Hawaii State Bar Association
Committee on Judicial Administration

2014 Criminal Law Forum

Ali`iolani Hale
Supreme Court Building, Room 101

Tuesday, September 23, 2014

INTRODUCTION

As described in the Hawaii 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 the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinates activities of the HSBA relating to improvement of the judiciary and administration of justice.

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

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

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

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

OPENING REMARKS

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

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

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

I. SENTENCING ISSUES – ADULT CLIENT SERVICES

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

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

Topics:

A. Presentence reports and sentencing

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

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

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

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

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

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

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

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

B. Restitution/Ability to pay studies

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

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

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

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

C. Treatment alternatives for probationers

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

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

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

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

D. Rule 43 Interstate Compact Issues.

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

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

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

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

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

II. PAROLE AND DEPARTMENT OF PUBLIC SAFETY ISSUES

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

Topics:

A. Criteria used for minimum sentences and parole hearings

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

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

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

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

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

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

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

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

B. Need for updated criteria

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

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

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

C. Preparation for minimum sentences and parole hearings

At a parole hearing, the board looks at:

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

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

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

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

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

Consecutive sentences are viewed as separate sentences.

Advice for inmates who hope for parole in the future:

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

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

D. Availability of inmate programs

There are three levels of substance abuse program:

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

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

2.5 = Intense Outpatient (Available at Halawa and Wahiawa)

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

3= Residential setting (Available at Wahiawa and Arizona)

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

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

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

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

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

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

E. Criteria for inmate program admission

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

Factors involved in the classification are:

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

F. Attorney visits

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

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

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

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

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

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

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

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

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

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

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

Topics:

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

Courts:

A. Judge Edward Kubo: Veterans Treatment Court

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

Of all military returnees:

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

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

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

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

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

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

Veterans Court facts:

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

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

B. Judge Steven Alm: Drug Court

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

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

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

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

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

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

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

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

C. Judge Richard Perkins: Mental Health Court

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

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

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

Admission factors to the program:

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

Application procedure:

(1) Defendants are referred to Mental Health Court by their defense attorneys who must submit a request/referral;

(2) The court reviews application for legal exclusions; and

(3) A clinical review is undertaken by a mental health team.

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

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

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

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

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

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

D. Judge David Lo: Driving While Impaired ("DWI") Court[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

The following are some encouraging comments by participants:

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

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

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

Topics:

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

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

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

A. Sheriff's Department

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

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

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

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

B. Honolulu Police Department

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

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

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

V. FOLLOW UP TO BENCH BAR ISSUES

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

Issues:

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

A. Efiling

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

B. Teleconferencing

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

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

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

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

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

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

C. Plea Agreements

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

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

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

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

D. Future Bench-Bar Topics

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

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

CONCLUSION

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

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

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

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

FORUM PARTICIPANTS

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