtroom while all others leave.
 - The Judiciary has considered renting alternate spaces such as the Hawai‘i Convention Center in the event that larger trials necessitate it.
 - Attorneys must remain seated throughout the trial, except during opening and closing statements when they may stand and face the jury. Alternatively, judges may consider allowing attorneys to present their opening and closing statements from the witness stand if so requested.
 - Exhibits will not be passed to jurors and so the court encourages the use of technology in the presentation of evidence. Attorneys may hand exhibits to witnesses in order to lay a foundation or refresh recollection but the court

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- encourages that a binder be prepared with that material and left on the witness stand for reference if the need is anticipated. As a practical matter, the court wants to avoid confrontations where a witness objects to touching an exhibit due to COVID-19 fears in front of the jury.
- Sidebars and other trial interruptions are discouraged given social distancing restrictions. If an attorney wishes to make an objection, it should be done briefly. Counsel and the court may have to discuss extensive objections or matters traditionally held at sidebar in the jury room if necessary. Otherwise, such breaks in the flow of trial should be done outside of the presence of the jury.
 - Remote testimony by out of state witnesses will largely be allowed given travel restrictions. Counsel is advised to ensure that out of state witnesses have marked exhibits at hand to avoid complications.
 - The court has discretion to allow local witnesses to also appear remotely if there are legitimate COVID-19 concerns related to that witness's attendance in-person.
 - In the first circuit, jury deliberations are planned to take place in the courtroom because of social distancing requirements. Prior to retiring for deliberations, the courtroom will be cleared of all removable electronic devices except for a single phone to contact the court staff. It is axiomatic that the use of the courtroom for jury deliberations will prevent its use for other hearings but at present, there is no alternate space to safely accommodate jury deliberations.

- The court encourages all attorneys to thoroughly plan for trial contingencies in light of COVID-19 concerns. This preparation should include the filing of proper motions or requests for status conferences prior to trial in order to expedite proceedings where the court, parties and jury are fully engaged.
- Many judges prefer that the parties participate remotely in bench trials and motions hearings through Webex or Zoom rather than by telephone.
- While there have been occasional objections when one party appears remotely and the opposing party appears in-person, the majority of hearings under these circumstances are acceptable to all parties. Many judges have asked parties to appear entirely through remote web access.
- Although it is unlikely that the civil bar will want to conduct remote jury trials, the court may consider it as an option once jury trials resume.

E. Neighbor Island Challenges

The panel addressed the challenges faced by the neighbor island circuit courts due to the COVID-19 pandemic. The panel's input is reflected by circuit.

1. Second Circuit

- Due to the geography of the second circuit, web-based and telephonic participation in hearings have been common for several years, especially for matters on Lānaʻi and Molokaʻi. HRCP Rule 16.2 has not hindered the practice of remote appearances in any significant manner.
- Web-based and telephonic remote participation in hearings include usual complications such as poor connectivity, equipment malfunction, feedback, muting and unmuting, and background noise. However, given the

- circumstances of the times, the benefits of remote participation generally outweigh the disadvantages.
- The court facilitates remote participation by sending out conference links and teleconference numbers. A failure to appear remotely is treated in the same manner as it would be if a participant failed to appear in-person.
 - The court foresees continued use of remote technology even post-pandemic because it addresses many concerns that are collateral to attending a hearing in person. These include limited parking, taking large blocks of leave from work, and arranging for childcare.
 - In the court's experience, attorneys tend to be less verbose when appearing remotely which aids in efficiency. The court sees no advantage with an in-person appearance over a remote appearance.
 - All attorneys are asked to remain seated during hearings with a remote component because it allows them to be seen and heard more clearly through the cameras and microphones. There is no waiting room in the court's online meeting and so parties to all cases must log on "stacked" at the appointed time and simply wait for their case to be called. This seems to promote efficiency because all remote parties should be immediately present.
 - In support of COVID-19 prevention and safety, the court has installed plexiglass screens around the bench, witness stand and court clerk's desk in a manner similar to that employed in the first circuit. Air purifiers have also been installed in the courtrooms.

- The court has engaged in practical exercises, including mock trials conducted by web platform, to prepare for the resumption of trials.

2. Third Circuit

- The third circuit has employed Zoom to conduct remote hearings as a result of the pandemic.
- The court has experienced occasional glitches associated with the remote platform but most problems tend to be due to user error or improper use. These include employing screen names that do not reflect the correct name of the participant (relied upon by the record), using improper or profane screen names, and dressing inappropriately. Attorneys occasionally do not have adequate technical ability and are admonished to prepare more thoroughly by using online tutorials.
- The court issued an administrative order early on in the pandemic making all motions hearings remote and it provided the Zoom link with the order. Parties that are unable to appear via the web may call into the Zoom meeting telephone number.
- Remote hearings are envisioned to be part of the future, irrespective of world events. They facilitate the administration of justice and provide solutions for collateral concerns as noted by the second circuit. That being said, the court has no preference with respect to current conditions and whether a participant appears in-person or remotely. As long as a participant can be adequately seen and heard, the method of appearance makes no difference.

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- In conducting hearings, all parties must stand according to normal court practice. The court has not experienced difficulty with this practice.
 - The court initially employed clear shower curtains around the bench, witness stand and court clerk's desk in observance of COVID-19 transmission prevention protocols. CARES funds have allowed the court to replace the shower curtains with plexiglass. The circuit's newer facilities in Hilo and Kona include the capacity to accommodate more people while still adhering to social distancing parameters.
 - Generally, the court clerks stagger hearings by the half hour but if a docket is heavy, they may resort to stacking.
 - The court utilizes a "wait room" function in Zoom. All attorneys are required to enter their full names so that the clerk can determine who the parties are, whether they are represented by counsel, and which parties are prepared to proceed. The "wait room" tends to lessen disruption of other hearings.
 - The court allows witnesses to appear remotely for evidentiary hearings and bench trials as long as there is no valid objection. The court expects attorneys to make prior accommodations for the use of exhibits by remote witnesses.

3. Fifth Circuit

- The fifth circuit has allowed remote participation in hearings by telephone for a number of years and will continue doing so during and after the pandemic. It has also implemented Zoom remote capability as a result of the pandemic. Parties wishing to appear remotely by web or telephone must first call into the court at least 48 hours in advance of the hearing and arrange to do so. Other

than mandatory closures due to the pandemic, the court has remained open for in-person participation and so the expectation is that unless remote participation has been confirmed with the court sufficiently prior to the hearing, the parties will appear in-person.

- The court has observed feedback, poor lighting and awkward camera angles as challenges associated with remote participation.
- In-person appearance by counsel is preferred by the court, particularly when an attorney's clients do so. The court experiences frequent representation of Kaua'i clients by O'ahu-based attorneys and feels that it is beneficial to have attorneys present to control their clients and explain court proceedings.
- In conducting hearings, all parties must stand according to normal court practice. The court has not experienced difficulty with this practice.
- The court has used its funds to install plexiglass panels in a similar manner to that done in the first circuit.
- There was one occasion where the court continued a hearing when one attorney was present physically while the other participated remotely and an objection was raised.
- The court avoids stacking hearings because of various logistical considerations related to its dual calendar.
- Parties are placed into a Zoom "wait room" when they connect remotely, and the court allows access to the Zoom courtroom when their matter is ready to be heard.

- The court prefers that witnesses appear in-person but it does allow remote appearances.
- Logistical issues involving the availability of staff and the size of jury rooms prevent the court from entertaining spoken objections and sidebars outside of the presence of the jury while still accommodating social distance requirements. The court has procured earmuffs from a local hardware store that it will require jurors to don when circumstances necessitate it.

F. Update: Civil Justice Reform

The Task Force on Civil Justice Improvements (“Task Force”) provided an overview of its findings as they related to orders issued by the Hawai‘i Supreme Court amending the Hawai‘i Rules of Civil Procedure (“HRCP”) and the Rules of the Circuit Courts of Hawai‘i (“RCCH”). The presentation included a discussion on the intended application of the new rules.

- The Task Force was convened in 2018 and included judges and attorneys with significant expertise in civil litigation. The general goal of the Task Force was to reduce the cost and delay often associated with civil litigation and to streamline the overall litigation process in Hawai‘i’s circuit courts. The Task Force conducted its work by gathering information from practitioners and other jurisdictions. A report that included proposed rule amendments was submitted to the Hawai‘i Supreme Court in 2019 which solicited public comments and conducted internal deliberations. Amendments to HRCP Rule 16(b) and RCCH Rule 12 were issued by the Hawai‘i Supreme Court in October of 2020 as a result of that process.

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- The amendments do constitute a sea of change in several areas, tailored to address and conform to the practice of litigation in the state's circuit courts.
 - Given the volume of cases in the circuit courts, certain cases, including CAAP post award matters, foreclosures, consumer debt collection actions, quiet title actions, agency appeals, and mechanic's liens are excluded from the application of the new rules. These types of cases were expected to derive the least amount of benefit from the rule changes.
 - The rule changes contemplate an early scheduling conference to secure the early and active involvement of the trial judge in setting trial dates and other important deadlines. This early scheduling conference is also intended to give the judge an opportunity to help manage discovery and address potentially contentious disputes before they escalate.
 - The scheduling conference is complimented by a scheduling order that the court must issue within 90 days after the defendant has been served with the complaint or 60 days after the initial appearance of the parties. The scheduling order will include deadlines for discovery, the joinder of parties, and motions. A track will also be assigned in the order. The objective of the scheduling conference and scheduling order is to have the attorneys focused on the case early on and promote a meaningful discussion of discovery issues. The scheduling order is envisioned as a road map to trial.
 - Parties may have their case assigned to an expedited track under the new rules. This supports the court's goal of resolving more cases in a shorter timeframe. The court will review each new case and determine whether the

- issues to be litigated, including the monetary value in dispute, make the case eligible for the expedited track options.
- Cases placed in the expedited track will have a trial date set within nine months from the initial trial setting conference whereas non-expedited cases generally take at least 12 to 18 months to go to trial. Courts will consider requests to set a non-expedited case for trial beyond 18 months on an individual basis.
 - Tracks are not fixed. The parties may seek to be moved from one track to the other for good cause. Continuances are also allowed within the expedited track for good cause.
 - Parties must meet and confer at least 21 days prior to the scheduling conference to discuss track selection and other relevant trial matters. A written report on this conference must be submitted to the court 14 days prior to the scheduling conference. The plaintiff is required to file a notice requesting scheduling of the meet and confer within 14 days after a defendant is served or makes his initial appearance. The complaint may be dismissed if the plaintiff fails to file this notice.
 - The new discovery rules will look familiar to those who practice in federal district court. The rules pertain to initial disclosures, expert disclosures, and expert discovery and are designed to simplify discovery and clarify the scope of expert discovery. The new rules also provide a streamlined procedure for the parties to seek assistance from the court in resolving a discovery dispute.

- Documents and things that may be used to support a party's claim or defense must either be copied to the opposing party or described by category and location.
- Known adverse witnesses do not need to be disclosed but they are still subject to discovery. These include non-retained and non-specialty employed experts such as treating doctors and other health care providers who are expected to express opinions on diagnosis or prognosis of a patient at trial.
- The party proffering an expert witness must provide the court and parties with a summary of facts to which the witness is intended to testify about.
- The party with the burden of proof is required to disclose all expert reports at least 4 months prior to the trial date and responsive parties must do so within 3 months.
- Work product protection applies to draft expert reports and disclosures as well as to attorney-expert communications with some exceptions.
- The changes to the rules also allow the court to modify the timing, form, or requirements of initial disclosures, modify the extent of discovery, provide for disclosure, discovery, or preservation of electronically stored information, and require a discovery conference with the court before a party moves for a discovery order.
- Discovery disclosures must be made within 14 days after the discovery conference and initial disclosures must be supplemented as new witnesses, documents, or things are identified.

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- All parties must agree to a request for streamlined discovery and in the event of a discovery dispute, the parties must confer in person and attempt to resolve the matter prior to submitting it to the court. If there is no resolution, the parties must submit letter briefs to the court and the court has the discretion to determine the procedure in which the issue is addressed.
 - Pretrial statements must be filed at least 7 days before a pretrial conference or 14 days before trial if the court has not scheduled a pretrial conference.
 - The pretrial statement must include the details called out in the rule, which include a short description of the claims and defenses, undisputed facts (with parties being expected to stipulate to as many facts as not reasonably disputable, the specific relief prayed for (including an itemization of all elements of the damages claimed), identification of amendments and dismissals, estimated trial time and all other relevant matters.
 - In addition to the required exchange of bona fide settlement offers, each party must submit a confidential settlement letter directly to the court (and not filed) that includes, among other things, a summary of the matter to date and the party's current and future settlement posture.
 - If a party fails to adequately address and disclose all required issues in its pretrial statement or settlement letter, the opposing party may ask the court to preclude those things that are not disclosed.
 - In the circuits with dual calendars, courts may need to stack more than one civil trial per week because it is anticipated that many litigants will choose the expedited trial process leading to a crowding of the calendar.

- Cases in progress at the time the new rules are implemented will need to be reviewed on a case-by-case basis to determine which of the rules may benefit disposition.
- Although originally intended to take effect on January 1, 2021, the Hawai'i Supreme Court is considering moving that date back to July 1, 2021 given the effect the pandemic has on the functioning of the courts.

IV. FINAL REMARKS/SURVEY MONKEY

Steve Chow concluded the Civil Law Forum by thanking all participants and asking that they complete an online survey about the event that will be forthcoming.

V. LIST OF PARTICIPANTS

The HSBA Committee on Judicial Administration in 2020 comprised of the following co-chairs and members: Hawai'i Supreme Court Associate Justice Simeon R. Acoba (ret.), Co-Chair; Steven J.T. Chow, Co-Chair; Judge Robert Kim, Judge Blaine J. Kobayashi, Judge Brian Costa, Judge Ronald Ibarra (ret.), Judge Rowena A. Somerville, Judge Randal G. Valenciano, Hayley Cheng, Dennis Chong Kee, Kahikino Noa Dettweiler, Vladimir Devens, Kirsha K.M. Durante, William A. Harrison, Edward C. Kemper, Dyan Mitsuyama, Carol K. Muranaka, Kyleigh F.K. Nakasone, Lester D. Oshiro, Shannon Sheldon, Audrey E. Stanley and Kevin Takata.

The Civil Law Forum is organized by the Civil Law Forum subcommittee. The subcommittee is comprised of the following JAC members: Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Chief Judge Randall G. Valenciano, Dennis W. Chong Kee, Steven J.T. Chow, Kahikino Noa Dettweiler, Ed Kemper, Carol K. Muranaka, Kyleigh F.K. Nakasone, Lester D. Oshiro, Shannon Sheldon, and Audrey E. Stanley.

The 2020 Civil Law Forum participants were: Hawai'i Supreme Court Chief Justice Mark E. Recktenwald, Hawai'i Supreme Court Associate Justice Sabrina McKenna, Judge Lisa M. Ginoza, Judge Keith Hiraoka, Chief Judge Craig H. Nakamura (ret.), Judge James H. Ashford, Judge Bert I. Ayabe, Chief Judge Richard T. Bissen, Jr., Chief Judge Robert M. Browning, Judge Peter T. Cahill, Judge Jeannette Castagnetti, Judge Gary W.B. Chang, Judge Jeffrey P. Crabtree, Judge Wendy M. DeWeese, Judge Ronald Ibarra (ret.), Chief Judge Robert Kim, Judge Peter K. Kubota, Judge John Tonaki, Chief Judge Randall G. Valenciano, Judge Paul B. Wong, Judge SherriAnn L. Iha, Judge Darolyn H. Lendio, Keani Alapa, Jaye Atiburcio, Russ S. Awakuni, Eric Chang, Wesley H.H. Ching, Dennis Chong Kee, Steven J.T. Chow, Lance Collins, Michael R. Cruise, Kahikino Noa Dettweiler, Vlad P. Devens, Gregory Frey, Gary Grimmer, Edmund W.K. Haitsuka, Leighton Hara, Daylin-Rose H. Heather, Michael C. Heihre, Daniel G. Hempey, Lerisa Heroldt, Karin L. Holma, Steven T. Iwamura, Kanani Kawika, Matson Kelly, Ed Kemper, Brandon Kimura, Robin M. Kishi, Derek R. Kobayashi, Geoffrey K.S. Komeya, Leslie R. Kop, David Lam, Sunny Lee, Lansen H.G. Leu, David M. Louie, Sharon V. Lovejoy, Jake Lowenthal, Harvey J. Lung, Mallory T. Martin, Patrick P. Mau-Shimizu, William M. McKeon, J. Anderson Meyer, Duane Miyashiro, Dyan Mitsuyama, Robert Miyashita, Lisa Munger, Carol Muranaka, Jenny Nakamoto, Kyleigh Nakasone, Darryl Nakasone, Zale T. Okazaki, Lori Okita, Daniel O'Meara, Lester D. Oshiro, Judy Pavey, Brad S. Petrus, Michelle Premeaux, Stefan Reinke, Kenneth S. Robbins, Cheryl Salmo, Shannon Sheldon, Woody Soldner, Audrey Stanley, Ben Summit, Stephanie E.W. Thompson, Brian W. Tilker, Lynne T.T. Toyafuku, Richard T. Turbin, Mark G. Valencia, Alan Van Etten, Shannon Wack, Allen Williams, Cynthia Wong, Jason G.F. Wong, Reginald K.T. Yee, Nathan H. Yoshimoto, Calvin Young, and Jennifer Yusi.

Hawai'i State Bar Association
Committee on Judicial Administration

2020 FAMILY LAW FORUM

Friday, September 25, 2020

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I. INTRODUCTION

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

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.

The JAC developed a Forum concept to focus on certain issues in criminal areas and civil areas separately. This year the JAC invited family law practitioners to participate in the first Family Law Forum. These Forums take place every other year, alternating with Bench-Bar Conferences.

In years past, civil and criminal law forums were held in-person at Ali‘iōlani Hale on a much more intimate smaller scale. This year because of the COVID-19 pandemic, the JAC held the Family Law Forum virtually through Zoom on September 25, 2020. The COVID-19 pandemic also provided the central topic of the forums.

The Forum was a collaborative effort between the Judiciary and the Bar to explore issues resulting from the COVID-19 pandemic’s effect on the procedure, process, and practice in the legal system. The Forum focused on the “new normal” now and in the foreseeable future that resulted from the COVID-19 pandemic.

The JAC acknowledges the generous support of Hawai‘i Supreme Court Chief Justice Mark E. Recktenwald for the use of Judiciary’s Zoom account. The JAC is grateful to Daylin-Rose H. Heather and Kanani Kawika of the Judiciary who provided the guidance, support and their time to make this virtual Forum possible.

II. WELCOME AND OPENING REMARKS

Hawai'i Supreme Court Justice Simeon R. Acoba (ret.), Co-Chair of the Judicial Administration Committee, and Judge Brian A. Costa, who is the lead judge in the Domestic Division of the Family Court of the First Circuit, provided opening remarks at the Family Law Forum on Friday, September 25, 2020.

Hawai'i Supreme Court Chief Justice Mark E. Recktenwald welcomed everyone on behalf of the Judiciary and briefly explained that on April 17, 2020, he established the Committee on Operational Solutions, which was formed in recognition of the need for a coordinated and measured response across all circuits to the pandemic. The committee is co-chaired by Chief Justice Recktenwald and First Circuit Court Judge Paul Wong. Chief Justice Recktenwald described the three subcommittees that were created to hone in on particular issue areas: (1) the Technology Subcommittee, chaired by Judge Paul Wong, worked to mobilize the courtrooms and other judiciary operations to utilize remote technology; (2) the Self-Represented Litigant Subcommittee, chaired by Judge Sherri Iha, focused on the needs of those appearing pro se in the courts; and (3) the Jury Trial Subcommittee, chaired by Judge James Ashford, determined how to meet the constitutional mandate of a trial by a jury of one's peers during the pandemic. The HSBA bar president was invited to be a member of the committee so that the concerns of the bar would be heard.

III. HSBA/JUDICIARY'S RESPONSE TO COVID-19

A. Committee on Operational Solutions

HSBA President P. Gregory Frey explained that the COVID-19 pandemic required the world to operate differently in every aspect of people's daily lives. The Judiciary was no exception. The COS was created to address the restrictions and limitations the pandemic caused to the Judiciary in providing access to justice to the public. Its primary responsibility and focus were to address the numerous issues which were caused by the COVID-19 pandemic- to provide solutions and procedures to enable the courts to operate safely and efficiently.

Mr. Frey explained the Committee on Operational Solutions met weekly to discuss how the Judiciary would operate with the COVID-19 pandemic restrictions imposed by the State of Hawaii and the individual Circuits. Issues that needed to be considered and resolved were the handling of court filings; in-person court appearances (if, when, and how); courtroom procedures; and virtual appearances (if, when, and how).

B. The Different Circuit Responses/Status¹

The COVID-19 pandemic led the judicial system to adjust and adapt its procedures, practices, and processes to ensure the health, safety, and welfare of judiciary staff, litigants, and the public. Statewide, each court implemented different procedures and practices to respond to the evolving safety concerns created by the pandemic.

¹ NOTE: All of the information provided was current as of the date of the Family Law Forum on September 25, 2020. However, as with everything associated with the pandemic is constantly evolving, these procedures and practices may be different at the time of this publication.

This particular panel included Family Court judges from each Circuit. They explained the different procedures in place to address the evolving concerns, and the balance between protecting health and safety and ensuring effective access to justice.

The COVID-19 pandemic resulted in the Family Court embracing technology. Family Court went from rarely granting phone appearances, (much less having virtual appearances) to requiring virtual appearances and prohibiting in-person court appearances for a period of time.

Virtual court appearances and other procedures were adopted by the various Circuits, to ensure the health and welfare of everyone, while still guaranteeing access to the courts. These procedures have been revised over the course of the COVID-19 pandemic and continue to be a work in progress. The judges shared the measures his or her Circuit adopted, and the panelists provided best practice tips for ensuring the most efficient use of technology.

One of the difficulties or problems that is unique to family law practitioners and the Family Court is that court closures prevented accessibility for court filing. All court documents are e-filed, except those relating to Family Court. Presently, Family Court documents are not integrated into the Judiciary Electronic Filing System (“JEFS”). It is anticipated that JEFS will incorporate Family Court documents in March 2022.

During the COVID-19 pandemic, each Circuit adopted different procedures to allow for a form of electronic filing. Initially, all Circuits implemented an alternative to in-person filing by allowing pleadings to be submitted via e-mail to be filed by the Court clerks.

During the first couple of months following the initial COVID lockdown, all Circuits temporarily adopted a form of electronic filing. Parties were allowed to email their

pleadings to Family Court to be filed. However, due to staffing and logistical issues (each emailed pleading had to be printed, copied and filed), this practice was suspended.

Family Court also adopted revised procedures to accommodate those appearing via Webex. Where possible hearings were staggered to reduce the high volume of internet usage and to reduce the number of actual persons in the courtrooms and court buildings. The panelists discussed the various procedures implemented in each Circuit to ensure the safety of all those who entered the Courts.

1. First Circuit

Judge Brian A. Costa and Judge Dyan M. Medeiros shared the following procedures for the First Circuit:

- Court virtual video appearances are via Webex.²
- Phone appearances will be allowed if one does not have video capability.
- Limited proceedings are being held in-person, specifically TRO's, Gun Protection Temporary Restraining Orders, Child Welfare Services trials, and divorce trials.
- Requests to appear in person for other hearings or court proceedings will be considered especially if the cases involve multiple interpreters or are hampered by poor or by lack of remote access.

The judges explained that in-person filing is allowed in the Kapolei Judiciary Complex, but not in the Circuit Court building at this time. The First Circuit also provides a "drop-box" for filing if one does not need the documents back immediately.

Regarding scheduling, the following changes were made:

- All hearings in the First Circuit are now scheduled at staggered times whether for in-person or virtual appearances.
- Fewer hearings are scheduled per day, particularly TRO hearings, which are scheduled for a maximum of nine cases per day per judge.

² It was reported that the Judiciary will be using Zoom exclusively sometime in 2021.

- Parties and attorneys are prohibited from entering the courthouse until 15 minutes prior to their scheduled hearing time.
- Witnesses for trials or any in-person proceedings, must wait outside the hearing room until called and must leave upon concluding their testimony.
- Witnesses are allowed to appear virtually upon request.

2. Second Circuit

Judge Adrienne Heely presented the Second Circuit's response to the pandemic as follows:

- Court virtual video appearances are via Webex.
- There is a move toward conducting most hearings via Webex.
- Divorce, paternity, juvenile and detention hearings are being held remotely.
- Temporary foster custody hearings or TRO hearings are conducted in-person because of service of process issues. However, Petitioners and advocates in TRO cases are allowed to appear in person.
- Family court clerks have been calling parties and/or counsel to inform them of the format of the hearing.

Court hearings are scheduled as follows:

- Hearings are staggered in 15-minute increments.
- Due to judicial vacancies, one courtroom is presided over by per diem judges.

Courtroom safety measures were also implemented:

- After each in-person hearing, the Court allows at least ten minutes to allow for cleaning in between hearings.
- A waiting room was designated to allow advocates to assist their clients with completion and filing of documents.
- A waiting room downstairs of the courthouse was also designated for attorneys and the public to wait prior to their hearing being called.

As for filing, the Second Circuit is allowing submission of pleadings via e-mail or by an electronic drop-box.

3. Third Circuit

Judge Darien Nagata shared the following with the participants:

- Court virtual video appearances are via Zoom.
- The Court has been increasing the utilization of remote hearings over the course of the pandemic.
- Parties are encouraged to refer to the most current Emergency Order(s) for the Third Circuit for guidance.
- Each courtroom has a separate Zoom meeting identification, and no passcode is required.
- If parties do not have video access, then they may appear via phone through Zoom.
- The Court requires the full name of a participant on Zoom. Attorneys should include “Esq.” after their names so they will be easily identified as an attorney.
- A request to appear in person will be considered if submitted in writing at least 24 hours prior to the scheduled appearance.
- The Court is considering expanding remote appearances for divorce and paternity trials.

Judge Nagata explained that after the pandemic there were four ways to file:

- Physically file at the window.
- Utilize the drop box at the entry to the courthouse.
- File via an e-mail submission.
- JEFs users may submit their pleadings via the Judiciary drop box.

However, at the time of the presentation e-mail submissions were discontinued.

Safety precautions were taken by implementing the following:

- Staggering hearings.
- Scheduling fewer hearings per day.
- Marking off waiting areas for social distancing.
- Cleaning the courtrooms in between hearings.
- Placing persons appearing in person in a conference room until called or allowing them to call from outside of the courthouse.

4. Fifth Circuit

Judge Edmund Acoba shared the following regarding virtual as contrasted to in-person appearances:

- Court virtual video appearances are via Zoom
- Phone appearances have been eliminated
- No “public” meeting ID and passcode is set-up; rather participants must contact the Court to make a request to appear via Zoom and then a link is forwarded to the participant
- Court attire is required
- In-person appearances are required unless a request to appear via Zoom is granted

As far as scheduling, the Fifth Circuit’s schedule³ is as follows:

- Domestic Cases (Tuesday, Thursday): Staggered at 8:00 a.m., 9:00 a.m., and 10 a.m.
- Juvenile Delinquency Cases: Staggered at 8:30 a.m., 10:00 a.m., and 2:30 p.m.
- Adult Criminal Cases: 1:00 p.m. when trials are scheduled on the first Mondays of each month.
- TRO Cases: Calendar calls are held at 1:30 p.m. and trials begin at 2:30 p.m.
- Dependency Cases: Staggered at 10:00 a.m. and 1:00 p.m.
- Kids First: The program has resumed in-person participation, but the number of participants was reduced to allow for social distancing.

When people are appearing remotely, they are placed in the waiting room on Zoom until their case is called. Judge Acoba explained that the number of cases scheduled per day decreased due to COVID 19.

Parties may file in-person, via mail, or a by a drop box.

Courtroom safety changes were as follows:

- Seats are marked to provide proper social distancing both inside and outside of the courtrooms.
- Counsel are separated at the counsel table; however this reduces the table space
- Masks are required unless the person is speaking as the record must be clear.

³ The 5th Circuit recently gained another Family Court Judge, and as such, the scheduling may be different at the time of this publication.

IV. ACCESS TO JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION REMEDIES

There was a short presentation on alternative dispute resolution methods available to parties in family law disputes.

A. Mediation Center of the Pacific (“MCP”)

Tracy Wiltgen, Executive Director of MCP, explained that MCP is operating virtually in providing mediation services to the public- including mediation for those with family law issues. MCP recently acquired its own building and moved in immediately before the statewide shutdown. In-person mediations were halted, but soon thereafter, MCP converted to virtual mediations through Zoom.

Ms. Wiltgen also explained MCP has been the manager or overseer of the Judiciary’s Volunteer Settlement Master program. The program was still operational, but contingent on the volunteer attorney’s availability and willingness to meet with parties in-person or virtually.

B. Access to Justice Room and Self-Help Centers

Jenny Silbiger, Hawai’i Supreme Court Law Librarian provided a short history of the Supreme Court Library. She also explained that currently the library was closed to in-person patrons but was accessible on-line.

Ms. Silbiger provided information about the Family Court Kapolei Access to Justice Room. The Access To Justice Room is staffed with volunteer attorneys who provide limited legal advice on family law matters to the public. Appointments were made via Ho’okele (Family Court). In late 2019, a satellite location was created downtown at the

Supreme Court Law Library. All in-person appointments were cancelled when the statewide shutdown occurred in March 2020.

In May 2020, a test pilot program using Zoom was implemented. The feedback was positive from volunteer attorneys and participants. Ms. Silbiger is the “host” for these meetings, which now have resumed their regular schedule of meetings on the first and third Thursdays of every month, from 11:30 a.m. to 1:30 p.m.

Volunteer attorneys actually prefer this new Zoom method as it is convenient and safe for them to remain in their offices while they provide assistance to those who cannot afford private attorney services.

At the neighbor island Self-Help Centers, volunteer attorneys provide limited legal information on family law and other civil matters. The Self-Help Centers operate in partnership with the Judiciary, Legal Aid Society of Hawai‘i, HSBA, and the county bar associations.

C. Family Law Arbitration

Judge Kevin T. Morikone, First Circuit Family Court Judge, reminded the participants that family law arbitration is now codified in the Hawaii Revised Statutes. He emphasized that arbitration can be a reasonable alternate dispute resolution method, not just for divorce cases, but possibly for cases that involve simple or single issues, e.g., post-divorce enforcement; relocation; and/or child support and alimony. He provided a list of names of private attorneys who are willing to be arbitrators along with some examples of hourly rates and retainers.

V. GROUP DISCUSSIONS

Participants, Judges, and court personnel were placed in six breakout groups to facilitate small group discussions about the measures instituted by the Judiciary. It was an opportunity to share what was happening in all Circuits- what worked; what needed improvement; and, what the Judiciary should maintain permanently after COVID-19.

The talking points of the small group discussions were as follows:

E-filing: Is there an alternative method until JEFS is ready?

- There is great support for e-filing and JEFS. Until these are implemented, e-mailing documents is extremely convenient and inexpensive for the public and practitioners. Some want the JEFS system before 2022.
- Unfortunately, e-mailing documents was extremely time-consuming for the Court staff. Staff had to print, make copies, file documents, then e-mail the documents back. The biggest problem for them was managing voluminous submissions.
- There should be page limits for documents submitted through e-mail if this was reinstated.
- Some expressed concerns about delays in filing *Ex Officio*.
- First Circuit practitioners would like the opportunity to file in-person in downtown Honolulu where many of the attorneys' offices are located.

Virtual vs. Remote Hearings: Do we anticipate maintaining virtual hearings after the pandemic is over?

Those who prefer virtual court appearances made the following comments and suggestions:

- The overall consensus is that continuing remote hearings would be favored for hearings, not trials.
- Participants felt that remote appearances saved their clients money and time.
- Some felt, however, that the opportunity to settle while waiting for the court to hear their case was lost via virtual appearances. If the court would allow parties or attorneys to go into a breakout room to discuss settlement while the Judge is occupied with another case, settlement may be more likely.
- Staggering hearings at different times is also viewed favorably regardless of in-person or virtual appearances.

- If remote hearings are to be used long-term, there is a strong consensus that specific courtroom procedures should be implemented for this change.
- The consensus was that Rule 16 Conferences should be used to outline pretrial issues such as the order of witnesses; presentation of exhibits; and, any other issues related to trial. There is a recognition that virtual appearances take more organization.
- It was questioned whether original signatures on pleadings are necessary at all as JEFS allows for electronic signatures.

Those who prefer in-person court appearances made the following comments and suggestions:

- For divorce or paternity/custody trials, participants prefer to have trials in-person.
- Participants raised the issue of judging credibility of witnesses or lack of credibility virtually on a video screen. However, since the Court requires parties to wear masks in Court does that even matter?
- Others are concerned about ensuring that only one person is in a room while testifying on-line/virtually. What measures can the Judge impose to ensure no one else is in the room?
- Others are also concerned about a witness not being able to see exhibits on-line/virtually. Conversely, how is a witness prevented from using notes while testifying on-line/virtually?
- Concerns were raised about connectivity and one's unfamiliarity with the technology of virtual appearance software such as Zoom or Webex.

After the breakout group discussion, everyone was brought back into the main area for a brief wrap-up.

The 2019-2020 family law case update was presented by Tom Tanimoto. Mr. Tanimoto provided a summary of the family law cases that were issued in the past year. There were thirty-five decisions from the Hawaii Supreme Court and Intermediate Court of Appeals that were issued in the past year. This summary is attached here as Appendix A.

Steven Hartley facilitated a session entitled "Hot Tips From the Bench/Bar." The presenters were as follows:

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- Blake Okimoto and Judge Darien Nagata presented tips on “How to Advise Your Client Prior To His/Her Deposition”.
 - Katie Bennett and Judge Edmund Acoba presented information and tips regarding “Online Dispute Resolution” and “Mindful Divorce Hawaii”.
 - Geoffrey Hamilton and Judge Adrienne Heely presented information and tips regarding “The Psychological Effects On Divorce” and Judge Adrienne Heely provided her feedback and comments.
 - Charles Kleintop and Judge Dyan Medeiros provided information related to preparation and presentation in Court proceedings.
 - P. Greg Frey and Judge Brian Costa reiterated that we are facing a new normal in how court will be conducted now and in the future.

The hot tips are attached here as Appendix B. Dyan Mitsuyama concluded the Forum by thanking all participants.

VI. LIST OF PARTICIPANTS

Bench/Judicial Participants:

Chief Justice Mark E. Recktenwald, Justice Simeon R. Acoba (ret.), Chief Judge Lisa M. Ginoza, Judge Edmund Acoba, Judge Brian A. Costa, Judge Adrienne Heely, Judge Dyan M. Medeiros, Judge Kevin T. Morikone, Judge Darien Nagata, Chief Judge Randal Valenciano

Bar/Attorney Participants:

Leslie Ching Allen, Kainani Alvarez, Cassandra Bagay, Katherine Bennett, Semmes Bobo, Eyke Brathhurdman, Sara Jo Buehler, Jennifer Chan, Aimoku Chee, Elizabeth Cuccia, Laura Cushman, Daryl Y Dobashi, Michelle Drewyer, Phil Dureza, Brandon Eugenio, Kayla Fajota, Tom Farrell, Shelby Ferrer, Stacy Fukuhara-Barclay, Crystal Glendon, Russell Goo, Donna Davis Green, Catherine Gutierrez, Shannon Hackett, Thomas Haia, Seth Harris, Geraldine Hasegawa, Emily Hills, Stephen Hioki, Barbara Ho, Caprice Itagaki, Debbie Jew, Teresa Kaneakua, Matson Kelley, Harlan Kimura, Adrienne King, Mari Kishimoto Doi, Carol Kitaoka, Erin Kobayashi, Jacqueline Kong, Roxanne Kwong, Grace Lee, Lynnae Lee, Kim Leonillo, Laurel Loo, Rosalyn Loomis, Marianita Lopez, Kendal Luke, Katherine Lukela, Kaitlyn Mark, Jay Mason, Elsa McGehee, Georgia McMillen, Angela Min, Makia Minerbi, Naoko Miyamoto, J. Alberto Montalbano, Cynthia Moore, Michelle Moorhead, Carol Muranaka, Annabel Murray, Alyssa Nafarrete, Tiare Nakata, Courtney Naso, John Nuha, Calvin Pang, Serena Pascual, Rosalyn Payen, Ellen Politano, Stephanie Rezents, Candra Rivers, John Schmidtke, Judith Schevtchuk, Nicholas Severson, Rae Shih, Randal Shintani, Sara Silverman, Gemma-Rose Poland Soon, Justin Sturdivant, Erin Sugita, Jo-Ann Takara, Rachel Thompson, Carol Tribbey, Molly Turpin, Jessica Uchida, Sheila Vierra, Jared Washkowitz, Aaron Wills, Michael G.K. Wong, Michael J.Y. Wong, Brianne Wong Leong, Cheryl Yamaki, Sandra Young

Court Administrators and Judiciary Staff:

Eric Chang, Ernest Delima, David Lam, Darryl Nakasone, Cheryl Salmo, Dawn West, Marsha Yamada

VII. APPENDICES

Appendix A	Family Law Forum Case Law Summary
Appendix B	“How to Advise Your Client Prior to His/Her Oral Deposition” by Blake T. Okimoto; “Online Dispute Resolution Is Here” and “Mindful Divorce Hawaii” by Katie Bennett; Hot tips by P. Gregory Frey; Hot tips and “Typical Psychological Stages When One Party Elects Divorce” by Geoffrey Hamilton; “Hot Tips for Not So Hot Times” by Charles T. Kleintop

FAMILY LAW FORUM CASELAW SUMMARY

- This summary is informational and nothing herein is intended or shall be construed as legal advice. Input is welcome as to its contents. Thank you.

Case Name and Key Words/Facts	Date of Order/Opinion	Primary Issue(s)	Holding
<p>DL v. CL (DL II)</p> <p>CAAP 18-0000536</p> <p>Trial Court issued orders granting Mother sole physical custody of the children and leave to relocate to Arizona. Orders concerning property division and child support were also issued. In the first appeal, the ICA affirmed the custody and relocation rulings. Father appealed the Court's denial of his Motion for Reconsideration of the above points.</p>	<p>October 7, 2019</p>	<ol style="list-style-type: none"> 1. Father contends that the trial court erred in denying reconsideration of child custody and relocation orders. Following trial, Mother left the children with husband while she moved to Arizona to get a job. While the children were with Husband, they did well. 2. Father claims that the court erred as to property distribution by failing to determine all parties' assets and debts and deviating from the partnership model. 3. Father claims that the Court erred: (a) in ordering husband to pay temporary child support while the children were in Arizona, (b) with respect to the amount of said temporary child support and (3) with respect to the amount of child support ordered following a post-trial change of custody. 	<ol style="list-style-type: none"> 1. Sole issue in custody determination is child's best interests; The Family Court originally heard testimony that Mother would have to relocate to start a new job and thereby leave the children with Father with Father in Hawaii. The ICA stated that even if the children did well with Father, it was not an abuse of discretion for the Family Court to rule as it did. 2. ICA discussed various assets and debts. With respect to the deviation, the ICA determined that the Family court abused its discretion in deviating from partnership model by focusing on the past in its findings as opposed to the current and future economic needs of the parties per the <u>Gordon</u> case. 3. The Family Court did not abuse its discretion assigning to Father the amount imputed to him during a pre-decree proceeding which considered the "median salary for an attorney in Honolulu".

<p>Ramirez v. Ramirez 145 Haw. 146</p> <p>CAAP-18-0000682</p> <p>This is a TRO case where the appointment of an interpreter for a respondent, continuance to seek counsel, time for presentation of the case, weight of testimony and the effective term of an Order for Protection were at hand.</p>	<p>October 8, 2019</p>	<p>Whether the Family Court erred by: (a) failing to appoint a Spanish language interpreter for Father; (b) not granting him a continuance in order to seek counsel; (c) limiting Father’s time to present his case; (d) rendering a decision upon the testimony of Mother and the parties’ child; and (e) implementing a 5-year Order for Protection</p>	<p>ICA affirmed the Family Court. ICA addressed the issues, even though there was no transcript attached to the appeal and Father’s opening brief failed to comply with the HRAP. Although there was no transcript, the court minutes, indicated that the judge inquired of Father whether he needed an interpreter and he responded that “Spanish is first language but is ok”. Nothing was in the record to indicate that Father did not understand and was unable to represent himself.</p> <p>Family Court did grant Father a continuance to obtain counsel and he was unable to.</p> <p>Father did not articulate what he was prohibited from presenting due to any time constraints.</p> <p>Trial court has the authority to base their decision on one (1) witness so long as he/she is deemed credible, per <u>In re Doe</u>, 95 Haw. 183, 196-97 (2001).</p> <p>As for Father’s argument regarding the 5-year term of the Order for Protection and the Family Court has the discretion to issue one for “a fixed reasonable period as the court deems appropriate” pursuant to Haw. Rev. Stat. 586-5.5.</p>
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<p>In re HK and KK</p> <p>CAAP-18-0000906 145 Haw 261</p> <p>In a CPS matter, Father participated regularly in the proceedings and then defaulted twice, said default was set aside. In a concurrent Guardianship proceeding, father failed to appear and was defaulted and a motion to set aside the default in that case was denied.</p>	<p>October 15, 2019</p>	<p>Does forgetting about a hearing constitute excusable neglect in order to support a request to set aside a default?</p>	<p>ICA ruled that “forgetting” about a hearing is not excusable neglect.</p>
<p>WV v. MV</p> <p>145 Haw. 261</p> <p>CAAP-17-0000918</p> <p>Post-Decree proceeding concerning modification of: (1) child support and (2) the terms concerning the disposition of the marital home that was undergoing foreclosure. Per the parties’ Divorce Decree, the foreclosure matter was to be settled by Husband and any liability borne by him, but if there were any net proceeds from a sale of home, they were to be split equally. Husband sought to stay in the home as required by the terms of the loan modification. Initially I appeared that there would be some equity in the home following a loan modification, but later it was discovered there would be no equity.</p>	<p>October 17, 2019</p>	<p>Both parties appealed orders of the Family Court.</p> <p>Wife appealed on grounds that the court: (1) did not have jurisdiction (despite an already pending appeal) to grant reconsideration on Husband’s motion seeking a ruling that there would be no equity to divide as to the former marital home, (2) should not have allowed husband to stay in the home, (3) used an incorrect value for the home and (4) failed to order the home be sold.</p>	<p>Support: family court’s decisions upheld.</p> <p>The ICA found that the Family Court has jurisdiction to enter the order granting reconsideration in favor of Husband per Rule 59.</p> <ol style="list-style-type: none"> 1. The family Court did not erroneously allow MV to retain house since it was awarded to him to sell or negotiate the terms of the then, pending foreclosure. 2. The home valuation matter was deemed moot because the home would not be sold and because of that, there would be no net proceeds. Nonetheless, Husband incurred additional debt to keep the home. 3. The Decree did not mandate an outright sale of the home.

<p>KL v RL</p> <p>CAAP-18-0000744 145 Haw 297</p> <p>Post-Decree action and compliance with Rule 10.</p>	<p>November 22, 2019</p>	<p>Whether Family Court erred in dismissing a Post-Decree motion without prejudice based on a violation of Rule 10 for lack of a supporting affidavit or declaration and awarding attorney's fees and costs.</p>	<p>Father was not prejudiced by the trial court's ruling because he could refile. As for awarding attorney's fees, the ICA did not find that the Family Court abused its discretion.</p> <p>Other factors: There actually was an affidavit in the record as part of the Court's pre-printed motion, however, it did not contain substantive content. Mother did not argue that the form of affidavit was improper; her argument was that there was no affidavit, which was not consistent with the record. Father on the other hand, did not argue that there was in fact an Affidavit appended to the motion.</p>
<p>JMH v. JCH</p> <p>CAAP-16-0000831</p> <p>145 Haw. 298</p> <p>This is a case with a good analysis of the doctrine of wasting/dissipation of assets.</p>	<p>November 25, 2019</p>	<p>3 points of appeal</p> <ol style="list-style-type: none"> 1. Whether the Family Court erred in finding that Father dissipated the marital estate and thereby awarding mother credit; 2. Whether G.I. bill benefits were part of marital estate (with the court having included such benefits in a wasting analysis) 3. Whether the Family Court erred in ordering father be equally responsible for children's extracurricular activity expenses due to insufficient evidence and findings to support the decision 	<ol style="list-style-type: none"> 1. There was no dissipation of marital assets because the parties entered into pre-trial stipulations where the assets alleged to have been wasted were in fact characterized as their separate property and no longer subject to division and/or inclusion on a PDC (spouses may expressly contract for a different division of marital property); The parties' Stipulated Order deemed their bank accounts separate property and thereby not part of the marital estate. 2. <u>Courts inclusion of G.I. benefits in the marital wasting calculation was an error.</u> – G.I. bill

			<p>benefits (per Title 38 Veteran's Benefits) are not property or rights, but gratuities and not assignable/divisible.</p> <p>3. The family Court didn't specify the extracurricular activities to be included and so the court erred. In addition, there was no further explanation regarding why the extracurricular expenses could not be covered by child support or the parties' other resources. (Following the ICA's decision on the <u>Jacoby</u> case).</p>
<p>BV v. TV</p> <p>CAAP-18-0000435 145 Haw 299</p> <p>Appeal following a trial with complex issues of property division such as wasting or marital vs. separate.</p> <p>Husband had a medical practice in Alaska which closed and thereafter he worked for another company owned by his fiancée.</p>	<p>November 29, 2019</p>	<p>Divorce matter</p> <p>Husband's point of appeal</p> <ol style="list-style-type: none"> 1. The Court erred with respect to its determination of the equalization payment because the calculation was based on figures erroneously included in the property division chart, such as a business account for an entity not owned by Husband and a bank account owned by both Husband and his new fiancé . 2. Court erred by failing to consider husband's argument that wife's liquidation of her investment accounts 	<p>ICA held:</p> <p>As to Husband's points</p> <ol style="list-style-type: none"> 1. Court did not err in classifying the business account as part of marital property because there was substantial evidence that his efforts were the source of the businesses' income. Husband claimed that the court's finding that there was \$81,398.00 in the business account was incorrect due to pending transactions, including \$60,000.00 to the IRS. The court rejected this argument since those transactions were indeed pending. In addition, the IRS payment was deemed a

		<p>during divorce constituted waste.</p> <p>3. Court abused its discretion in awarding wife attorney's fees</p>	<p>pre-payment and not an actual payment for an amount that was actually due.</p> <p>As for the joint account owned by Husband and Fiancee, there was a presumption that Husband held an interest in the entire account joint account and that he had the burden to prove his equitable interest was less than the entire account.</p> <p>2. Wife was found to have wasted \$55k by purchasing a Mercedes with living expenses received from Husband, leasing a BMW for two (2) years while the said Mercedes was not available for two (2) months, along with other spending.</p> <p>3. The standard for an award of attorney's fees is that it must be fair and reasonable and it is within the sound discretion of the Court.</p> <p>As to Wife's points</p> <p>1. The court made no findings identifying VARCs that may, or may not, have justified deviation. In order to deviate, the court must</p>
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		<p>Wife's point of appeals</p> <ol style="list-style-type: none"> 1. Court erred in failing to identify whether any valid and relevant considerations justified deviation from an equal division of property, whether there should be such a deviation and the reason thereto. 2. Erred and abused its discretion in finding wife wasted assets (buying a Mercedes and incurring a lease on a BMW for the 2 months that the Mercedes was not available) and failed to find husband wasted assets. 3. Erred and abused its discretion by failing to find that an 18 carat diamond ring was a gift from husband to wife by including it in the PDC as marital property awarded to wife. 4. Erred and abused its discretion in determining husband's income. 5. Erred and abused its discretion as to the 	<p>first make a finding of VARCs.</p> <ol style="list-style-type: none"> 2. Court's descriptive error (it was a used Mercedes and not "brand new") was harmless because the amount attributed to the vehicle was always the same at \$55k. In fact, the court found that Wife's excessive spending including on vehicles, jewelry, furniture, travel expenses, personal development while claiming she had no money and could not pay her utility bills supported a finding of waste. <p>The Court finding that Husband's actions was not waste with respect to equipment and furniture while winding down his unprofitable Alaska practice, along with his efforts in selling said items was supported by substantial evidence.</p> <ol style="list-style-type: none"> 3. The court erred in finding the ring was category 5 property regardless of whether it was a gift. Wife claimed that the ring in question valued at over \$52,000.00 was obtained as a result of upgrades from the original ring Husband gave her. Husband
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		<p>amount and duration of alimony.</p> <p>6. The Court failed to include certain credit card debt in the PDC.</p> <p>7. Erred and abused discretion by attributing to husband and equalizing a \$100,000 debt to husband's Mother</p>	<p>claims that the actual ring in question was not derived from the ring he gave her and was hence, not a gift. Upon remand, the Court must make determination as to whether the ring was a gift in order to determine whether it is marital partnership property.</p> <p>4. Court did not err in determination of income; Husband presented evidence that Husband's business income plummeted due to factors including reduced insurance coverage for medical procedures.</p> <p>5. Wife's argument that her alimony award of \$2,600.00 a month for two (2) (the marriage being for approximately 17 years) would result in an "unconscionably disparate", standard of living between the parties was not sustained as the Court's finding were supported by substantial evidence. For example, while the couple did enjoy a high standard of living at one time, that dropped after a bad investment in an Alaskan office building and the decline in Husband's medical practice. The court also noted Wife's resources, what she already</p>
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			<p>received from Husband, and what she could expect as an equalization payment.</p> <p>6. There was substantial evidence to support the Court's determination that it was just and reasonable to not include Wife's credit card debt in the PDC due to wife's high spending and non-payment of balances owing following their separation. Husband claimed that the parties' credit card debts were essentially \$0 when the parties split. There was further proof that Husband had funded her \$200k during the separation.</p> <p>7. Court's finding was supported by substantial evidence regarding the reasons why Husband borrowed the \$100k and how it was spent.</p>
<p>In re NF and AF CAAP. 18-0000948</p> <p>146 Haw 29</p>	December 13, 2019	Father appealed an Order awarding DHS Foster Custody of his children;	Family courts findings were supported by substantial evidence.
<p>In re R children</p> <p>SCWC-16-0000441 145 Haw 477</p> <p>The termination of Father's parental rights is analyzed under two (2) statutes, one of which requires a finding</p>	December 13, 2019	Whether the Family Court erred by relying on the Family Court statute under 571-61(b)(1)(E) concerning termination of parental rights even though the Child Protective Act (CPA) provision of 587A -33 (a)(3) requires a best interest of the child finding.	Family Court Proceedings: Father lost parental rights even though the statutory requirements were not met. Specifically, the Family Court did not make a specific finding that the DHS' permanent plan was in the best interests of the minor child. Thus, the statutory provision was not met and the

<p>of best interests to support such a termination.</p>			<p>Family Court Provisions cannot substitute the plain language of the CPA.</p> <p>ICA: Held the Family Court ruling stating that while Family Court did not make the finding that the DHS permanent plan was in the best interest of the minor child, the Family Court had the authority under the Family Court statute to terminate parental custody without such a finding.</p> <p>Supreme Court: vacated judgment and remanded to Family Court. Supreme Court held that the Family Court provision should not have substituted the CPA provision.</p>
<p>In re AB SCWC-18-0000010 145 Haw 498</p>	<p>December 16, 2019</p>	<p>What is the proper consideration and weight to be given to a Hanai relationship in the context of a child welfare proceeding?</p> <p>A Hanai relationship is very much considered in different aspects of law, and also should be sufficient to allow for intervention in family court.</p>	<p>A hanai relative who is a child's resource caregiver has an interest in that child's custody sufficient to allow intervention in such proceedings under Rule 24(a)(2) of the Hawai'i Family Court Rules. Additionally, a child's hanai relationships must be considered when conducting a best interest analysis</p> <p>Supreme Court: -KL (hanai relative) had a right to intervene in the case under HFCR Rule 24(a)(2). Her status as the resource caregiver, hanai relative, mother of child's half-sibling, and petitioner to adopt child gave her enough standing to intervene.</p> <p>Regarding issue of her not ever filing a motion to intervene timely, her declaration filed pro se at the hearing was sufficient to evince her desire to intervene, and rule 10's</p>

			<p>formality that the motion needs to be in writing, did not apply, as she made the motion in court at the hearing.</p> <p>Regarding out of state placement, the family court must make its own determination of best interests of the child. Only DHS provided the plan, but then also never explained the sudden change from their position from a hanai relative being a suitable caregiver, to mainland family members were better caregivers.</p> <p>The child's relationship with her half-sibling here in Hawaii as well as the suitability of mainland caregivers should have been looked into.</p>
<p>CH v. JH</p> <p>CAAP-19-0000051 146 Haw 31</p> <p>Appeal of a Divorce proceeding involving issues of denial of entry of default, home state jurisdiction and dismissal of a complaint for lack of jurisdiction.</p>	<p>December 23, 2019</p>	<p>Father argued that the Hawaii Family Court erred by: (1) not entering default against Mother; (2) ruling that a Nebraska court retains jurisdiction over child custody matters and thereby declining to exercise jurisdiction and (3) dismissing his complaint for divorce.</p>	<p>Family court has discretion whether to enter default against a party who appears in an action but has not filed an Answer.</p> <p>Hawaii court retained jurisdiction over divorce action but not over child and custody matters. A Nebraska court would assume jurisdiction over child and custody matters due to the fact that because the minor had no home state per the UCCJEA the subsequent and necessary forum analysis resulted in Hawaii being deemed an inconvenient forum.</p> <p>The dismissal of Father's Complaint for Divorce based on the departure of both parties from the State of Hawaii was in error as Father was present for a continuous period of six (6) months prior to the filing of the divorce.</p>

<p>In re G children CAAP 19-0000327</p> <p>146 Haw 32</p>	<p>December 27, 2019</p>	<p>Mother appeals from an Order terminating her parental rights</p>	<p>Family court judgment affirmed; factual findings of family court not clearly erroneous</p>
<p>In re KS</p> <p>CAAP 19-0000404</p> <p>146 Haw 32</p> <p>Entry of default after regular appearances over multiple court appearances.</p>	<p>December 31, 2019</p>	<p>Was there an abuse of discretion where Mother was defaulted for a single non-appearance in court.</p>	<p>Mother sought relief by pointing to <i>in re TW</i> 124 Haw. 486 (App. 2011) which set forth that parental rights cannot be denied without an opportunity for parents to be heard at a meaningful time and in a meaningful manner.”- The instant case was distinguishable because the court relied on evidence taken throughout the proceedings when Mother had fully participated.</p>
<p>WB III v DB</p> <p>CAAP 18-0000661</p> <p>146 Haw 115</p>	<p>January 15, 2020</p>	<p>Whether the presumptive amount of child support under the guidelines was properly calculated; whether the downward deviation was properly calculated, the termination date was proper and the ordering of payment through CSEA; the parties’ divorce decree called for a calculation yearly of support based on Father’s updated income. Standard of living of child for calculation of support. What’s the standard of living by submitting income and expense statements and the determining whether exceptional circumstances apply.</p>	<p>Court found that reasonable expenses of children were 5k or so and found that the child support indicated in the guidelines of \$7k exceeded their reasonable standard of living. Father had to overcome this by providing adequate evidence that the \$7k which was pursuant to the guidelines was in excess. Mother then had to refile her IE to show what her expenses would be, which came out to only about \$5k which is what the Family Court ordered per month. On the first day of trial, Father mentioned his other children as a factor to be included in the calculation of the subject children, however, there was never any CSGW that Father provided that sought that exception. Father had issue with Mother’s amended IE, and Father brought forth the issue of credibility regarding her expenses and her income as well, however, this court will not going into determining credibility as that is the trial</p>

			<p>court's province (the trier of fact).</p> <p>Court ordered support until graduation of age 23 to conform with the guidelines. Father argued that he should not have to pay child support for the child all the way through graduate school, but the Family Court did not order that he was liable for graduate school and thereby did not abuse its discretion when it conformed it's Post-Decree Order with the guidelines.</p> <p>Payment through CSEA was ordered. No case law supported Father's argument that he pay directly. And children submitted letters stating that Father paying child support to CSEA would be best as it could harm their ability to attain scholarships/grants.</p>
<p>In Re VBR</p> <p>CAAP 19-0000441 146 Haw 115</p> <p>Analyzes the extent to which DHS must provide services while a parent is incarcerated.</p>	<p>January 17, 2020</p>	<p>Mother's Claim on Appeal: Termination of her parental rights in error because there wasn't clear and convincing evidence that she was not presently willing and able to provide safe family home for minor child. Challenges to FOF and COL.</p> <p>Father's Claim on Appeal: Termination of his parental rights in error because he was not provided a reasonable opportunity for reunification.</p>	<p>ICA: upheld the Family Court's FOFs/COLs.</p> <p>DHS is required to provide parents a reasonable opportunity through a service plan to reunify the family.</p> <p>Incarceration may be considered along with other factors.</p>
<p>RL v DL</p> <p>CAAP-18-0000727</p> <p>146 Haw 116</p> <p>A portion of Father's retention bonus was</p>	<p>January 21, 2020</p>	<p>Whether a "bonus" received by Father was severance pay or an actual bonus and if it is the latter, should it be included as income for purposes of calculating child support.</p>	<p>Retention bonus percentage should be paid pursuant to the Decree; Father argued that was part of his severance pay, but there was no evidence indicative of that.</p> <p>When calculating his gross income, the Family Court should</p>

<p>awarded to Mother in a post-decree proceeding, and that bonus was also used in modifying child support.</p>			<p>not have included the \$60k retention bonus as the parties' decree specifically provided for any bonus not to be included in the gross income for purposes of calculating child support.</p> <p>Father should not have been imputed income for purposes of calculating child support as there were no findings for such. There was evidence presented that Father had been actively, though unsuccessfully searching for jobs, even on the mainland, while he was on unemployment.</p>
<p>In re GC CAAP-18-0000892</p>	<p>February 4, 2020</p>	<p>Father pro se, appealed award of foster custody based on a presumption that a parent has sole custody of a child while out on bail pending a criminal trial that would not occur for months is unable to care for the child</p>	<p>ICA stated that the court should not have taken into account as a factor, that Father's bail would be revoked without evidence of such.</p>
<p>LO vs. NO (custody/Decree) CAAP 19-0000446 Child Custody/CE; Admission of an exhibit provided late</p>	<p>February 6, 2020</p>	<p>Mother appealed Family Court's decision on Decree regarding custody, enforcement of a prenuptial agreement etc.</p>	<p>ICA affirmed and stated:</p> <p>The Family Court's decision awarding child custody to Father was based on the substantial and credible evidence by both testimonies of the parties and the custody evaluation report.</p> <p>There was evidence to enforce the premarital agreement, that Mother voluntarily entered the agreement, there was discussion about it prior to the wedding; there was no evidence that she did not understand English, etc.</p> <p>Past due child support arrearages are enforceable even absent inclusion in a divorce decree.</p>

			An Exhibit was introduced on the second day of trial, however this exhibit was not disclosed to the other party until the day of and as such, the court did not admit it into evidence. No reason was presented as to why could not have been obtained before trial and by the exhibit deadlines.
In re SK et al CAAP 19-0000068	February 18, 2020	Both parents appealed the termination of their parental rights	Incarceration does not alone, mandate a termination of parental rights.
MD v PR CAAP 19-0000085 Burden of proof in TRO cases	Feb 24, 2020	Respondent appealed entry of an Order for Protection	Even though a respondent must show cause why a TRO should not continue, the burden remains on petitioner. Cracking cell phone case; digging finger nails into was deemed domestic abuse. Such were not deemed isolated incidents because the parties live only 5 houses apart and share a child. Compare with Schack v Kassbeer which discussed isolated incidents.

<p>BMH v BTH</p> <p>CAAP 18-0000662 Post-Divorce Child Support Modification proceeding</p>	<p>February 28, 2020</p>	<ol style="list-style-type: none"> 1. Whether the Family Court erred in determining daughter was not enrolled as a full time student thereby terminating Father's child support obligations 2. Whether the Court abused its discretion in entering its order granting attorney's fees and costs in favor to Father 	<ol style="list-style-type: none"> 1. Divorce decree provided child support shall further continue uninterrupted for so long as child continues post high school education on a full time basis. Daughter failed a class and so court terminated father's support obligations. Court was wrong to terminate; daughter didn't earn all credits but was still a full time student. 2. Award of fees to father is vacated because he didn't prevail on motion.
<p>JW v RJ</p> <p>CAAP 19-0000328</p> <p>Child Support and the self employed parent. Use of 529s for tuition</p>	<p>March 16, 2020</p>	<p>Gross income calculation: Family Court's calculations of Father's income differed from both party's own submissions.</p> <p>College 529 account: whether ordering that the 529 account be applied to the children's tuitions was in error</p>	<p>ICA: remanded either to enter specific findings of fact explaining Family Court's calculation of Father's gross monthly income or to recalculate the amount of Father's monthly gross income and child support obligation.</p> <p>The total financial situation of a self-employed parent should be looked at – not just tax returns.</p> <p>529 accounts do not belong to the children and can be used subject to certain penalties for other than education. 529 account was Mother's separate property and thus, Mother could do with it as she pleases.</p>

<p>In re LI and HDK</p> <p>CAAP 18-0000773</p>	<p>April 6, 2020</p>	<p>Mother appeals from order terminating parental rights arguing court (1) failed to timely hold permanency hearing; (2) failed to timely appoint an attorney to represent her; (3) terminated parental rights based on insufficient evidence of “harm”</p>	<ol style="list-style-type: none"> (1) There was a failure to hold a timely hearing but the mother did not object to delay so point is waived, but even if the matter were to be considered, any delay is harmless. (2) Mother received counsel 97 days after child placed in foster custody; court declines to vacate judgment because delay was partially caused by inability to contact mother and she did not state how she was prejudiced. (3) Drugs were in children’s systems and that is “harm” however, the Court ultimately found that she could not provide a safe home.
<p>DJ v CJ</p> <p>SCWC 17-0000027</p> <p>In a 2012 divorce, joint legal and physical custody was granted to mother and father. In 2016, mother filed post decree relief requesting sole physical and legal custody. A CE or BIFF was appointed at first, but due to cost issues, the Court’s Officer was appointed, followed by the CIU. At trial father requested the assistance of an attorney to question the CIU social worker and report, however, the</p>	<p>April 13, 2020</p>	<p>Father claimed that the Family court abused its discretion in considering CIU report and not allowing him an opportunity to obtain counsel.</p>	<p>The CIU Report was completed one week before trial and it was uncertain when the parties received it.</p> <p>Father was assisted by a Tagalog interpreter.</p> <p>Although Father had time from the onset of the Post-Divorce Proceeding to obtain counsel, he did not have enough time to do so since the CIU report was issued.</p> <p>Father may very well have needed more time to at least review and respond to the 28 page CIU report.</p> <p>The right of cross examination as to the CIU report is</p>

<p>request was deemed untimely and the Court ruled in favor of mother.</p>			<p>important. The court called the CIU social worker as its own witness.</p> <p>Supreme court stated that parties should be given adequate time to review and respond to a twenty eight page, single spaced report that summarizes the testimonies of numerous witnesses and implicates important constitutional interests.</p> <p>Policy Point:</p> <p>Relocation issues implicate substantive liberty interests in the care, custody and control of a child. CIU or other social worker reports should be considered in making such a difficult decision.</p> <p>Family courts have the discretion to appoint a GAL.</p>
<p>DJ v. CJ Concurring/ Dissenting opinion</p>		<p>Agrees with majority holding that family court did not abuse its discretion in relying upon the Custody Investigation Unit report in making custody decision; disagrees with majority holding that family court abused its discretion in denying father's motion for continuance</p>	<p>Father was not deprived of a fair hearing; he gave opening and closing statements, presented evidence, elicited testimony. He struggled with cross-exam but this did not prejudice his case</p>
<p>DJ v CJ Dissenting opinion</p>		<p>Disagrees with majority's conclusion that the family court abused its discretion in denying father mid-trial request for a continuance to seek assistance of counsel.</p>	<p>The Dissent disagreed with the majority's abuse of discretion analysis because this was not the first time Father sought an attorney during a court proceeding. In a prior hearing, Father sought an attorney when he felt things were not exactly</p>

			<p>going the way he wanted it to. Father only asked for an attorney after Mother presented her case. The Hawaii Family Court Rules should be construed in a way that advances the fair, equitable, speedy and inexpensive determination of every action.</p> <p>Also concluded the family court did not err in accepting the CIU report.</p>
<p>DL v. CL SCWC 18-0000630</p>	<p>April 17, 2020</p>	<p>DL asserts that ICA erred by: (1) (a) considering family court's 04/26/2018 amended findings of fact and conclusions of law regarding child custody despite its entry of some findings of fact regarding child custody before the 03/26/2018 notice of appeal, as the family court was without jurisdiction to enter additional findings after the notice of appeal had been filed; and (b) not properly considering DL's arguments that even if the family court had jurisdiction to enter them, the 04/26/2018 finding and conclusions should be rejected because they took CL's Fof/Cols verbatim; (2) affirming the family court's denial of its motion to disqualify CL's counsel and law firm (this was based on CL hiring a paralegal that was previously working at DL's law firm); and (3) affirming the family court's grant of sole physical custody of the parties' minor children to CL and allowing CL to relocated the children to Arizona.</p> <p>Side issue: Whether filing a notice of appeal after decision but before entry of the decree gives the appellate court</p>	<p>On Cert:</p> <p>(1)(a) Family Court did not err by amending the FOFs/COLs because that was while the Family Court had jurisdiction, before the Divorce Decree was filed, even though it was after the notice of appeal, because the notice of appeal did not take effect until the Divorce Decree was filed.</p> <p>(1)(b) Family Court did not err as there are no appellate cases prohibiting a trial court from adopting FOFs/COLs submitted by counsel, as long as they are not clearly erroneous or wrong.</p> <p>(2) ICA did not err in affirming the family court's order in denying DL's motion to disqualify. Family Court did not abuse its discretion. Nonlawyer paralegal was properly screened.</p> <p>(3) ICA did not err in affirming the family court's order awarding custody. ICA carefully reviewed the family court's FOFs/COLs and were supported by substantial evidence.</p>

		<p>jurisdiction. ICA denied motion to dismiss on this appeal because once the divorce decree entered, and as there was a notice of appeal, that allowed ICA to take jurisdiction over DL's appeal.</p>	
<p>DL v. CL</p>	<p>April 29, 2020</p>	<p>(1) whether ICA erred in ruling that Father's motion to amend and motion for new trial were untimely.</p> <p>(2) whether filing of Father's notice of appeal divested the court of jurisdiction.</p> <p>(3) whether family court abused its discretion in denying Father's motion to amend and motion for new trial.</p>	<p>On writ:</p> <p>(1) family court clerk's acceptance and date stamping of a HFCR Rule 59 motion as "received" was "a filing that satisfied the jurisdictional requirements of HFCR Rule 59(a) and (e)." ICA erred. Father's motions were timely.</p> <p>(2) ICA erred when it held the family court's orders denying Father's motions were void because of the notice of appeals. However, the amended version of HRAP Rule 4 accounts for the presiding court or agency in which the motion was filed to dispose of any such post-judgment motion by entering an order upon record within 90 days after the date the motion was filed. Thus, Family Court had jurisdiction.</p> <p>(3) Family court did not abuse its discretion. Family court ruled on the merits and "timeliness" of the motions were not the issue.</p> <p>Re: Father's motion to amend. Father argued that family court's findings were "unsupported by any credible evidence in the record". Appellate courts will not pass upon issues dependent upon the credibility of witnesses and the</p>

			<p>weight of the evidence. Family Court did not abuse its discretion.</p> <p>Re: Father's motion for new trial.</p> <p>Father argued that facts had materially changed since the conclusion of trial due to mother's move to Arizona. Mother testified at trial that she would likely move to Arizona to start her job. Family Court also had a hearing on Father's motion for new trial. Family Court did not abuse its discretion as Mother's move is not new evidence.</p>
<p>JZ v JZ</p> <p>CAAP 19-0000496</p>	<p>May 21, 2020</p>	<p>Whether Family Court erred in awarding Father sole physical custody of the children, calculations of the parties' gross incomes, valuations of businesses, real property, division of property, attorneys' fees, and child support calculation.</p>	<p>Substantial evidence to support award of sole physical custody to father and visitation to Mother; expert report needed for expert testimony per language of the pre-trial order; findings to show that when one requests alimony, there must be a need and an inability to meet such needs</p>
<p>Hawai'i v. Justin Bright</p> <p>SCWC-16-0000833</p>	<p>June 3, 2020</p>	<p>Whether place of work is a neutral location under an Order for Protection</p>	<p>A party's work location is not a neutral location.</p> <p>A neutral location means "a place that is unaffiliated with either party."</p>
<p>In re LC1 and LC2</p> <p>CAAP 19-0000591</p>	<p>July 28, 2020</p>	<p>Mother appeals COL that she was not willing and able to provide a safe family home, even with assistance of a service plan; mother contends that the court erred by admitting or considering the toxicology reports without sufficient foundation.</p>	<p>Even though several witnesses testified as to the testing procedure, there was insufficient foundation laid for admission of toxicology report</p>

<p>NB v GT</p> <p>CAAP 19-0000610</p>	<p>July 31, 2020</p>	<p>Mother had joint legal, sole physical custody and wanted to relocate to WA state, which was denied.</p>	<p>Best interest of the child is the factor; detailed landing plan needed and mother failed to provide clear details such as job, housing; how to pay for costs of visitation; both parents were involved in the children's lives and it wasn't a key factor that mother had more time; father made the most if his time with the children during the weekends, holidays, etc.; Father was active in children's extracurricular activities; per GAL the children wanted equal time with both parents; job was speculative and mom said she'd live with brother until they could find permanent housing, however she never provided any testimony regarding the brother's home; 2 kids didn't want to go and 1 kid said that he would go if he had to per GAL report. Based on this, Family Court awarded joint legal, joint physical. ICA said no abuse of discretion by the Family Court, when Family Court took in all factors in deeming the best interests of the minor children.</p>
<p>LO vs. NO</p> <p>CAAP 19-0000762</p>	<p>August 13, 2020</p>	<p>Whether Family Court had jurisdiction to order Father to agree on signing off for issuance of a passport for the minor child</p>	<p>Father argued that Family Court did not have jurisdiction to enter orders that he be forced to sign off on minor child's passport because –</p> <p>1: family court erred in entering orders before the parties went to mediation because decree stated that parties were to mediate first. ICA ruled that this issue was waived as it was not brought up before the trial court. Although, Father would</p>

			<p>have been correct, had he brought it up.</p> <p>2: Family Court did not have jurisdiction because the Divorce Decree was being appealed and was pending. ICA ruled that they would address this, although the issue again was not brought up in the trial court. HRS 580-47(b) and HFCR 62(a) allows for the family court to rule on certain matters pending appeal, and can make judgments or other orders as it considers proper.</p> <p>ICA ruled that Family Court did not abuse its discretion. There was no compelling evidence that Father should not sign off on a passport, even though Family Court offered that he could hold onto the passport, he still refused.</p>
<p>KR v TR</p> <p>CAAP 19-0000661</p> <p>Post-Decree matter regarding legal custody and reversion to Joint physical custody provided by the decree years after its entry.</p>	<p>August 27, 2020</p>	<p>Sole legal custody requested by Father due to alleged high conflict between the parties. After mother returned to Hawaii from North Carolina, joint physical custody was implemented pursuant to the parties' decree and an appeal followed.</p>	<p>Affirmed as court found that father was the one making communication difficult; mother's return to Hawaii would be after about 3 years, and the ICA chose not to disturb the trial court's findings. And stated that if circumstances warrant, Father could move for a modification, but a return to the status quo was not an abuse of discretion.</p>
<p>JL v. MV</p> <p>CAAP 19-0000826</p>	<p>September 9, 2020</p>	<p>(1) Whether the Family Court's November 2019 Order violated the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion);</p> <p>(2) Whether the November 2019 order violated the law of the case established by the May 2019 Order.</p>	<p>Father's arguments:</p> <p>(1) May 2019 order had preclusive effect over the November 2019 order because: the May 2019 order required the parties to mediate disputed issues and to see a family counselor before filing a post-decree motion; and the issue of child changing schools was</p>

			<p>already raised during the April 29 evidentiary hearing but the family court did not authorize a change in the May 2019 order.</p> <p>ICA affirmed the Family Court Order. Family Court should always consider the best interests of the child as required by HRS § 571-46 (following Waldecker). Father cites the family court's finding of child's best interest as error, however, no argument presented about why the Family Court abused its discretion, thus the point is waived.</p> <p>(2) Appellate Law of the Case Doctrine does not apply here as family court's November 2019 order was not entered to follow the Appellate Court's law of the case. So this doctrine does not apply.</p> <p>In cases where more than one judge has presided, "the usual practice of court to refuse to disturb all prior rulings in a particular case" is referred to as the "law of the case" doctrine. This was not the case here, as the November 2019 Order did not modify the May 2019 Order.</p>
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HOW TO ADVISE YOUR CLIENT PRIOR TO HIS/HER ORAL DEPOSITION

By BLAKE T. OKIMOTO, Esq.

In some cases, your client will be orally deposed by the opposing counsel. Your client will be under oath just as he or she were in court and questions regarding the case will be asked by the opposing counsel. The questions and answers provided will be recorded by a court reporter. The oral deposition may take place at the opposing counsel's office or a neutral area. The opposing counsel and you and your client will be in attendance at the oral deposition, however, there will be no judge present. You must reassure your client that you will be present. The opposing party may also be present at the oral deposition. The oral deposition may take up to 2 or 4 hours or even a whole day or more. After the completion of the oral deposition, the court reporter will transcribe and bound the oral deposition as a transcript. A transcript may be used in court for many purposes such as in cross examinations and be used to attack your client's credibility. It is therefore of utmost importance that you prepare your client in what they testify and how they say it in their deposition.

Unless your client has been seasoned in litigation, it is highly recommended that you meet with your client and review the ground rules of the deposition at least two (2) occasions before the deposition. People who have never had their oral deposition taken before will be more than likely very nervous not knowing what to expect. Your role is to instill in the best way possible confidence that they can get through this process and provide truthful and helpful responses. There are many aspects of a deposition, but this tip will cover the basics. Also the necessity of repetition with your client is extremely important. You cannot expect your client to be able to grasp all of your advice in one (1) sitting. Therefore, at least two (2) sessions with your client to discuss the deposition is suggested.

The basic advice that you will provide to your client is as follows:

1. Advise your client that it is of utmost importance that they tell the truth. It is very damaging if they lie in their deposition and is caught in that lie. Honesty is the best policy. A lie may cause the case to be greatly compromised. If the truth is damaging, you may be able to rehabilitate the client in other ways. Nonetheless, it is of utmost importance that you impress the client to tell the truth.

2. Your client should respond to counsel's questions in an attentive and polite manner. It is not helpful that your client argue with the opposing counsel or provide sarcastic answers.

3. Your client should not anticipate that their response will either help or hinder their case.

4. Your client should listen to each question carefully and be advised that they must understand the question before they answer. Oftentimes your client is so anxious to get this ordeal over with they will provide a rash response. It is important that you remind your client take their time and understand the question.

As a corollary to the foregoing point, your client must fully listen to the question. Your client should not interrupt the question and only answer the question when it is completed. Likewise, your client must be sure that he or she hears the complete question. In the event that there is interference during the oral deposition and that your client is unable to hear the question, you must assure that your client has a full understanding of the question.

5. Your client must be sure before he/she answers the question posed to them that they understand the question. Your client should not provide a response until he/she fully know what is being asked. If your client does not understand the question posed by the opposing counsel, he/she

must inform the opposing counsel that he/she does not understand the question. The question should then be repeated. The before answering the question.

6. The Court Reporter can also be asked to repeat the question by reading their transcription.

7. It is important your client takes his/her time and not rush to answer the question. There is great importance for your client to think of the question and think about the answer before responding to the question.

8. Oftentimes the oral deposition will go for long periods of time. It is prudent to have your client take a break as necessary during the oral deposition to recollect his/her thoughts and replenish himself/herself.

9. You must make it clear to your client that he/she should not volunteer any answers; he/she should answer only the question that is posed to him/her. You can make it known to your client that if you want to provide further details to the answer he/she has given you may do so at a later time as you may also be able to ask questions later in the deposition.

10. Sometimes questions may be asked over and over. This can happen and it is important that the answer to the original question be provided each and every time. If the question is repetitive, you can always object to the form of the question being "asked and answered".

11. Your client should be advised to speak slowly and clearly. Nodding or shaking of the head are not responses to the questions. Saying "Uh huh" or "Ah huh" are not answers and cannot be deciphered in the transcript.

12. Your client should not look towards you for an answer to a question that is posed by the opposing counsel. You should advise your client that he/she should be prepared to provide an

answer to each question that is posed to him/her. Again, you will need to advise your client as to maintain his/her poise and the scenarios in which he/she may become flustered or unable to answer the question. You are not there to provide any type of signal to your client as to how to answer a question posed by the opposing counsel. Your client should expect you to provide support and assurance that the oral deposition remains cordial and professional.

13. If the question insists on an estimate, your client may respond to the question only by making it clear that it is an estimate; your client should not “guess”. If your client does not know the answer, then the client should say so.

14. Your client should limit his/her testimony to only facts within their knowledge and avoid speculation on anything unless specifically asked to do so. Exaggeration of an answer is to be avoided. Your client should only provide information that is readily available to him/her.

15. Your client should not “joke” during the oral deposition. It is a mistake to engage in humor with the opposing counsel. Your client is not at the oral deposition to make “small talk” with the Court Reporter or more importantly to the opposing counsel.

16. Your client should not engage in arguments with the opposing counsel. At the oral deposition the opposing counsel has a right to ask questions that are relevant or will lead to relevant information. Do not allow your client to answer a question with a question. If your client does answer a question with a question, then it is apparent that your client does not understand the question.

17. Your client should not lose his/her temper. Divorce can be very emotional. If a person loses his/her temper, he/she stops thinking. Oftentimes, the opposing counsel may have the objective to make your client mad in order to elicit a poor answer. If your client is asked if he/she

has talked to you about the oral deposition and about questions that are being asked and the facts that he/she is testifying to, your client should admit to it. It is expected that prior to the deposition your client would be discussing the subject matter of the deposition. If that is not done, then you are not doing your due diligence as an attorney representing your client.

18. The opposing counsel is not allowed to ask specifically questions about your communications with your client as it is protected by the attorney-client privilege.

19. Objections. Advise your client that if and when you make an objection, that he or she should stop his/her answer. This will allow you to state for the record the objection that you have. Advise your client that after you have stated your objection he/she can continue with his/her answer.

20. If your client provides a wrong answer, he/she may correct his/her answer immediately as soon as he/she realizes it. In addition, your client will have an opportunity to review the transcript and make corrections to the transcript.

21. There are a number of what is known for as sinful words that should be avoided. They are:

- A. "Always";
- B. "All";
- C. "Never"; or
- D. "Ever".

These words are sinful because they can be used in many respects to diminish the credibility of your client in the deposition.

22. Oftentimes documents are shown to your client. Make sure that you advise your client to take his/her time to read the documents carefully and thoroughly.

23. There may be times when you will instruct your client not to answer the question posed. Hopefully, your client will follow your advice. On some occasions when opposing counsel is abusive, you may terminate the deposition and seek a protective order.

24. If your client is a first time deponent, this is certainly not going to be fun for him/her. He/she will lose a lot of sleep over it, however, your preparation may make him/her feel better about this experience and that it is necessary to go through in order to complete the legal proceedings. A good deposition is an easy deposition and the best way to give an easy deposition is to tell the truth.

Katie Bennett – Hot Tips

Online Dispute Resolution is Here

- Guidelines and Ground Rules for Online Divorce/Custody Mediation
- Zoom, Google Chat, join.me, Webex, Skype, Facetime...
- ODR is not the same
- Benefits
- Tips for Lawyers in Online Mediation
- Online Divorce Platforms are growing nationally

Mindful Divorce Hawaii

- Trisha White from Honolulu Financial Partners
- Britt Young from Xplor Counseling
- Financial Planning + Co-Parenting Plans + Mediation

MEMORANDUM

TO: FLS Members & Bench Bar Forum Attendees
FROM: P. Gregory Frey

1. Kiss the past goodbye.

- a. COVID has forced our Court and its practitioners to become (more) proficient at participating at court hearings and proceedings on a remote/virtual basis.
- b. Don't fool yourself into thinking that "everything will return to normal" once COVID is under control/contained (i.e., that remote/virtual hearings and proceedings will go away).
- c. The Courts have devoted enormous amounts of time to learn how to master the handling and administration of court hearings and proceedings on a remote/virtual basis. So much time, energy and effort, in fact, that it is highly unlikely, if not certain, that the Court will not abandon the practice (of remote/virtual hearings) simply and swiftly because COVID is controlled and mandates/restrictions are lifted.
 - i. The Court's high level(s) of proficiency have been attained because the idea going forward is clear: remote/virtual hearings and court proceedings are "here to stay," at high levels and with great frequency, no matter that COVID is under control.

2. Why continue the use of remote/virtual hearings and court proceedings post-COVID at high levels and with great frequency?

- a. The simple reality is that compliance/attendance rates for party litigants are proving to be far higher/greater than "back when" party litigants were required to personally appear at court. (Query: Is it as simple as, "make it convenient?").
- b. Party litigants are far more comfortable, familiar and at ease using Zoom or WebEx or like remote access programs than are the attorneys, in many cases; so, the Court's initial fears that court access would be challenged and fractured as a consequence of remote/virtual hearings and court proceedings has not been well-founded; quite the opposite has occurred.

3. Bolder, more confident litigants.

- a. Party litigants are far less nervous, impacted by the stressful surroundings, or feeling totally "like a fish out of water" now that they need not actually come to the courthouse (to physically appear before a Judge).
- b. Party litigants are now more willing to engage, participate and advocate than they may have otherwise been "back in the day" when forced to physically appear and participate at formal court proceedings.
 - i. This new level of confidence and independence and feelings of control has led to reduced compromises or the willingness of party litigants to "just get it over with" by agreeing to settle.

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September 10, 2020

HOT TIP ONE:

1. There are predictable psychodynamic stages that each spouse goes through, separately, in the typical divorce process.
2. Those predictable psychodynamics stages underlie, shape, and often dictate, how the legal divorce process goes. Stated another way, the legal process is superimposed on top of, and affected by, those psychodynamic stages that the clients, separately, are going through.
3. The smarter, the wiser, the more conscious you are about the psychodynamics of divorce, how the emotional process of divorce typically unfolds, what the specific stages are, and apply that knowledge to any particular case, the more effective you'll be as a divorce attorney.

Let me explain:

In roughly 85% of the cases one spouse is the initiator of the divorce, and the other spouse is the non-initiator. Who the initiator is has nothing to do with who files first. It's the person who really wants the divorce and communicated that to their often unsuspecting spouse. The initiator and the non-initiator behave differently during the legal divorce process. To the degree to which divorce is like death by way of a prolonged terminal illness, the psychological stages for both the initiator and the non-initiator are similar. Emotionally, and in terms of being ready to get the divorce done and move on, the initiator is far ahead of the non-initiator in the process. Divorce usually starts with a private deliberative phase: the initiator moves from being at least semi satisfactorily married to recognizing that they are unhappily married, to considering the possibility of divorce, to actually exploring that option, to deciding that that's what they want to do, to coming to your office, and at that point they've already decided to do that or they are seriously considering it. The non-initiator is often totally oblivious to the process that the initiator has gone through.

The non-initiator doesn't want the divorce of the first place and it's being "done to him or her". That person is going to behave differently. They're paying you to get what they don't want.

In graphic form it looks like this:

**TYPICAL PSYCHOLOGICAL STAGES WHEN
ONE PARTY ELECTS DIVORCE**

**INITIATOR
"Divorcer"**

Backdrop of stress
Denial
"Seeds of Doubt"

Acknowledgement
Maybe "yes," maybe
"no"
Covertly hostile
Acts, Affairs(?)
Grief/Guilt/Failure
Detachment
Ambivalence/"Back
and forth"
"The last straw"
(?)
"Rewrite" marital
history
Decision!

**MARRIAGE,
Transition
Through Divorce**

Psychological
Marriage contract
breaking down

Inability to
negotiate
Marriage deadlock
Sabotage(?)
Sexual breakdown
Rough times -
struggle/fighting
or silent
struggle
Sleeping in
separate bedrooms
No communication
Renegotiation ?
Therapy?
Potential for
reconciliation ?
Decision
communicated

**NON-INITIATOR
"Divorcee"**

Denies serious
problems or
possibility of
divorce; often
blames existing
problems on
other spouse

DIVORCE DECISION COMMUNICATED; CONFRONTATION,
UPHEAVAL; SEPARATION (PHYSICAL, EMOTIONAL OR BOTH)

<p>"Honeymoon" Relief/Euphoria Anger Depression Low self-esteem</p>	<p>Someone starts litigation ? - - - - - Honeymoon settlement? or Escalation; Inflammatory behavior</p>	<p>Denial/Disbelief/ Shock (typically the husband who says "I had no idea!!") Violence? Grief/Guilt/Failure Depression Low self-esteem Extreme anger Love (or lust) affair</p>
<p>Severe disorganization Mourning Relief of repressed anger Ambivalence (moves into nostalgia) Sadness</p>	<p>Anger leads to abuse of legal process</p>	<p>Severe disorganization Mourning Release of repressed anger Ambivalence Sadness "Rewrite" marital history</p>
<p>Let go of past, move on.</p>	<p>- - - - - ? Settlement more likely here - the longer it goes</p> <p>Not the end; possible chronic litigator.</p>	<p>Resignation Transition to new life; often recognition that divorce in hindsight was for the best</p>

You might say, “that's all interesting, but so what? How does that affect my everyday practice?”

Here are some specific ways:

- The initiator is easier to work with, and focus, than the non-initiator. They are paying you to get what they want. The non-initiator is paying you to get what they don't want.
- The non-initiator is often in some form of shock and disbelief. They often need time to adjust. Classically, they are prone to bizarre, aggressive behavior that has little relationship to the legal divorce process. They may “act out”.
- The non-initiator is often unable to focus on settlement. They are often stuck in fault for the divorce. Revenge and punishment are often “lurking in the wings”. If you represent the initiator counsel them that the non-initiator needs time and to start focusing on the future.
- The hardest clients to deal with are the non-initiators of long-term marriages who have little other support (satisfying careers, or children with them at home, or nurturing other activities) in their lives.

HOT TIP TWO:

This is addressed to your professional soul:

Remember meeting people, making small talk, and then telling them you were a divorce attorney, and watching them wince, as in “How could you do that? All that heartache and doomy, gloomy!” BUT: Rejoice: Contrary to the cultural myth that divorce is a bad thing, in the short run, maybe yes, but in the long run, maybe no, at least for most people: Consider these statistics: divorce may be a blessing in disguise: surprisingly 91% of the women in 87% of the men reported that their divorce was a good thing for them. Even more surprisingly, 66% of the women and 74% of the men reported that their divorce was a good thing for their spouse. The bottom line is the vast majority of divorce people view the divorce is favorable for both themselves and for their spouse.

Maybe, notwithstanding the heartache, the sadness, and the pain, we, divorce professionals, “terminators of bad marriages”, are actually doing good things for our clients, and even for the opposing party.

TANTALIZING TIDBITS

- Women initiate divorce twice as often as men do.
- Women recognize that a divorce is coming and is inevitable on the average of 22 months before the divorce was actually initiated.
- Men recognized that a divorce is coming and is inevitable on the average of 10 months before it happened.
- There was no gender difference as to the litigant's perceptions of the fairness of the judicial process and outcome in contested divorce cases.
- Last but certainly not least, nondrinkers are more likely to file for divorce than drinkers. Whether that means that nondrinkers should start drinking rather than filing for divorce is up for discussion.

September 9, 2020

HOT TIPS FOR NOT SO HOT TIMES

By: Charles T. Kleintop, Esq.

Introduction

For almost six months now, we lawyers have had to accept new processes and procedures consistent with the proclamations and orders issued by the governor and mayors of our State. For many Family Court practitioners, this “new normal” has been challenging, frustrating, and exasperating at times. Our commitment, however, to Hawai'i's families inspires and enables us to cope, adjust, and move forward as best we can under the circumstances. I, for one, do not accept the “new normal” as being something that should continue after the pandemic passes. We are lawyers and we belong in the courtrooms of Family Court when hearings and trials are necessary to resolve issues. That is also where our clients belong so they can appreciate the gravity and importance of what we and Family Court judges do every day to help people in our community.

Although many of my “Hot Tips” below would have application in non-pandemic times, I have tried to tailor them to our current times. I have found these tips to be very useful over the last six months.

Hot Tips

1. Prepare Even More Than You Would For An In-Person Hearing Or Trial.

a. Prepare Yourself. Prepare as you would for an in-person hearing or trial and resist any temptation to prepare less because your hearing or trial is in the comfort of your office or home. Your client and the Court want you to be as prepared as you can be and this is your opportunity to demonstrate that you are well prepared even in an unusual setting. Because I perceive the Court can observe me closer on the screen in a WebEx or Zoom hearing, I prepare even more than I might otherwise prepare for that hearing. I also remind myself to constantly have a professional demeanor because the Court may be observing me even if I am not speaking at that moment. So far, this approach has worked very well for me.

b. Prepare Your Client. Prepare your client for the setting of the hearing or trial, as well as for the hearing or trial itself. Your client can be observed, heard, and assessed by the Court pretty easily on the screen, so he or she needs to understand the importance of appearing sincere, attentive, and concerned. The Court will likely be observing

him or her at times other than when he or she may be testifying, so proper demeanor is very important during the WebEx or Zoom hearing.

2. Manage Hearing Exhibits.

a. Selection of Exhibits. The selection of the exhibits you're going to use or may use at a hearing or trial is very important. One should never select exhibits without a strategy for using them. I have seen many attorneys have their staffs prepare packets of exhibits that contain every document or item produced in discovery or given to them by their clients. Most of those documents were never used or referenced at the hearing or trial and did nothing but take up space. In short, there was no strategy developed for using them. A smaller number of exhibits, all of which have a purpose at the hearing or trial, reflects sound preparation by the attorney and gives that attorney credibility with the Court.

b. Exchange of Exhibits and Submission to the Court Well in Advance of Hearing or Trial. In these unusual times, it is best to exchange exhibits and submit them to the Court well in advance of whatever deadline has been set by the Court. The last thing you want is to have the Court not have your exhibits at the commencement of the hearing or trial. After you submit them, it is best to call the Court's clerk a short time thereafter and confirm that the hearing or trial judge has received them. You do not want the Court upset with you at the outset of your hearing or trial because the Court doesn't have your exhibits. The Court will also probably not like your excuses even if they're legitimate.

c. Use of Exhibits at Hearing or Trial. If you have strategically selected your exhibits, be sure to effectively use them at the hearing or trial. Presumably they were selected because they support or reinforce the requests you are making of the Court. That being said, if the hearing or trial has progressed or is progressing in such a way that you don't need a particular exhibit, don't waste the Court's time trying to introduce it. Be conscious also of the setting and that the laying of a foundation for an exhibit may take longer if for no reason other than the delays in people speaking remotely. The last thing you want is the Court wondering why you took ten minutes to introduce an exhibit that wasn't really necessary for your case.

3. Conduct An Efficient And Effective Hearing Or Trial.

a. Offer of Testimony, if Possible. An offer of testimony by the attorney can shorten a hearing considerably. It is also an opportunity for the presenting attorney to offer the testimony of a client

in a thorough, yet efficient manner. Do not read it to the screen just like you would not read it to a judge in an in-person hearing. Present it by speaking in a calm, logical manner and covering the facts that would be testified to by your client. You should also reiterate the specific relief the client is seeking from the Court. An offer of testimony is not argument. It is a presentation of facts which the client should then confirm and adopt before he or she is cross-examined.

b. Prepare Direct Examination. Direct examination of any witness, including the client, should be prepared and practiced. This keeps the testimony focused, moving, and relevant. I have seen many parties looking at their counsel perplexed by a question. That should never happen. Preparation of direct examination is even more important in a remote hearing where the witness may not be able to clearly see or hear the attorney and confidently understand the question.

c. Prepare Cross-Examination. Cross-examination is simply not as effective when conducted remotely instead of in-person. That being said, we have an obligation to make our cross-examination as effective as possible under the circumstances and that takes preparation. We can't approach witnesses to show them exhibits, we can't be as influential when we raise our voices, and we can't have that eye to eye contact that can be so effective in cross-examination. So, we have to do the best we can in our questions, our use of exhibits, and our manner of focus. I am convinced we can still effectively cross-examine witnesses remotely, but it does take a somewhat different form of preparation.

d. Anticipate Objections and Be Prepared to Respond to Them. It should go without saying that as one prepares for a hearing or trial, one should be able to anticipate objections along the way. Those objections may be to a line of questions, an exhibit, or a portion(s) of testimony. Be prepared to respond to those objections. The objections, if sustained, may exclude important evidence you want before the Court, so you need to be able to effectively respond to those objections. Also important is your personal credibility with the Court and confidently overcoming objections is one way to build that credibility. Also understand that in a WebEx or Zoom hearing, there may be a delay from the time an objection is made to the time it is heard by the Court and the witness or opposing counsel. So, if you are the attorney making the objection, make it clearly and firmly as soon as possible so the Court can promptly address it before the witness or opposing counsel proceeds much further.

e. Anticipate Questions From the Court and Be Prepared to Respond to Them. If you know your case fully and completely, you should be able to respond to any factual question from the Court. If, however, there are legal issues, do your best to master those issues before the hearing or trial so you can intelligently discuss or argue them at the hearing or trial. You should not be surprised by any question from the Court, but if you are, stay calm and let your knowledge and preparation form your response. Knee jerk responses are never good (e.g. “Judge Smith never required me to do that” or, if on a Neighbor Island, “we don’t do things that way in the First Circuit”) and should be avoided.

f. Deliver a Succinct Oral Closing. You have heard the evidence develop, you know what the issues are, and you know what your requests for relief are. Argue from there (assuming the Court wants an oral closing). Focus on the evidence that supports your requests and why it’s credible and persuasive. Presumably that evidence will then convince the Court of the merits of your positions. Your closing doesn’t have to be long. In fact, a short and persuasive closing should be your goal. Keep eye contact with the Court just like you would if this was an in-person hearing or trial.

4. Stay Calm When The Technological Glitches Occur.

a. Be Helpful, If You Can. If you have technological skills, certainly offer them to the Court in the event of a problem. If the Court, however, has its own idea of what the problem is and offers a fix for the problem, back off. You do not want the Court’s frustration with a technology problem carrying over to you.

b. Keep Your Client Calm. Prepare your client, prior to the hearing or trial, for the possibility of a technological problem occurring. The client must stay calm and quiet if such an event happens. Any outburst or show of frustration by the client will likely be observed by the Court and that’s not good.

c. In the Event of a Recess, Stay Focused on the Task at Hand. Sometimes a short recess is required (while the technological problem is fixed) before the hearing can continue. If possible and you can communicate separately with the client, use the recess to calm the client, educate the client, and prepare the client for what’s coming next. It may just be a reassurance for the client, but it will keep you focused on the task at hand when Court resumes so you are then back where you were when the recess was called and ready to effectively continue your role in the hearing or trial.

d. Be Flexible and Accept the Court's Decision on How to Proceed or Not Proceed. Being flexible is the hallmark of any good trial lawyer and there will be days when a remote hearing or trial just doesn't proceed smoothly at all. Stay calm and adapt to the situation. You may not like the Court's decision on how to proceed or not proceed, but roll with it. There are ways to overcome frustrating days like this and you will find those ways before the next hearing or trial day.

5. Accept The Reality Of Things, But Don't Stop Being An Effective Lawyer.