HAWAII STATE BAR ASSOCIATION

COMMITTEE ON JUDICIAL ADMINISTRATION

REPORT OF THE 2022 CIVIL LAW FORUM

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ACKNOWLEDGMENTS

The Hawaii State Bar Association's Committee on Judicial Administration ("the committee") was established for the purpose of maintaining a close relationship with the Judiciary on matters of mutual concern to the bench and bar. Since 2012, the Bench-Bar Conferences and in alternate years, the Criminal Law Forums, Civil Law Forums, and Family Law Forums have been positive and constructive because of the enthusiasm of Hawai'i Supreme Court Chief Justice Mark E. Recktenwald, who has supported the endeavors of the committee. The committee appreciates his commitment to making these efforts a priority.

The committee acknowledges the many hours that Lisa Lum, Special Assistant to the Administrative Director of the Courts, contributed to facilitating the 2022 Civil Law Forum via Zoom. The committee is also grateful for the following moderators and panelists who assisted and conscientiously prepared for the Forum: Tred Eyerly, Sheree Kon-Herrera, Audrey Stanley, Moana Lutey, Amanda Weston, Elizabeth Strance, Kaliko Warrington, Dennis Chong Kee, Ed Kemper, Judge James Ashford, Lisa Bail, Greg Kugle, Lance Collins, Steve Chow, Judge Randal Valenciano, Judge Henry Nakamoto, and Judge Kelsey Kawano. Special thanks for the diligence of the reporters: Natasha Baldauf, Kahikino Noa Dettweiler-Pavia, Kurt Kagawa, and Kyleigh Nakasone.

Hawai'i State Bar Association
Committee on Judicial Administration

REPORT OF THE 2022 CIVIL LAW FORUM

I. Welcome

On Friday, September 16, 2022, Associate Justice Simeon R. Acoba (ret.), co-chair of the Judicial Administration Committee ("JAC") of the Hawai'i State Bar Association ("HSBA"), welcomed all participants to the 2022 Civil Law Forum and noted that the JAC is celebrating its tenth year of alternating forums and bench-bar conferences in collaboration with the Hawai'i State Judiciary ("Judiciary"). Justice Acoba acknowledged the work of Carol Muranaka, James Kawashima, Steven Chow, and Vladimir Devens in leading the JAC over those ten years. The HSBA, under the leadership of 2022 President Shannon Sheldon and Executive Director Patricia Mau-Shimizu, was also acknowledged for its continued support of the JAC. Justice Acoba thanked Chief Justice Mark Recktenwald for carefully considering the outcomes and recommendations of each year's Bench-Bar Conference or Law Forums.

HSBA President Shannon Sheldon also extended her thanks to the organizers, participants, and supporters of the JAC and its annual events. Ms. Sheldon underscored that the purpose of this Forum is to raise and address issues brought to the spotlight by members of the bench and bar.

Mr. Devens welcomed the Forum participants and specifically acknowledged the JAC Civil Law Subcommittee co-chairs and the Judiciary for developing this year's Forum.

Chief Justice Recktenwald welcomed all participants and thanked the JAC, HSBA, and members of the Judiciary for their effort in bringing the Forum to fruition. He emphasized the impact that the JAC forums and bench-bar conferences have on improving the Judiciary and the dispensation of civil justice in the State of Hawai‘i. Key among these has been civil justice reform through revisions to the Hawai'i Rules of Civil Procedure and Hawai'i Rules of the Circuit Courts. Chief Justice Recktenwald noted that the forums and bench-bar conferences convened over the past two years have also been important in helping the Judiciary respond to the COVID-19 pandemic. A critical development arising from the pandemic has been the Judiciary's implementation of virtual hearings. Since August of 2020, Hawai‘i courts have conducted approximately 500,000 remote hearings, resulting in a real impact on access to justice. Based on interaction with other jurisdictions, Chief Justice Recktenwald believes that in terms of civil justice reform and response to the pandemic, Hawai'i is ahead of the curve. As in past years, Chief Justice Recktenwald looks forward to the report that will be produced by the Forum and hopes that the report will be helpful in charting the future of the Judiciary.

II. Insurance-Related COVID Issues

Tred Eyerly and Sheree Kon-Herrera addressed the handling of COVID-19 business interruption claims by insurance carriers. Mr. Eyerly opened by noting that direct physical loss or damage to a business' property arising from COVID-19 would most likely be claimed under the business interruption provisions in the entity's insurance policy. At issue was whether the mere presence of COVID-19 virus particles in the air at a business edifice (thereby necessitating closure for the sake of public health) resulted in a covered direct physical loss to that business. To date, most federal courts have denied such

claims based on the general rationale that virus particles cause no direct physical loss or damage. Courts have held that COVID-19 virus particles can be dispatched with a thorough cleaning of the environment. Similarly, government mandated COVID-19 shutdowns do not constitute insurable business loss or damage. As of this date, there are no COVID-19-relevant decisions by Hawai'i courts on this matter.

Ms. Kon-Herrera presented several scenarios under which businesses have sought coverage due to COVID-19 related losses, including:

- Hotel occupancy losses
- Country club business interruption
- Restaurant service losses
- Bakery losses stemming from closure due to employee offsite COVID-19 exposure

Similar to the Business Interruption rulings, most courts have held that the covered properties listed above did not lose the ability to physically serve their function because of COVID-19. In broad terms, for a property damage claim to be sustained, the insured must show physical damage to the property that necessitates a suspension of operations during the period of restoration. The majority of lawsuits premised on claims for property damage related to COVID-19 diminished business opportunities have been dismissed.

Mr. Eyerly noted that three recent law review articles authored by scholars and practitioners have called into question the propriety of resolving business loss claims by substantive motions because evidence was not yet developed.[1] Generally, loss is

[1] *See* R. Lewis, et al., "Couch's 'Physical Alteration' Fallacy: Its Origins and Consequences," ABA 56 Tort Trial & Insurance Practice Law Journal (Fall 2021); C. Miller, et al., "COVID-19 and

separate from damage. Thus, even when no physical damage to property is claimed, the loss component of coverage should be further scrutinized by the courts. In earlier times, business loss was frequently covered even where no structural or physical damage to property had occurred. However, following the Severe Acute Respiratory Syndrome ("SARS") outbreaks in the early 2000s, policy standards were revised to specifically exclude claims arising from viruses. Mr. Eyerly also cited a range of examples where insurers have accepted loss claims even when, arguably, there was no physical, structural damage to the property. These cases found that the presence of asbestos, mold, gas, and pet urine caused direct physical loss to property, triggering business interruption coverage.

Ms. Kon-Herrera noted that under general insurance law, insureds tend to be favored but the same does not appear to be true for COVID-19 physical loss or damage claims. In contesting a claim denial, insureds bear the burden of proof. Government closure orders because of COVID-19 were issued to slow the spread of a disease and, unlike natural disasters, did not cause physical destruction. Generally, courts review and interpret insurance policies according to their plain language and avoid creating ambiguity where there is none. Potential claimants must also take into account that most policies require claims to be made within two years of the damage or loss and the COVID-19 pandemic is fast approaching its third year. Finally, as a matter of policy, courts hesitate

Business Income Insurance: The History of Physical Loss and What Insurers Intended It to Mean," ABA 57 Tort Trial & Insurance Practice Law Journal (2022); E. Knutsen and J. Stempel, "Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic," 27 Conn. Ins. L.R. 185 (2021).

to view insurance as a safety net for all dangers. Doing so would likely have a significant impact on overall rates and have a chilling effect on the insurance market.

III. Government Liability

With Audrey Stanley moderating, Moana Lutey, County of Maui ("Maui County") Corporation Counsel, Elizabeth Strance, County of Hawai'i ("Hawai'i County") Corporation Counsel, Kaliko Warrington, City and County of Honolulu ("Honolulu City and County" or "City") Deputy Corporation Counsel, and Amanda Weston, State of Hawai'i ("State") Deputy Attorney General (collectively, "Government") discussed various aspects of state and local government liability. The discussion applied a question-and-answer format, as reflected here.

A. Proper parties and service of process

When preparing a complaint against the government, should the department that is the subject of the complaint be named in addition to the government?

- City and County of Honolulu:
  - The subject department should not be named as departments are not legal entities.
  - The Revised Charter of Honolulu § 5-205 provides that legal process shall be served upon the Corporation Counsel (or any deputy), and, if unavailable, then upon the mayor. If the mayor is unavailable, legal process shall be served upon any council member.

- County of Maui:

- Only the County should be named as a defendant. As a matter of course, the County will file a motion to dismiss a department if a department has been named.
- The Maui County Charter requires service to be made on the Corporation Counsel or any of its deputies.

- County of Hawai'i:
  - Only the County should be named as a defendant. The departments of the County should not be named because they are not legal entities. The Hawai'i County Code requires service on the Corporation Counsel or any of its deputies.
- State: State law requires that if a department is individually named, it must be served, in addition to service upon the Department of the Attorney General.

B. Conflicts of interest

How does the government decide if a conflict of interest exists between an employee and the government and how is that conflict addressed?

- City and County of Honolulu:
  - The Department of Corporation Counsel will determine whether a conflict exists by first reviewing the allegations in the complaint and determining whether the actions undertaken by an employee were within the course and scope of a government employee.
    - In the case of police officers, the Police Commission is responsible for this decision.

- If the employee was acting within the course and scope of employment, the Department of Corporation Counsel may represent that individual.
- If the Department of Corporation Counsel determines that there is a conflict in representation between the City and the employee, the Department of Corporation Counsel will ask for permission from the City Council to hire special counsel to represent the employee.
- This process may be lengthy as the City Council only meets once per month and the time it takes to address the matter averages two months.

- County of Maui:
  - The County's conflicts of interest process mirrors that of the City and County of Honolulu.
- County of Hawai'i:
  - The County's conflicts of interest process mirrors that of the City and County of Honolulu.
  - It will also, normally, have a representation agreement between the County and the subject employee if representation is approved.
- State: An employee has the option to retain private counsel at their expense or request the Department of the Attorney General for representation (if eligible). A committee within the Department of the Attorney General will review the request, research the issues, and determine whether the employee was acting within the course and scope of employment. The Attorney General will decide whether the Department of the Attorney General will represent the employee. This process usually takes

approximately one week after receipt of the employee's written request unless the Attorney General is unavailable.

C. Service of Process (Employee as Defendant)

Will the government accept service on behalf of the employee?

- City and County of Honolulu: If the Department of Corporation Counsel has not made a determination that it will represent the employee, then the Department of Corporation Counsel will not accept service on behalf of the employee.
    - If the Police Commission has not made a determination as to whether it will authorize representation of an officer, the Department of Corporation Counsel will usually ask the plaintiff's counsel for a time extension. If the plaintiff's counsel is not amenable to an extension, the Department of Corporation Counsel will contact the court to apprise it of the situation. There have been instances where a default was entered against the subject officer and the Department of Corporation Counsel, once representation was approved, has then moved to set the default aside.
- County of Maui: If the complaint names the employee in an official capacity, then the Department of Corporation Counsel will accept service. Otherwise, service needs to be made on the employee.
    - With respect to Corporation Counsel representing police officers as defendants, the Police Commission must first approve representation by finding the officer acted within the course and scope of employment. An

extension to answer has not been an issue and generally, plaintiff's counsel is willing to agree to an extension.

- County of Hawai'i: Generally, if the Department of Corporation Counsel has determined the employee was acting within the course and scope of employment, it will accept service. However, it may need to first check with the employee for authority to accept service. The serving party should, therefore, contact the Department of Corporation Counsel prior to attempting service.
- State: If a complaint has been served and there is a delay in determining whether an employee will receive government representation, the Department of the Attorney General will ask for an extension to file an answer.

D. Jury Demands

May an individual suing the Government demand a jury trial?

- City and County of Honolulu: Jury demands are typically made in cases against the City and even if the plaintiff does demand a jury trial and later withdraws its demand, the City will demand a jury trial. The City wants the people to be the trier of fact.
- County of Maui: The County makes jury demands for the same reason stated by the City and County of Honolulu.
- State: There is no right to a jury trial against the State in state courts, and therefore, it will usually seek to have a jury demand denied. In the event the State is one of multiple defendants, a jury trial can proceed but the

verdict will only be advisory as to the State and the judge serves as the ultimate factfinder.

E. Uniform Information Practices Act ("UIPA") and Discovery with the Government

(1) What is the interplay between Haw. Rev. Stat., Chapter 92F (Uniform Information Practices Act) and traditional discovery?

- City and County of Honolulu: UIPA generally limits disclosures to a greater extent than a discovery request made during litigation. Under a UIPA request, the requestor must pay for the government for retrieval of the information as well as for copies thereof and so regular discovery is the more inexpensive course.
- County of Maui: It is rare for the County to receive a UIPA request from the opposing party once litigation begins because discovery is the preferable way to obtain information from the government. In the few times a UIPA request has been made while in litigation, the County department that receives the request will notify the Department of Corporation Counsel and it will contact the requesting counsel to discuss how best to proceed with the production of the information.
- County of Hawai‘i: Under Haw. Rev. Stat. § 92F-13.2, government records pertaining to litigation involving the County are exempt from UIPA disclosure. Also, there are several Office of Information Practices ("OIP") informal opinions that focus on documents that might be considered "private records" and therefore, constitute an unwarranted invasion of personal privacy. A 1995 OIP decision says that generally,

information available under UIPA is likely available under discovery while information unavailable under UIPA is not necessarily unavailable under discovery. Various appellate decisions concerning privacy and confidentiality make distinctions between availability under discovery versus UIPA. As a practical matter, the Department of Corporation Counsel often assists departments with the response to a UIPA response. If there is litigation, pending or expected, the Department of Corporation Counsel will treat a UIPA request like a discovery request and try to work with the requesting party's attorney.

- State: Once a lawsuit is initiated, opposing counsel should not contact the Department of the Attorney General's client (the relevant state agency), in an attempt to obtain a document to which it would not otherwise be entitled. In one situation, an interrogatory and production of documents request was made against the State, and the requesting attorney made a UIPA request for the same information. The Department of the Attorney General's position in that instance was that if a requestor is not entitled to a document under normal discovery, they would not be entitled to it under a UIPA request. Finally, a requesting party will need to pay for the production of information under UIPA, whereas there is no similar expense for discovery of that material.

(2) UIPA and HRPC Rule 4.2

Does the Government consider a UIPA request made during active litigation to be a violation of HRPC Rule 4.2?[2]

- City and County of Honolulu: This has not been a significant issue for the City. If a UIPA request is made during active litigation, the Department of Corporation Counsel will contact the plaintiff's counsel and ask counsel to submit the request through Corporation Counsel.

(3) HRCP Rule 30(b)(6)[3]

[2] HRPC 4.2 provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[3] HRCP Rule 30(b)(6) provides as follows:

> (6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules.

Has the Government experienced significant HRCP Rule 30(b)(6) issues?

- City and County of Honolulu: Some City agencies have a high turnover rate of employees. It can also be difficult for the Department of Corporation Counsel to identify the best person to answer certain questions. The Department of Corporation Counsel recommends that requesting attorneys provide relevant information to it as early as possible so that the Department can work with relevant agencies to facilitate the request.
- County of Maui: Attorneys noticing a 30(b)(6) deposition should be as concise as possible in describing what they are seeking. They should also contact the Department of Corporation Counsel as early as possible so that a determination can be made as to which employees may appropriately testify. Some 30(b)(6) depositions may require multiple employees, and scheduling can be a major obstacle.

- State: The Attorney General prefers to work with the requesting attorney to narrow the scope of the questions because it is common to have up to 10 employees who have knowledge in an area. This is especially challenging when the requesting attorney is seeking information from 20 years ago or later as relevant employees may have quit, retired, or passed away.

F. Litigation Holds

When and how does the Government issue litigation holds on potential evidence?

- City and County of Honolulu: The City takes its litigation hold obligation seriously. If the Department of Corporation Counsel receives a letter or other indication that a lawsuit is possible, it will issue a hold to all relevant agencies. Extreme examples of this include keeping a tree for four years and a garbage truck for two years.
- County of Maui: If a claim is made prior to filing a lawsuit, then the Department of Corporation Counsel will issue a litigation hold to all agencies that may be affected. The County's Information Technology department is generally included in the hold so that emails related to the matter can be preserved. It is disadvantageous to wait until the statute of limitations approaches to make a claim because certain information may no longer exist as a matter of course.
- State: When a claim is made, the Department of the Attorney General will issue a hold to all affected departments.

G. Discovery

General timing issues.

- City and County of Honolulu: Responding to discovery requests often takes some time because there is high turnover of employees and numerous agencies involved. Often, requests implicate old records. Certain items may be available promptly, but many responses require more than 30 days,

and production may be ongoing. Opposing counsel will usually agree to extension requests.

- State: Opposing counsel usually seek a large number of documents. The Department of the Attorney General asks that opposing counsel take into consideration the time to locate and redact documents as may be necessary to comply with laws, including FERPA and HIPAA. The State is usually not able to meet the 30-day production requirement and will seek extensions. Sometimes, a protective order is not sufficient to address confidentiality concerns and so the State may require a court order that mandates production.

H. Fees and Costs

May a prevailing party recover fees and costs from the government?

- City and County of Honolulu: The general rule is that if recovery of fees is not allowed by applicable law, then the party seeking it against the City is not entitled to it. The City frequently uses the Court Annexed Arbitration Program ("CAAP") to preclude a claim for fees and costs against it. The City may make an HRCP Rule 68 offer during the CAAP process because, the City can recover its costs if a plaintiff takes a CAAP determination to trial. Note that the City's HRCP Rule 68 offer is usually around $5,000.
- County of Maui: HRCP Rule 54 provides that costs against the County shall be imposed only to the extent permitted by law. There have been situations where settlements have included an amount to cover certain fees and costs.

- County of Hawai'i: Few cases have resulted in awards of fees and costs against the County. In few instances where the allegations include the private attorney general doctrine, the County has been required to pay fees and costs.
- State: For claims made under the State Tort Liability Act, Haw. Rev. Stat. § 662-12 applies and recoverable fees are limited to 25% of the judgment and must be paid out of the judgment. Effectively, the State is not charged fees over and above the judgment. Costs are generally limited by statute. In past instances, the State has been successful in arguing that expert fees are not recoverable if the applicable statute does not provide for recovery. These are important considerations when negotiating a settlement with the State.

I. Punitive Damages

Does the government accept liability for punitive damages?

- None of the jurisdictions are subject to punitive damages in the state courts. However, in lawsuits where an individual is made a party outside of an official capacity claim, that individual can be held liable for punitive damages.

J. Appeals and Bonds

Is the government required to post a bond on appeals?

- City and County of Honolulu: There is no requirement that the City post a bond if it appeals a case.[4]
- State: If the State is the appellant, it typically does not put up a bond.

K. Settlement Demands

What constitutes a "good" settlement demand package and how does timing affect the government's attitude towards settlement?

- City and County of Honolulu: The Department of Corporation Counsel has the authority to settle claims under $5,000. All settlements in excess of $5,000 must be approved by the City Council. In seeking approval of the City Council, the Corporation Counsel will need to set forth justification, potential liability, a damages analysis, and supporting documentation. In considering settlement offers, the Corporation Counsel asks that the plaintiff provide as much relevant information supporting the settlement amount as possible.
- County of Maui: A good settlement package includes the liability aspect succinctly laid out. The Corporation Counsel has the authority to settle claims under $7,500. Any higher amount must be approved by the County Council. Without significant documented support, the County Council is generally not receptive to early settlement offers where liability is not clear.
- County of Hawai'i: As noted by the other government entities, a settlement package that proposes a reasonable offer substantiated by supporting

[4] The other panelists did not disagree.

documentation tends to receive a more favorable reception. Unreasonable demands early in the case tend to trigger vigorous discovery. The preferred time to receive a settlement offer depends on the case and how clear liability is. The Department of Corporation Counsel is authorized to settle matters for $10,000 or less. Anything higher requires County Council approval. The office takes its public trust obligation seriously and is prudent with taxpayer money.

- State: The Department of the Attorney General division supervisors have authority to settle claims under $10,000. If a settlement is between $10,000 and $25,000, the settlement must be approved by the Attorney General. For any amount above $25,000, all the previous amount approvals are required and in addition, the approval of the legislature is required. A realistic settlement demand with sufficient supporting information is important.

L. Settlement Process and Considerations

What is the process for Government approval of settlements and what are some of the issues that arise in that process?

- City and County of Honolulu: For settlements that require City Council approval, the matter must be placed on a monthly City Council agenda. The agenda must meet Sunshine Law requirements; therefore, timing is important. Prior approval by a City Council committee may also be needed. The City Council does not meet in December and lately there have not been meetings in January. If there are no disruptions, the process generally

takes between one and a half months to two months. During that time, the Corporation Counsel will work with the plaintiff's counsel to make payment arrangements. There is no guarantee on how the City Council will vote. Consequently, council member composition is an important consideration in the settlement process. Lately, if concerns arise, the City Council will table the matter and return to it after it has been further addressed internally. If the City does not appeal a CAAP award and it becomes a judgment, City Council approval of the judgment amount is not required.

- County of Maui: The Corporation Counsel requests settlement authority requiring County Council approval by draft resolution with a request to be placed on the County Council's agenda. The agenda must comply with the Sunshine Law and be publicly posted for six days prior to the meeting. The County Council meets twice a month and refers settlements to a committee which also meets twice a month. This means that settlements take at least a month from start to finish. From approximately March through June annually, the County Council addresses the county budget and does not take up any other matters. Settlements pending approval during that time will generally be deferred to June or July, which means that settlement approval may not occur until August. Settlement demands that are not properly substantiated may be rejected by the County Council. The Council members are seasoned and may expect further documentation regarding the settlement, such as further discovery, results and dispositive motions prior to settlement offers being made. On occasion, a settlement offer may

be rejected by the Council because it appears to be excessive based on the discovery available at the time of the demand. There are times where settlement authority has been sought prior to a settlement conference so that an offer may be made. Our goal is to be in a position to have productive settlement discussions.

- County of Hawai'i: The County Council process for approval of a settlement takes between one to two months and must be placed on the County Council's agenda in accordance with Sunshine Law requirements. The County Council meets twice per month. The Department of Corporation Counsel may discuss the settlement with the Mayor and the affected agency before bringing the matter to the County Council.
- State: Prior to seeking legislative approval, affected individual agencies will be apprised of the settlement and given an opportunity to provide input. A bill addressing the proposed settlement will need to be introduced by January in any given year. If approved by the legislature, the bill will require the Governor's signature which typically is obtained in July. A check is then issued in August.

IV. Administrative Appeals

First Circuit Court Judge James Ashford, Lisa Bail, Greg Kugle, and Lance Collins discussed the administrative appeals process with Dennis Chong Kee and Ed Kemper as moderators. The individual responses to the question and answer have been combined into a comprehensive summary.

A. Overview of the Administrative Appeals Process under Haw. Rev. Stat. Chapter 91

The right to an administrative appeal arises when a state or county agency renders a decision as the result of a contested case hearing ("CCH"). A CCH is a proceeding where the legal rights or obligations of an individual or government agency are determined. A CCH affords due process to the parties, but the proceedings are not as procedurally formal as a court hearing. For example, the Rules of Evidence are somewhat less stringent than in a court proceeding. At the completion of a CCH, the controlling agency will render a decision on the matter. The parties have 30 days in which to appeal the agency's decision to a court.

B. What is the venue for the appeal?

The appeal process is largely governed by HRCP Rule 72 and Haw. Rev. Stat., Chapter 91. In general, an agency appeal is heard by the circuit court. Exceptions to this process include appeals of decisions issued by the following agencies:

- Administrative Driver's License Revocation Office appeals are made to the district court.
- Child Support Enforcement Agency appeals are made to the family district court.
- Labor and Industrial Relations Appeals Board appeals are made to the Intermediate Court of Appeals ("ICA").
- Appeals of Public Utilities Commission decisions regarding motor and waterway carriers are made to the ICA.

- Appeals of Board of Land and Natural Resources ("BLNR") decisions regarding conservation districts are made to the Hawai'i Supreme Court.
- Appeals of Land Use Commission decisions are made to the Hawai'i Supreme Court.
- Appeals of Council on Water Resource Management decisions are made to the Hawai'i Supreme Court.
- Appeals of Public Utilities Commission decisions under Haw. Rev. Stat. Chapter 269 are made to the Hawai'i Supreme Court.

C. What standard of review is applied?

Haw Rev. Stat. § 91-14 allows the court to reverse or modify the decision of an administrative agency if the substantial rights of the petitioners have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Items (1) through (4) above are legal determinations and subject to the right/wrong standard on appellate review. Items (5) and (6) are reviewed under the abuse of discretion standard. There is substantial case law that addresses the deference that the

reviewing court should lend to the legitimacy of an agency's decision. This deference is premised on the understanding that agencies are staffed by individuals who have a degree of expertise in specialized matters falling under their purview. Nonetheless, the court reviews the matter de novo.

In the First Circuit Court, the bulk of agency decisions reviewed by the circuit court under Haw. Rev. Stat., Chapter 91 are currently assigned to Judge Ashford's division, but administrative appeals of environmental matters are handled by Judge Crabtree's division. As a point of practice, Judge Ashford noted that establishing the correct standard of review for an administrative appeal is critical, therefore, it is incumbent upon appellants to avoid making a simple boilerplate list of all the standards under Haw. Rev. Stat. § 91-14.

D. How are secondary appeals handled?

Unless an agency appeal is subject to direct review by the Hawai'i Supreme Court, a secondary appeal is available. The appeal to the relevant appellate court is handled like any other appeal applying the standards under Haw. Rev. Stat. § 91-14(g). The appellate court will review the record of the circuit court, which is the same record that originated from the CCH.

E. What do the statistics illustrate about administrative appeals?

Within the first circuit, the highest number of administrative appeals seem to arise from decisions concerning worker benefits such as workers' compensation and unemployment insurance. Land use decisions from county planning departments and the appellate boards that oversee them such as the Board of Land and Natural Resources

are also heavily appealed. Appeals from decisions of the Department of Public Safety, the Employees Retirement System, and election entities such as the Office of Elections and Election Commissions follow in appeal frequency. Very few circuit court level appeals arise from the Department of Commerce and Consumer Affairs.

The Judiciary provides information in its annual report regarding the number of administrative appeals handled by the circuit court. A five-year average from all the circuits shows that 89 agency appeals were filed per year.

F. Administrative appeals process timing

Timing in an appeal to the circuit court is not significantly different than a standard ICA appeal. Once the record on appeal is filed with the court, opening briefs are submitted. HRCP Rule 72 sets out the mandated time frames and the overall process tends to take six to eight months from the time the Notice of Appeal is filed (depending on whether extensions are granted). Subject to the court's calendar, the court typically schedules oral argument three weeks after the reply brief is due. If a record on appeal is voluminous, the court may need more time to complete its review prior to scheduling oral argument. Environmental appeals are particularly complex, and it may take the court a full two weeks to review the record. Since the court will necessarily be handling other cases at the same time, a review of the record may involve a significant amount of time. In terms of issuing a judgment, each judge is different. The court may rule from the bench, take the matter under advisement and, on occasion, direct the parties to submit simultaneous findings of fact, conclusions of law, and orders.

G. What factors affect the success of an administrative appeal?

A court is far more likely to reverse an administrative decision when there is a procedural error such as in the Thirty Meter Telescope BLNR decision where the Hawai'i Supreme Court found due process violations with respect to the board vote. One key to preventing a procedural error is to ensure that the agency has an experienced attorney advising it. Typically, the Department of the Attorney General or the Department of Corporation Counsel (as applicable) will assign experienced attorneys to matters requiring an administrative decision since procedural errors can essentially undo years of work.

It is also critical for the parties to make a clear record in the administrative proceedings because the reviewing court is limited to that record. The court appreciates briefing that includes clear and direct citations to the record.

H. Are there areas for improvement in this process?

There is a lack of settlement and alternative dispute opportunity at the administrative level as well as at the circuit court level on appeal. Facilitated mediation would be beneficial as would a well-timed pause in the process to consider settlement options. However, administrative appeals often involve complex and contentious matters that can be difficult to settle globally.

V. Application of the New Civil Rules

First Circuit Court Judge James Ashford, Second Circuit Court Judge Kelsey Kawano, Third Circuit Court Judge Henry Nakamoto, and Fifth Circuit Court Judge Randal Valenciano discussed the application of the new civil rules promulgated in October of 2020 and effective as of January 1, 2022. Steve Chow moderated the discussion, which followed a question-and-answer format. Responses representing the panel as a whole

have been combined and summarized to the extent possible. Separate references to a particular "circuit" represent the view of the panelist from that circuit.

1. How have HRCP Rule 16(b)(4) and Rules of the Circuit Courts of Hawaii ("RCCH") Rule 12(a)(4) been implemented with respect to scheduling conferences?

None of the courts has set more than a dozen scheduling conferences since the implementation of the new rules. Each court has received some requests to continue scheduling conferences either by way of stipulation or ex parte motion and those have been routinely granted. Several continuances have been requested, and the courts endeavor to set a new scheduling conference date within two to four weeks of the original date.

- Fifth Circuit: The court determines the 60- and 90-day deadlines under the rules and works backwards in terms of setting the trial schedule with the addition of a one- to two-week cushion for the order to be issued. The court has a concern as to whether continuance motions are being employed to delay the overall case schedule. The court interprets the rules as requiring the setting of a trial date within the prescribed time frame and although motions to continue have been granted, the trial dates remain fixed.
- Third Circuit: The court is aware that the overall implementation of the new rules is a work-in-progress. The attorneys who have appeared in these matters have been cognizant of the new rules. Unrepresented litigants have been referred to the Judiciary's website to access the rules and relevant forms.

2. What is the preferred process for requesting a continuance?

Written stipulations to continue are preferred because they establish a record as to agreement by the parties.

- First Circuit: The court will not grant a continuance by a phone call from a single party. At a minimum, it requires an ex parte motion to continue with a proposed order attached.

3. Once the scheduling conference has been held and pretrial deadlines are set, have the courts received requests to extend those deadlines? What is the preferred method by which to request such an extension?

The courts have not received many requests to extend pretrial date deadlines. Requests to do so should be by way of stipulation or ex parte motion. Both forms of request should clearly state the reasons supporting an extension.

- First Circuit: If an ex parte motion to extend a pretrial deadline is made, the court will generally wait a reasonable time to receive opposition (if any) before granting the motion.
- Second Circuit: A telephone call to chambers requesting a deadline extension may be acceptable if it is followed by a letter from the parties stating that they agree to the extension.

4. Have there been instances where the plaintiff files an HRCP Rule 41 Notice of Dismissal of the case prior to the scheduling conference?

This has not occurred in the second, third, or fifth circuits. The first circuit has received four such notices.

5. Where can parties obtain forms relating to the new rules?

The relevant forms with instructions are located at the Judiciary's website.

6. At least 21 days prior to the Scheduling Conference, the rules require that the parties meet and confer about matters related to the case. In terms of timing, are there measures in place to accommodate the meet and confer requirement prior to the scheduling conference?

The rules require the court to set the scheduling conference within 90 days after a party has been served or 60 days after an answer is filed. The courts try to set the scheduling conference one to two weeks prior to the mandated deadline to afford the parties some cushion with respect to timing. The courts have not experienced significant problems with missing these deadlines.

- Second Circuit: The courts have dual calendars, and timing can be a challenge, because criminal matters receive preference over civil matters in terms of scheduling to comport with a defendant's constitutional right to a speedy trial. The court tries to be flexible and accommodate availability of the parties.
- Fifth Circuit: The court is mindful that flexibility in timing with respect to the 21-day meet and confer requirement is sometimes necessary but expects overall adherence to the rules.

7. After a defendant has been served, does a defendant's request to extend the time to file an answer affect the setting of the scheduling conference?

This issue has not arisen. The courts expect that a stipulation or ex parte motion would be submitted explaining the situation and seeking a reasonable amount of time for a continuance.

- First Circuit: The court would be skeptical of a request that seeks a long extension of several months.

- Fifth Circuit: Maintaining the schedule under the new rules is important. The court would proceed with the conference but allow an extended time period for the defendant to file an answer.

8. Would the courts consider issuing sanctions if the parties failed to comply with the 21-day deadline to meet and confer?

The courts would consider the circumstances that resulted in noncompliance with the 21-day meet and confer deadline when determining whether to impose sanctions. The important point is that the parties understand and adhere to the schedule under the new rules.

- First Circuit: The court views timely submission of the scheduling conference statements and the joint report as necessary so that the court and parties may prepare for the scheduling conference as critical steps in the process, and failure by the parties to meet and confer would be evaluated through that lens.

9. If a party failed to initially disclose its lay and expert witnesses, would the courts consider barring the witnesses from testifying?

The courts would consider doing so but it depends on the reason the party failed to make an initial disclosure. The courts understand that the new rules require a change in thinking and preparation at the outset of the lawsuit. The courts will not tolerate gamesmanship in that context.

10. Do the parties have an ongoing duty to supplement initial disclosures?

- First Circuit: In the court's perspective, "initial" means the parties should make an earnest effort to disclose material that they have up to the appointed time and supplement the information as they obtain it during the process. The court

does not expect the parties to know everything about their case at the commencement. It is important to keep everyone current with new information that arises as the case proceeds to trial.

- Second Circuit: Information reasonably available to a party should be initially disclosed but the court understands that the parties will not know the entire case universe from the outset.
- Third Circuit: The parties have a duty to supplement disclosures in a timely manner as new information arises.
- Fifth Circuit: Supplemental disclosure is expected. Cases should be resolved on their merits, and it is important for attorneys to be candid and forthcoming with respect to the information they have about their cases.

11. Have the courts added any information or requirements to the standard form of the scheduling conference order?

Generally, nothing has been added by individual courts, but the fifth circuit noted that the old form of trial setting order included specific trial-related instructions and those were helpful. The court may start issuing supplemental orders that provide trial- related details as a case moves closer to the trial date.

12. Which party should file the joint report?

There is no preference among the circuits as long as the joint report is filed in a timely manner.

13. Is there any additional information that the courts would like included in the joint report?

The information currently called for in the joint report is generally sufficient.

- First Circuit: The court would like to know whether the case is purely a jury trial, purely a bench trial, or if it is a jury trial with certain equitable claims to be resolved by the judge, as this impacts who the settlement judge will be.

14. Do the courts prefer to hold scheduling conferences virtually or in person?

Conducting scheduling conferences virtually is acceptable.

- Second Circuit: The court prefers to hold scheduling conferences in-person although Zoom is an acceptable alternative. Telephone participation in the scheduling conference is discouraged.
- Fifth Circuit: The scheduling conference is not an informal matter; therefore, the court prefers to hold it in person, but Zoom is acceptable.

15. Have conferences regarding motions for discovery been held?

No.

16. Would a motion for a discovery conference be handled like a normal motion?

- First Circuit: The court would seriously consider holding a status conference on the matter and attempt to resolve it without a hearing.
- Second Circuit: The hearing on the motion would be conducted like any other civil motion.
- Third Circuit: The court would conduct a hearing on the motion. The standard 18-day rule for hearings would apply and the movant must contact chambers for a hearing date. If counsel indicates that the issue is relatively simple, the court may hold an informal discovery conference to try and resolve the matter.

17. Have any cases been put on the expedited trial track yet?

The first circuit is the only court to have set cases on the expedited track. One case was set for trial, but it was resolved by a dispositive motion. The second, third, and fifth circuits have not set any cases on the expedited trial track, but it is important for litigants to understand that due to consolidated calendars, criminal trials have priority, and the date set for trial is not necessarily the date on which the trial will start.

18. Have there been any instances where a party seeks a continuance of a trial date under the new rules?

This issue has not arisen, but the good cause standard would apply when considering a motion to continue the trial date.

19. Have there been issues with the initial disclosure of expert witnesses under HRCP Rule 26(a)(1)(c)?

The courts have seen parties list treating physicians as both lay and expert witnesses to avoid a dispute as to whether such witnesses were properly disclosed as one or the other. The status of a treating physician is largely dependent upon the explanation of the care that the physician provided. The courts do not see a need for a physician to prepare and testify about a treating report. The medical records alone are usually sufficient to demonstrate the condition and treatment thereof.

20. How are streamlined discovery disputes handled?

A party involved in the dispute should contact the court and arrange for the matter to be addressed.

- First Circuit: A party may email or call the court to have the matter addressed, and the court prefers to do so off the record because the discussion tends to

be candid. If the dispute cannot be resolved off the record, the court will have the parties argue the matter on record.

- Second Circuit: The court is amenable to a telephone conference where the parties can argue their positions. The court will also require the parties to submit briefs on the matter so that there is a record.
- Third Circuit: The matter may be addressed by conference once a party raises it. If the dispute requires it, the court may order briefing.
- Fifth Circuit: The court should be contacted, and the parties will be directed to brief the matter with a five-page limit.

21. Have there been timing issues regarding the requirement that the plaintiff make a settlement offer to the defendant prior to a settlement conference and the requirement that the defendant submit a bona fide response to the demand?

The courts have not encountered issues with this process but noted the importance of the plaintiff issuing the demand as soon as possible to encourage a productive settlement discussion.

VI. Closing Remarks

Mr. Chow thanked the participants and noted that the purpose of the Forum is to improve the judicial system through a partnership and dialogue between the Judiciary and the bar.

2022 CIVIL LAW FORUM PARTICIPANTS

The HSBA Committee on Judicial Administration in 2022 comprised of the following co-chairs and members: Hawai‘i Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), Co-Chair; Vladimir Devens, Co-Chair; Judge Ronald Ibarra (ret.), Judge Blaine J. Kobayashi, Judge Brian Costa, Judge Rowena A. Somerville, Chief Judge Randal G. Valenciano, Judge Wendy DeWeese, Judge Summer M. Kupau-Odo, Judge M. Kanani Laubach, Judge Clarissa Malinao, Hayley Cheng, Dennis Chong Kee, Steven J.T. Chow, Kahikino Noa Dettweiler, Kirsha K.M. Durante, Tred Eyerly, Daylin Rose Heather, Edward C. Kemper, Erin Kobayashi, Simeona Mariano, Dyan Mitsuyama, Carol K. Muranaka, Kyleigh F.K. Nakasone, Richard Sing, Audrey E. Stanley, Wilson Unga, and Dawn West.

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Honorable Sabrina S. McKenna, Associate Justice, Hawai‘i Supreme Court
Honorable Lisa M. Ginoza, Chief Judge, Intermediate Court of Appeals
Honorable Keith K. Hiraoka, Associate Judge, Intermediate Court of Appeals

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