HAWAII STATE BAR ASSOCIATION

COMMITTEE ON JUDICIAL ADMINISTRATION

REPORT OF THE
2023 BENCH-BAR CONFERENCE

March 28, 2024

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ACKNOWLEDGMENTS

The Hawaii State Bar Association Committee on Judicial Administration 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, Criminal Law Forums, Civil Law Forums, and Family Law Forums have been positive and constructive because of the participation of Hawai‘i Supreme Court Chief Justice Mark Recktenwald, of other members and staff of the Judiciary, and of the bar. Chief Justice Recktenwald is an energetic and enthusiastic supporter of these events, and the committee appreciates his dedication in 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 conference via Zoom. The committee is also grateful for the those who assisted as lead judges, reporters, or facilitators at the conference: First Circuit Court Judge John Tonaki, First Circuit Court Deputy Chief Judge Jeannette Castagnetti, First Circuit Court Judge James Ashford, First Circuit Deputy Chief Judge Melanie Mito May, First Circuit District Court Judge Karin Holma, Second Circuit Court Chief Judge Peter Cahill, Third Circuit District Court Judge Darien Ching Nagata, Landon Patoc, Terina Fa‘agau, Kurt Kagawa, Teri-Ann Nagata, Tarita Keohokalole-Look, Natasha Baldauf, Laurel Loo, Suzette Hill, and Paula Nakata.

I. INTRODUCTION

The Hawaii State Bar Association's ("HSBA") Committee on Judicial Administration's ("Committee") goals are:

> 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.[1]

The 2023 Bench-Bar Conference was held on Friday, September 29, 2023, via Zoom. The conference of judges, lawyers, court administrators, and Judiciary staff were separated into the following groups: Civil Circuit Court Groups 1, 2, and 3, Criminal Circuit Court Groups 1 and 2, Civil District Court Group, Criminal District Court Group, and Family Court Groups 1 and 2.

A. WELCOME AND OPENING REMARKS

Hawai'i Supreme Court Associate Justice Simeon R. Acoba, (ret.), co-chair of the Committee, welcomed the participants with the following remarks:

> We hope you find the conference both invigorating and beneficial. The conference is a gathering of lawyers, judges and judicial staff, a sort of legal town hall, convened to share views on matters of interest to the judiciary, the bar, clients, and in the general sense, the public.
>
> In our times, the importance of law has risen to daily and historical significance. We have not been unaffected by actions that seem to undermine the constitutional basis of our democracy, or to threaten incursions on the rule of law.
>
> We can, on a state basis and on a legal footing, strengthen our democracy by maintaining the integrity, the competence, and the quality of justice in our legal system, as aided by convocations like these. These two months have also brought challenges to our state. Lawyers and judges have meaningfully and positively responded to the Lahaina fire tragedies.

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[1] *Hawaii State Bar Association ("HSBA") Board Policy Manual*.

> Chief Justice Recktenwald has been a supporter of these gatherings since it started in 2012. This support has brought with it the participation of the judiciary and judiciary staff who make the conference all the more worthwhile for all of us.

Hawai‘i Supreme Court Chief Justice Mark E. Recktenwald thanked the Judicial Administration Committee for convening the conference and acknowledged:

> The bench-bar conferences and the law forums have become the well-established tradition over the past decade and provide a unique opportunity for the courts and attorneys to work together to improve the administration of justice. I'm excited to see such an incredible turnout today. We have 227 people on the Zoom meeting already. We expect that to go up to 270, which is just incredible. I think it shows how committed everyone in this community is: lawyers, judges or administrators working together to improve our judicial system.
>
> Once again, this is only possible because of the dedication of those of you who are here today--your willingness to be part of this event; to give up your morning to participate and share your thoughts and ideas.

Both Justice Acoba and Chief Justice Recktenwald acknowledged the passing of Pat Mau-Shimizu, executive director of the HSBA, who supported these Bench-Bar Conferences and Law Forums.

Chief Justice Recktenwald mentioned the tragedy on Maui and expressed appreciation for members of the bar who stepped up to assist people in the weeks since the wildfires.

> Within a few days of the fire, HSBA members had donated two truckloads of supplies that were delivered to Maui by Matson and the next week, volunteer attorneys were staffing a legal assistance hotline to help those impacted navigate the legal issues that they were encountering, and again Pat was instrumental in all those efforts, so we are so grateful for her leadership. . . .
>
> I want to acknowledge the Maui County Bar Association and its President Christina Lizzi who stepped up in these in these past weeks. They are staffing tables around the community, providing pro bono assistance since the fires and to this very day. I want to thank everyone who has volunteered on a hotline, staffed a table, or contributed in other ways. Hundreds of hours of volunteer time have been donated and I want

> to thank the public entities and legal services providers who stepped up as well. The public defender's office has been in the community, meeting with people in addition to their clients, to provide assistance and guidance and the prosecuting attorney's office helped with the Family Resource Center at Kaanapali and a number of legal services providers, Legal Aid Society, Native Hawaiian Legal Corporation, the Legal Clinic, among others.
>
> Our Lahaina District Courthouse was not damaged from the fires. We had to shut it down for a couple of weeks and then we were able to reopen it earlier this month and I am incredibly grateful for the dedication of our Lahaina staff, most of whom either lost their own homes or their homes were damaged. They have not been able to return to them. I really appreciate them coming back and helping us to begin to resume serving the Lahaina community.
>
> I want to thank Judge Jim Rouse, who also lost his home and was back on the bench within a few days. He said that doing so helped him to heal--being part of the judiciary and doing his job and being on the bench was that important to him. I want to thank Judge Rouse for his example.
>
> Chief Judge Peter Cahill, Judge Blaine Kobayashi, deputy chief judge, Sandy Kozaki, our court administrator, have done a great job in leading our folks in the second circuit. And again, I want to thank our Maui attorneys who are with us today. We are so grateful for your dedication.

Chief Justice Recktenwald explained that the feedback from the conference is taken seriously. The report that is produced by the Judicial Administration Committee is circulated to the chief judges and they all work carefully on a response and want to be transparent about what they are able to do.

Vlad Devens, co-chair of the Judicial Administration Committee, explained the day's agenda and commented: "With everyone's participation, insight and experience to share, we believe this should be a very collaborative and productive conference of ideas and solutions to help our individual practices and to promote the efficient administration of justice." HSBA Bar President Rhonda Griswold stated that what is particularly rewarding about these conferences is that it "does not generate talk but it generates action. Many of the ideas that are brainstormed here may ultimately be incorporated into court rules, statutes, and procedures."

Summary

The 2023 Bench-Bar Conference addressed a number of issues affecting the dispensation of justice across the State of Hawai‘i. Matters of social import such as civility, as well as modes of interaction between the courts, attorneys, parties, and witnesses were discussed in detail. In terms of substance, participants explored the benefits of continuing education and training for both the bench and bar. The conference also took stock of a recent change to court rules affecting the trial process and how it has affected lawyers, the courts, and litigants. Prospectively, participants analyzed the impact that adopting practices of the federal district court relating to motions for summary judgment might have at the state circuit court level. The HSBA Committee on Judicial Administration is grateful for the contributions made by the conference participants.

II. REPORT OF THE CIRCUIT COURT CIVIL LAW GROUPS

A. COMMON TOPICS

1. Civility (Lawyers and judges have reported a concerning increase in the lack of civility in all practice areas)

Question Overview:

The Circuit Court Civil Groups addressed concerns about a perceived increasing lack of civility within the bench and bar. The Guidelines of Professional Courtesy and Civility for Hawai‘i Lawyers (“Guidelines”) are a helpful tool in identifying uncivil behavior but avenues to correct the problem are limited. Attendees explored potential root causes of incivility, including generational differences in methods and modes of communication and overzealousness.

Discussion:

Overall, the attendees felt Hawai‘i lawyers and judges are courteous and civil towards one another. This remains true even though, as many noted, the country suffers from growing social and political conflict. Several participants observed that Hawai‘i’s unique blend of cultures has long necessitated a respect for differences, and this is reflected across the Hawai‘i bar. At the same time, litigation is adversarial by nature and so some conflict is to be expected.

As between the bench and bar, judges mostly find attorneys to be respectful of the parties and forum. Judges anticipate that attorneys, in their advocacy, will occasionally resort to sniping or hyperbole. Attorneys should be mindful that judges view such behavior as unproductive, even to the extent of rendering an argument ineffective. Some participants expressed that if negative behavior is displayed in court, the opposing attorney has an obligation to call it out and the judge should address it as a teaching moment at the very least. One judge advised that attorneys should show him that an opposing argument is absurd through legal reasoning rather than by petty sniping or cynicism. Another felt it is her obligation to set the proper tone for civility in proceedings by laying down clear expectations at the outset of a matter and managing the process and the parties while in court.

With respect to root causes of uncivil behavior, the participants first explored the expansion of remote participation in proceedings as a consequence of the COVID-19 pandemic. Many participants endorsed remote participation. Some judges and attorneys, however, expressed concern over the loss of formality, focus, and decorum that they believe are negative fallout from remote participation. These participants observed that the overarching problem with remote participation is the lack of face-to-face interaction. Some in attendance expressed that virtual participation restricts personal interaction which, in turn, can stifle empathy.

The participants largely agreed that civility has traditionally been embraced across Hawai‘i’s bench and bar, but statistical changes may negatively impact that standard. As the number of practicing attorneys in Hawai‘i grows, the sense of community and familiarity among practitioners has eroded. The pace and intensity of practice in Hawai‘i has also sped up and some less experienced practitioners, as well as newcomers to the jurisdiction, mistake aggressiveness for zealous advocacy.

A share of participants felt that practice styles diverge on generational lines. One attorney observed that many longtime practitioners tend to embrace a less combative style of advocacy while the younger generation of attorneys are keyboard warriors who see every issue as a battle. Strenuously objecting to an opposing party’s well justified request for a continuance was cited as an example of the generational erosion in civility norms. Some participants noted that younger attorneys tend to become acrimonious over discovery disputes or during depositions.

Outcome:

There was a consensus among participants that the Guidelines are helpful in defining the courteous and civil practice of law in Hawai‘i but they should remain aspirational at this juncture. Individual judges should inform the parties of the standards and expectations they are expected to conform to early in the cases. Judges should be consistent in setting and enforcing these standards for the fair and effective dispensation of justice. If an attorney justifiably believes that opposing counsel is behaving uncivilly to the detriment of the judicial process, the behavior should be raised with the judge. The

Office of Disciplinary Counsel may take action against incivility that is in violation of the Hawai‘i Rules of Professional Conduct or other applicable legal standard but members of the bench and bar should endeavor to practice and promote civility to maintain harmony across the profession. Irrespective of the violation, referral of an attorney to the Office of Disciplinary Counsel should not be weaponized or used as leverage against an opponent. Programs such as the Attorneys and Judges Assistance Program offer confidential support to practitioners whose ability to practice courteously and with civility may be compromised by personal crises.

Civility should be emphasized from the outset of legal training. A decline in civility among newer practitioners may reflect the need for law schools to further address the issue. The Guidelines should be taught as a mandatory facet of a law school's overall professional responsibility curriculum. Law schools should also explore complementary student and community programming such as hosting guest speakers with a strong background in civility and ethics. Rule 1.14(a) of the Rules of the Supreme Court of Hawai‘i requiring all new admittees to complete a Hawai‘i professionalism course is an important civility training tool. The bar association should explore further civility and professionalism training offerings for its members.

Younger attorneys and those new to the practice of law should seek out opportunities to train under experienced attorneys who can model civility. Senior attorneys who practice with professional courtesy should mentor younger attorneys or participate in trainings where they can disseminate their knowledge and techniques to those with less experience.

Finally, attorneys and judges should be mindful that courtesy and civility extend to all forms of interaction. It behooves practitioners to carefully consider uncivil or flatly inappropriate statements they may feel free to make in writing when they would not do so in person.

2. Training and Education

Question Overview:

Judges must rule on an ever-widening array of subjects and specialized substantive training can benefit the administration of justice, particularly with respect to novel and highly complex issues. Judges have diverse styles and preferences with respect to matters such as settlement conferences and it can be challenging for attorneys to adjust their practice accordingly. The lack of trial skills in many new attorneys is evident to the bench but existing opportunities for new attorneys to gain trial experience appear limited. There may be aspects of practice that can be leveraged or built upon to allow new attorneys to develop litigation skills.

Discussion:

Attorneys expressed a desire for judges to receive training in both procedural and substantive matters. Common among these was the importance of judges receiving uniform training in the handling of settlement conferences. While attorneys had confidence in the ability of judges to conduct productive settlement conferences, some noted the variation in form and style between judges made preparing for these conferences a challenge. Participants noted that the Judiciary's regular judicial conference would be an excellent forum for uniform settlement conference training. Experienced mediators and judges with a track record of guiding successful settlements could offer their colleagues valuable insight into the elements of effective facilitation of settlement. The need is especially strong given the number of judges who are new to the bench. Judges mentioned that the Judiciary is taking steps to address this issue and recent judicial conferences have included training sessions on settlement facilitation.

Attorneys stated the bench may benefit from training in several substantive areas such as artificial intelligence, ediscovery, electronically stored information, and environmental disasters driven by climate change. Many circuit judges face the challenge of hearing a vast array of issues and specialized courts, such as the environmental court, have the benefit of focusing on a specific area of substantive law. The Judiciary may benefit from establishing other specialized courts if it has the resources to train judges accordingly.

The judges encouraged attorneys who may be hesitant to make a comment about the judges' training to communicate to the Judiciary via the administrative judge, the bar association, or other discreet methods.

Judges believe many attorneys could benefit from further training in trial practice. Some of the deficiencies in trial skills is attributable to a lack of meaningful practicum courses offered in law school. Pre-trial settlement of cases also limits the opportunity for attorneys to gain meaningful litigation experience. One judge shared that effective legal writing is a critical element of trial practice and a skill that many attorneys could improve on. The inefficiencies that arise when attorneys, who lack experience in trying a case, have a negative impact on clients. Several judges noted that poor interpretation and application of case law and an unfamiliarity with the rules of evidence are common. Members of the bench felt that all litigators could benefit from regular training in those areas. Judges also expressed that they are happy to provide feedback to attorneys appearing before them if so requested.

In addition to trial competence, judges encouraged attorneys to receive training on effective client management and settlement negotiation. Honing these interactive skills enables attorneys to set realistic expectations with their clients and pursue achievable outcomes.

As a managing partner, one attorney explained that he actively seeks training opportunities in areas such as voir dire and discovery for his associates. Judges encouraged law firms to adopt similar training regimens for all their attorneys. Firms should also actively pair newer attorneys with senior practitioners who are willing to let the former take the lead in less complex hearings to gain experience before the bench. Likewise, successful training programs such as the trial academy organized by the federal district court provide valuable opportunities for newer attorneys to hone their advocacy skills.

Finally, if a firm is unable to provide direct opportunities in court for its inexperienced attorneys, it should consider offering pro bono representation to organizations involved in litigation of less complex matters. There is a pressing need for

volunteer legal representation in areas such as landlord-tenant disputes and domestic violence-related restraining order litigation.

Outcome:

Training for both judges and attorneys is an essential element of practice. The Judiciary should offer uniform training to judges on the facilitation of settlement conferences. Doing so would allow attorneys to prepare more effectively for efficient and meaningful settlement discussions. In the same vein, attorneys should pursue training in settlement and client management to establish realistic expectations with their clients and maximize the potential for resolution short of trial.

Judges should also obtain training in substantive matters that have a significant impact on controversies that may appear before them. The courts should be prepared to adjudicate novel claims involving complex and evolving issues. While the litigation process is designed to identify and resolve conflict over claims, judges with training in contemporary matters of legal importance can more effectively adjudicate disputes. Training judges to preside over specialized courts significantly furthers justice.

The legal academy affords limited opportunities for budding attorneys to gain meaningful litigation experience. Once in practice, novice attorneys are rarely afforded the chance to grow their skills in trial given the high settlement rate of civil cases. This limitation is evident to judges who preside over matters handled by newer attorneys. The bar should promote and provide training in the craft of litigation to these practitioners through seminars, trial academies, and encouraging senior litigators to mentor their junior associates. Enabling a new attorney to litigate less complex matters under the guidance of a senior mentor is a valuable training method. Likewise, new attorneys should solicit feedback from judges who they appear before with the aim of excelling through constructive guidance, and judges should be encouraged to provide such feedback.

3: Communication (what communication processes or practices between the court and attorneys work well; what processes should be improved)

Question Overview:

Methods of communication between parties, courts, and attorneys have expanded since the COVID-19 pandemic. There is a growing reliance on email and virtual meeting solutions to handle procedural and substantive litigation issues. The efficiency of new communication methods is often tempered by court rules and established processes.

Discussion:

Timeliness in communication is of major import to the judicial process. Judges and attorneys largely feel that using email to set hearings and deadlines among the court and parties has proven beneficial. For emails on those matters to be successful, all parties and the appropriate court representative (generally, the court clerk or law clerk) must be addressed, responses must be timely, and the parties must be willing to reasonably accommodate respective scheduling limitations. In particular, the parties must keep in mind that the courts must balance an average of 300 hearings and between 250 to 400 non-hearing motions each year.

Calendaring preferences among judges vary. Some judges said they will accommodate telephone requests to calendar motions, but the requesting counsel must ensure that all parties are promptly notified of the hearing date. One judge recalled that the bar association issued a questionnaire to judges regarding their procedural preferences. Assembling and disseminating such data may be helpful so that attorneys know beforehand how to handle procedural matters with a particular judge.

Status conferences were identified as another effective and traditional method to facilitate communication between the court and parties. While as a rule, some judges require in-person status conferences, others are amenable to telephonic or virtual participation. Remote participation is given due consideration when the attorneys and/or court are based in different circuits. One judge felt status conferences are an important

and underused tool to manage cases and resolve breakdowns in communication that can result in unnecessary acrimony.

Most judges said that irrespective of the method, they generally do not record status conferences because they want to encourage forthright dialogue. Some judges will on occasion record status conferences if they think that capturing the discussion will further the likelihood of success in future settlement conferences. Several judges said they require an attorney to prepare a summary of the status conference for dissemination to the parties.

Attorneys expressed appreciation for judges who engage with the parties and lay out the court's expectations for the matter prior to going on the record. Some judges will also conduct an informal colloquy with the parties prior to starting a hearing in the hope of fleshing out unexpected issues that can otherwise prolong a hearing.

Outcome:

Alternatives to in-person communication for routine procedural matters such as setting or continuing a hearing date are generally favored by attorneys and judges for their efficiency. Emails should not address matters of substance as doing so may constitute ex parte communication. Emails for procedural matters should be clear and identify all the necessary particulars. Emails to the court should always include all parties, be handled promptly, and parties should endeavor to reasonably accommodate the scheduling needs of others. Contacting the court by telephone to obtain a hearing date may be acceptable to certain judges but the contacting attorney must communicate the relevant information to all parties after speaking with the court.

Status conferences, whether on or off record, are a useful tool to ensure clarity of communication and informally address certain issues before they become problematic. Status conferences can also resolve breakdowns in communication and reduce acrimony between the parties. Many judges are willing to accommodate remote status conferences, especially when the parties and/or the court are in different circuits, but attorneys should contact the court beforehand to ensure that such accommodations are possible. While most judges do not generally record status conferences, some will do so

to ensure that parties are consistent in their representations, particularly when it comes to settlement negotiations.

B. SPECIFIC TOPICS

1. Update on New Rules of Court

Question Overview:

The revised civil rules have been in place for approximately one year. Among other things, they establish scheduled tracks that civil cases must follow, with the intention of reducing cost and delay. The judiciary wants to gauge the bar's reaction to the revised rules, including the practicality of the expedited trial track and whether the new process is effective in resolving matters efficiently.

Several factors must be satisfied for settlement negotiations to be productive. The settlement process under the revised rules includes clear and thorough requirements that the parties must adhere to for settlement negotiations to be productive. In addition to traditional settlement negotiations, the courts and parties have explored creative methods to encourage settlement.

Discussion:

Attorneys reported that the revised timelines for cases on the regular track have sped up the trial process to the extent that few are opting for the expedited track. Nevertheless, attorneys were generally pleased with the new process under the revised rules. Attorneys shared that the overall faster pace forces the parties to be proactive from the onset of a case. The faster pace has resulted in earlier settlement of several cases that likely would have otherwise languished. One attorney noted, however, that dealing with pro se litigants under the revised rules has become especially burdensome as the rules impose several obligations on the parties that were not previously in place and pro se litigants often have difficulty understanding those obligations.

Judges generally agreed that the trial process under the revised rules has improved, especially on the front end of cases because parties are required to interact early. Judges did note that trial dates are becoming oversaturated due to the new timing requirements. This challenge is compounded by the effect the COVID-19 pandemic had

in delaying trials. Judges from the second, third, and fifth circuits highlighted that the trial backlog is at least partly attributable to combined criminal and civil calendars in those jurisdictions. One of these judges noted that he sets 10 to 15 criminal trials and between one and three civil trials each week and he foresees stacking trial dates to be a growing issue of concern.

Judges also expressed dismay that there are increasing instances of complaints not being served in a timely fashion. There was also a concern expressed by some judges and attorneys that the rules on scheduling orders and pre-conference disclosures are not effective in meeting their intended goal of eliminating drawn out discovery. Judges noted that some attorneys continue to file initial disclosures that are vague and overly broad.

With the expedited trial track option appearing to be underutilized, some attorneys felt that a further rule revision mandating the expedited trial track for certain cases may be beneficial. One attorney offered that cases brought under the Uniform Information Practices Act should be assigned to the expedited track but with an option to pause the process for settlement purposes at appropriate junctures.

With respect to settlement under the revised rules, as in the discussion about training, attendees felt that the new rules emphasize the need for judges to be effective settlement facilitators. Many attorneys felt that demands and bona fide offers should be submitted as far in advance of the settlement conference as possible so that the defense has time to meaningfully respond. For their part, judges emphasized the importance of attorneys fulfilling all the requirements under the revised rules for settlement conferences. If the requirements are not timely met, it is often not productive to proceed with a settlement conference.

The attendees largely felt that mini-trials and mock opening and closing arguments before surplus jurors can be beneficial for settlement purposes in certain cases. Having all parties attend settlement conferences in person (with certain exceptions for out-of-state parties where the use of a virtual appearance is more economical) also seems to support a more expeditious settlement. Finally, judges observed that attorneys who

exercise good client management and set realistic expectations tend to be successful in settling cases.

The revised rules pertaining to electronic signatures posed no notable concerns among the attendees. Attorneys did express a desire for making the process to obtain a stipulation to dismiss uniform across the divisions and circuits. Finally, attendees agreed that the process of calculating deadlines poses no extra hardship under the revised rules.

Outcome:

The revised rules have largely improved the time and cost it takes to litigate a civil matter. The requirements under the revised rules with respect to timing and procedure are clear and necessitate that an attorney be fully engaged with a case from inception to resolution. The expedited trial track is likely underutilized because the pace of cases under the regular track is brisk. It may be beneficial to mandate the expedited track for certain claims, such as those under the Uniform Information Practices Act.

The settlement process under the revised rule is clear and the litigants must satisfy all the steps mandated by the revised rules for negotiations to be meaningful. Creative measures such as mini-trials and mock arguments can be beneficial to reaching a settlement. Client control, including managing client expectations, is an essential element of successful settlement.

No significant concerns have been raised about electronic signatures, stipulations or calculating deadlines, although attorneys would appreciate uniformity in terms of obtaining court approval of stipulations to dismiss.

2. Remote Trial Testimony

Question Overview:

Remote witness testimony is governed by Hawai‘i Rules of Civil Procedure ("HRCP") Rule 16.2(b). Especially during the pandemic, the courts and parties came to incorporate and rely on remote witness testimony in civil matters. The demand for remote witness testimony continues even with the relaxation of COVID-19 restrictions. Attorneys see the ability to have their witnesses testify remotely as a significant benefit in terms of cost and logistics, but important factors such as fairness must be considered when a

request for remote participation is made. Despite advances in technology, remote testimony is not glitch-proof, nor do some consider it an entirely satisfactory alternative to in person testimony.

Discussion:

Attorneys appreciate the opportunity to have their witnesses testify remotely, particularly if the witness resides out of state. Doing so represents significant savings in cost and time. Despite the appreciation for remote testimony, some attorneys have encountered challenges with it. There can be a disconnect between the attorneys and a witness when reference to an exhibit is made. Some witnesses are less adept or altogether unfamiliar with the technology needed to facilitate remote testimony.

It can also be difficult to control disruptions at a witness's remote location. Attorneys understood that they are obliged to coordinate logistics with their witnesses sufficiently in advance of a hearing and to undertake all necessary measures to avoid disruptions in testimony. One attorney shared that in a recent hearing, opposing counsel objected to the remote testimony of a witness because they suspected that there were others in the room with the witness and the other unidentified people in the room may have been influencing the testimony. The court and opposing party should be notified well beforehand if an attorney intends to have a witness testify remotely so that the opposing party has sufficient time to agree or object. To the extent possible, disclosure of intended remote witnesses should be made at the initial scheduling conference so the court and parties have adequate time to address the matter.

Judges offered differing perspectives on the use of remote witness testimony. Some judges approve remote witness testimony in most instances as a matter of course. Others believe that in the interest of fairness the parties must agree on remote testimony. Judges also noted that in person witness testimony has certain advantages for the trier of fact in terms of non-verbal expression and overall presentation. These considerations can have an important impact on determining witness credibility.

Judges unanimously agreed that the attorney calling a remote witness must undertake all necessary effort to ensure that the witness, technology, and venue of

remote testimony are prepared sufficiently beforehand. Attorneys must also coordinate with court staff in a timely manner to facilitate remote witness testimony. Judges understand that unforeseen technical difficulties may arise, and the Judiciary has experienced court staff to address complications from the court's end. A few judges noted that the court's recording system can have difficulty capturing remote testimony and so the parties should work with the court staff to arrange the testimony so that it is sufficiently audible.

Notwithstanding the allowance for remote witness testimony, judges generally expect that the parties appear in person if they will testify.

Outcome:

Attorneys broadly appreciated being able to present their witnesses via remote testimony, especially when geographical circumstances make in person witness testimony challenging to coordinate. The courts are well equipped with technology capable of accommodating remote witness testimony and staff are trained to facilitate the process from the court's end. While some courts allow remote testimony as a matter of course, the general preference is for parties to agree upon remote witness testimony well in advance of the hearing date. The court will make the final determination regarding remote witness testimony where the parties cannot agree. Judges expect attorneys to coordinate with court staff several days in advance of the hearing date to ensure that the technology on all ends is sufficient to accommodate remote testimony.

3. Motions for Summary Judgment

Question Overview:

HRCP Rule 56 has not been amended in 23 years. The United States District Court for the District of Hawai‘i has implemented local rules that supplement Rule 56 of the Federal Rules of Civil Procedure. It may be beneficial for the bench and bar to consider adopting some of those federal local rules. Concern has been expressed about authenticating proposed exhibits in an HRCP Rule 56 motion. Attorneys have noted that the HRCP Rule 56 timing requirements can be unduly burdensome in certain circumstances.

Discussion:

There was a divergence of opinion among the attorneys as to the benefit of adopting the Hawai‘i federal district court's Local Rule 56.1 requiring the inclusion of a concise statement of facts ("Concise Statement") for motions for summary judgment. Judges and attorneys in favor of its adoption noted that preparing a concise statement of facts requires the parties to narrow the issues and identify supporting evidence for material facts. Judges found citations to the record included in the evidentiary support column of the concise statement helpful. Those who disfavored the concise statement argued that it is duplicative and requires an extraordinary amount of time and effort to prepare.

Many judges felt that authentication issues with evidence submitted in support of a motion for summary judgment should be brought up in the opposing party's opposition memorandum. At the hearing on the motion, the court may strike evidence that has not been appropriately authenticated.

Several attorneys raised concerns about the timing requirements for opposing memoranda and replies to opposing memoranda under HRCP Rule 56(b), noting that the filing deadlines can be affected by holidays. A participant proposed and a few attorneys agreed that an extended period be allowed for opposition and replies irrespective of intervening holidays.

Most judges and attorneys raised concerns about any change to HRCP Rule 56 that would make it easier for a party to file a motion for summary judgment because in principle, such motions supposedly contravene the constitutional right to a trial. Participants worried that a relaxation of the rule will result in result in more motions being filed for inappropriate purposes. Judges reminded attorneys that motions for summary judgment should not be filed solely for the purpose of educating or sensitizing the court.

Outcome:

While there do not appear to be significant concerns with HRCP Rule 56 as it is currently stated, the Judiciary's committee on the rules of civil procedure should explore

the potential benefit of extending the filing deadlines for memoranda in opposition and replies thereto.

III. REPORT OF THE DISTRICT COURT CIVIL LAW GROUP

A. COMMON TOPICS

Lead Attorney Dennis Chong Kee welcomed participants to the District Court Civil Law Group of the 2023 Bench-Bar Conference. He thanked the District Court Judges in attendance: Lead Judges Melanie Mito May and Karin Holma, Judges Summer Kupau-Odo and Shellie Park-Hoapili of the First Circuit, and Judge Kimberly Taniyama of the Third Circuit.

In addition to the judges, 22 attorneys participated, representing plaintiffs' attorneys, defendants' attorneys, law firms, solo practitioners, long-time practitioners, and newer practitioners.

Mr. Chong Kee discussed the Bench-Bar Conference's history of accomplishments. For example, participants at one of the first Bench-Bar Conferences discussed the malfunctioning elevators at the District Court in Honolulu. Chief Justice Recktenwald ensured the elevators were repaired. In addition, as a direct result of a past Bench-Bar Conference, legislation was passed to increase the jurisdictional limit at the District Court.

1. Civility

Lawyers and judges have reported a concerning increase in the lack of civility in all practice areas.

- Should the civility guidelines be included in the Hawai‘i Rules of Professional Conduct and be enforced by the Office of the Disciplinary Counsel?
- Are there measures that would improve civility in written submissions to the court; in correspondence between the parties; during remote proceedings?

<u>Judges</u>

By way of background on this issue, the judges shared that there are reports of a decrease in civility in remote proceedings and in written correspondence. The Hawai‘i Supreme Court Commission on Professionalism is reviewing whether the *Guidelines of Professional Courtesy and Civility for Hawai‘i Lawyers* should be incorporated into the Hawai‘i Rules of Professional Conduct.

The District Court judges reported that they are fortunate to work with attorneys who are civil with one another and with self-represented litigants. They do not see a need to incorporate civility guidelines into the Hawai‘i Rules of Professional Conduct.

Practitioners

The practitioners concurred with the judges. They have not had issues with civility in District Court.

Several practitioners expressed concerns with incorporating the civility guidelines into the Hawai‘i Rules of Professional Conduct. For example, would a lack of civility be a basis for a complaint to the Office of Disciplinary Counsel? People may have different views of civility and litigation may get heated.

Practitioners noted that judges already have the ability to sanction and control their courtrooms. Handing civility complaints over to an investigator could lead to unfair results if the investigator were not in the courtroom to observe first-hand the alleged uncivil behavior.

The few attorneys who may lack civility are not enough to justify incorporating civility guidelines into the Hawai‘i Rules of Professional Conduct. Some of the guidelines are likely more appropriate for rules of court that apply to all litigants (e.g., agreeing to a reasonable extension) while other guidelines may be difficult to enforce.

Practitioners noted that there are differences in behavior with in-person and remote proceedings. Pro se litigants, in particular, may not understand that court proceedings via Zoom are different from other Zoom meetings.

Finally, practitioners expressed concern about reports or complaints to the Office of Disciplinary Counsel as part of a litigation strategy. In addition, clients may contribute to a lack of civil conduct. Clients may expect their attorneys to be aggressive. Attorneys can do a better job of using the civility guidelines to demonstrate that civility is not a sign of weakness, and that civility is expected in this jurisdiction.

2. Training and Continuing Education

- What additional judicial training do attorneys suggest judges should have, and why?

Judges

The District Court judges discussed the variety of training available to them. Judges are invited to judicial conferences in the fall and spring of each year. The two-day conferences cover a range of topics such as case and courtroom management, evidence, insurance, settlement, and emerging trends like electronic evidence and artificial intelligence. The per diem judges in District Court separately attend judicial training in the fall and spring. In addition, all judges receive training specific to their courts and calendars. Judges also may sign up for training, if interested. All judges are assigned mentors when they are new to the bench. Finally, there is a semi-annual conference for continuing education that discusses issues that affect all courts, including, for example, the issues of ChatGPT and artificial intelligence. The District Court judges invited practitioners to share topics that would allow the judges to prepare in advance for any emerging issues.

Practitioners

Several practitioners commented on the importance of courtroom and calendar management. For example, practitioners discussed the value of judges' actively managing remote proceedings in which one or both parties appear via Zoom. Some judges are better than others at quieting participants who are not involved in the proceeding. When all parties are present in the courtroom, most people know that they should be quiet when they are not participating but, it is not as simple when the hearing is via Zoom.

The District Court judges concurred and noted that they have identified an issue with managing parties who participate via Zoom, particularly when they appear by telephone. If parties are not participating appropriately by telephone, the District Court judges may ask the parties to appear by video or in person. The judges explain that it is a privilege to appear via Zoom rather than in person.

Practitioners stated that experienced District Court judges understand the cases and help move cases quickly. Shadowing and mentoring are important. In addition, court

staff and experienced District Court judges provide helpful reminders regarding, for example, scheduling the next hearing, or making arrangements for interpreters.

Chief Justice Recktenwald visited the District Court – Civil Group and thanked participants for the productive discussion of issues involving civility and remote and hybrid proceedings. He extended his appreciation to the lead judges, lead attorney, reporter, and to Nicholas Severson of the Legal Aid Society of Hawai‘i for his work in assisting Maui residents at the Lahaina Civic Center.

- What areas of continuing education do judges suggest attorneys should have, and why?

Judges

The District Court Judges offered several recommendations for attorneys' continuing education, including the following:

- Consider additional education and training in evidence, which would benefit most attorneys;
- Develop a better understanding of Zoom, its breakout rooms, and tools;
- Review the court rules, especially if one does not appear often in District Court;
- Review the trial process, including distinguishing facts from argument and opening from closing statements;
- Know when to raise objections; and
- Stay up to date on changes in law.

In addition, the District Court judges thanked the Legal Aid Society of Hawai‘i for taking an active role in providing legal information to parties during the returnable calendars. Having legal information available to unrepresented parties makes the process a lot smoother.

Practitioners

Practitioners recommended that the Bar offer training in areas such as evidence and trial practice. Reading rules is different from learning to apply them in court. If attorneys can help each other, this will benefit the system.

Practitioners noted that Judge Gary Chang and former Chief Judge Ronald Ibarra previously provided attorneys with a list of appropriate objections and instructions on presenting evidence and short, crisp objections.

Practitioners commented on learning through trial and error and encouraged junior attorneys to seek assistance from more senior attorneys and seek good reference books on topics such as asking questions and laying foundation.

Finally, practitioners noted that the Hawaii State Bar Association sponsors a trial academy intended to train junior attorneys. In addition, the Family Court organized a Bench-Bar Conference for newer attorneys, during which Family Court judges sat with newer attorneys and provided brown-bag presentations on three successive Fridays. Similar types of conferences could be organized for other courts.

3. Communication

- What communication processes or practices between the court and attorneys do you (judges, attorneys, court staff) believe work well?
- What communication processes or practices between the court and attorneys do you believe should be improved?

Judges

The District Court judges noted that they face challenges with communications with attorneys for several reasons. First, District Court judges do not have assigned staff such as judicial assistants or law clerks. If matters arise such as traffic delays or exposure to COVID-19, getting a message to the court is challenging. District Court judges also travel to different courts. They will not be in Honolulu to pick up voice mail messages if they are sitting in Kaneohe. Mail can be sent to District Court judges, but the judges receive mail only in Honolulu, even if they are sitting in different courts several days per week.

The Legal Documents Office can receive inquiries and communicate messages to the judges. This includes inquiries about pending dispositions.

Practitioners

Practitioners offered several suggestions for improving communication between the Court and attorneys:

- Hiring judicial assistants.
- Communicating with court clerks to avoid ex parte communication with judges.
- Creating an email mailbox for each courtroom. Staff could monitor the mailbox and identify communications that are appropriate for the judge.

The District Court judges noted that creating an email mailbox for each courtroom would require dedicated staff. If attorneys expected that the email mailbox would be checked live, the court would need to assign a person to perform those checks. Court resources are limited, and remote hearings add another layer of complexity. Some of the scheduling issues may be caused by attorneys who overextend themselves. There may not be a simple solution to addressing the court's communication challenges, but the District Court judges appreciated the attorneys' collaboration and suggestions.

B. SPECIFIC TOPICS

1. Settlement Conferences

- When should settlement conferences be set?
- What are appropriate incentives for parties to give settlement serious consideration given the perception that trial calendars are backed up?

Judges

The District Court judges explained that settlement conferences are allowed in most cases. All judges evaluate how the case can best move forward and will consider whether mediation or settlement would be helpful, or if the case needs to be set for trial. In the First Circuit, settlement conferences can be set on Tuesdays, Wednesdays, or Thursdays from 8:30 a.m. to 1:00 p.m., but the judges will entertain requests for times outside those periods to accommodate the parties and attorneys' schedules. The District Court judges are also conscious of the schedules of the settlement conference judges.

Generally, if a party requests a settlement conference, the judge will grant the request. However, if a Judge feels the parties are too far apart, he or she might elect to set an earlier trial date rather than a settlement conference. The judges also often spend additional time on status conferences if they sense that the parties are close to a settlement.

In the Third Circuit, requests for settlement conferences are rare. There are additional logistical roadblocks to settlement conferences because of the distances that parties need to travel to appear before a settlement judge. However, the Third Circuit District Court judges are open to settlement conferences and will also consider remote settlement conferences so long as the parties have reliable internet connections.

Settlement conference letters are not required in District Court. However, they are permitted, and the judges generally find that they are helpful. Specifically, if there are special circumstances that are not apparent from a review of the record, they should be included in a settlement conference letter. The judges are well-prepared and want cases to be resolved in the most cost-effective manner. They do not need extremely detailed settlement conference letters from attorneys.

Practitioners

The practitioners explained that if a case demands more work, it will be difficult to settle the case because of the increased attorneys' fees and costs. It was suggested that settlement would be more common if settlement conferences were held on the day of the return hearing when fees and costs are the lowest.

In landlord-tenant disputes, the tenants are generally agreeable to working out a payment plan or some other settlement. However, it may be beneficial to have a settlement judge present at the return hearing to explain the process to the parties who may find the experience intimidating and to encourage settlement when fees and costs are at their lowest.

The judges shared that they have been discussing ideas similar to having settlement conferences on the day of the return. They have discussed having representatives from the Mediation Center of the Pacific present in the courtrooms and available to assist in settlement discussions on all return hearing days. Ideally, the District Court judges also would like to see settlement judges in the courtrooms on return hearing days, but there are significant logistical and resource problems that would make this difficult to achieve.

The practitioners understand that the Judiciary has limited resources but highlighted that eviction also imposes considerable costs on litigants. The practitioners suggested making more resources available because the current process burdens the community financially and in other ways. When all hearings were held in person, the parties and their attorneys could and often did go out into the hallways to try to settle cases on the day of the return. However, this practice seems to be less prevalent now that most hearings are via Zoom. Anecdotally, the practitioners feel that more cases end in evictions rather than payment plans or other settlements and that fees are higher.

It was pointed out that when pro se litigants enter general denials, this may prolong proceedings. Particularly with pro se litigants, the practitioners felt that settlement conferences would be more effective than mediation because, in mediation, the outcomes often are dependent on the mediators and their understanding of the cases.

The practitioners were encouraged to speak out and advocate for solutions that address housing problems on a bigger scale because issues relating to summary possession and foreclosure cases are symptomatic of larger housing problems.

2. Virtual or Remote Court

- What are the benefits of virtual court, especially for the neighbor island practitioners and courts?

Judges

The District Court judges explained that most civil proceedings are available by Zoom. The exceptions are generally trials, evidentiary hearings, and temporary restraining order hearings. In small claims cases involving security deposits, parties often have moved from the state and, in those cases, may be allowed to appear at trial by Zoom. In general, however, trials are held in person.

The District Court judges have seen problems with participants not being fully engaged in remote proceedings. This is more problematic when participants appear by telephone rather than video. The judges also have encountered problems with determining who is speaking when parties appear by telephone. District Court judges

also have seen problems with the presentation of exhibits when not all parties are physically present in the courtroom, such as in small claims security deposit trials.

Overall, remote proceedings appear to increase participation. The District Court judges noted that parties appear at a higher rate when remote proceedings are permitted.

On the neighbor islands, many individuals seek to appear remotely because of transportation limitations. When remote appearances are allowed, exhibits must be exchanged in advance.

Remote hearings are generally more of a problem for pro se litigants. It is easier to talk over each other in remote hearings. However, while remote hearings are not perfect, the hearings expand access to the courts.

Practitioners

Practitioners were unsure of how to request remote appearance in the neighbor island courts and suggested that there be a uniform method to request a remote appearance throughout all circuits. The practitioners pointed out that there is information on how to appear via Zoom on the Judiciary website.

The District Court judges explained that they receive remote appearance requests in many forms (e.g., letters, emails, or motions) and the dispositions are informal (e.g., a stamp or sticker stating the request was approved or denied).

Practitioners suggested that the Judiciary assess the quality of the equipment available in each courtroom. In some courtrooms, the audio quality is not satisfactory.

Practitioners asked if there were any plans to amend the District Court Rules to address remote appearances as has been done for the Hawai‘i Rules of Civil Procedure, and whether the courts could add instructions for litigants regarding conduct when they appear remotely. It was suggested that a YouTube video could be created to educate parties on how to conduct themselves during remote hearings. This video could address basic procedures such as muting one’s self when first logging on and following the order of cases on the calendar.

There was a general consensus that remote hearings increase access to justice because participation via Zoom is less intimidating than appearing in person and the

benefits outweigh the problems. However, more education for parties who do not normally participate in District Court cases is needed.

3. District Court Rules of Procedure, Rule 12.1 Declarations and Defenses of Title

- How do the judges approach issues relating to title?
- What do the judges look for when reviewing Rule 12.1 affidavits?
- Any special issues with Rule 12.1 affidavits or motions?
- What are some pitfalls where courts have denied motions to dismiss based on issues of title?

Judges

The District Court judges explained that each Rule 12.1 motion is reviewed on a case-by-case basis. Hawai‘i District Courts have exclusive jurisdiction over summary possession cases, concurrent jurisdiction over ejectment cases, and no jurisdiction over cases involving title.

Generally, issues of title must be raised in a motion with an affidavit of the person raising the issue. Rule 12.1 submissions are weighed against the standards set forth in *Monette v. Benjamin*, 52 Haw. 246, 473 P.2d 964 (1970), in which the Hawai‘i Supreme Court held that the defendant showed that title was in dispute, and *Deutsche Bank Nat’l Trust Co. v. Peelua*, 126 Haw. 32, 265 P.2d 1128 (2011) in which the Hawai‘i Supreme Court held that the defendant did not show that title was in dispute.

When deciding Rule 12.1 motions, it is not the District Court judges’ job to weigh facts. For example, they cannot look at a counter-affidavit. The judges would consider the source, nature, and extent of the title claimed by the defendant. Judges do not have the authority to stay proceedings; a case sufficiently raising issues of title should be dismissed without prejudice. Whether a case is pending in Circuit Court is irrelevant to the District Court’s review. In addition to Rule 12.1 motions, the judges can consider documents attached to the complaint and legal arguments such as a long-term ground lease.

The District Court judges have had numerous discussions with each other about Rule 12.1 motions and affidavits. Many defendants in the First Circuit will raise the issue.

The judges often will need to refer parties to the rule and give them time to comply. In the judges' experiences, there is usually no issue regarding the veracity of the allegations pertaining to title, but the issue is instead whether there is sufficient explanation of the source, nature, and extent of title claimed. Often the facts alleged do not bear upon title.

Practitioners

While the practitioners do not commonly see Rule 12.1 issues, they recognize that it may be used in some instances as a stalling tactic by defendants.

The practitioners were unsure of the standard of review courts utilize when ruling on 12.1 motions.

The judges explained that they cannot weigh evidence or make findings of fact. They accept the facts alleged as true to a certain extent. However, there still must be sufficient facts to raise an issue of title under the standard set forth in the case law. Judges will ask whether the defendant has set forth sufficient detail on the source, nature, and extent of title to establish an issue of title.

4. Rent Trust Funds

There seems to be a growing trend of district court judges granting oral motions to establish rent trust funds.

- What information should counsel have when making a rent trust fund request?
- What should attorneys keep in mind when making such a request?

Judges

Requests for rent trust funds are reviewed by the judges on a case-by-case basis. Rent trust funds have been requested by oral motion and have been granted. Case law says requests "shall" be granted. Judges are trying to resolve cases as quickly and efficiently as possible. There is no reason not to grant a request orally if the defendants have not presented any defenses.

The amount of rent is the main issue the judges consider when ruling on oral motions for rent trust funds. The attorney requesting the rent trust fund should know the monthly rent amount. What the defendant owes from the past is not directly relevant to granting a rent trust fund because the past amount will not be included in the rent trust

fund. Judges will ask the defendant if the monthly rent stated is consistent with his or her understanding. If the amount of rent is disputed, judges may grant the request as to the undisputed amount. Judges have seen that counsel for landlords usually are amenable to a rent trust fund based on only the undisputed amount.

The judges will explain the rent trust fund to the tenant and the tenant's obligations under the rent trust fund. The judges are also cognizant of tenants' paydays and have altered rent trust fund payment dates to align with the tenants' paydays.

Before ordering a rent trust fund, the judges consider whether due process has been provided with sufficient notice and time to respond. If a tenant is confused regarding the rent trust fund, judges may allow more time for the tenant to consult an attorney before ordering a rent trust fund.

Practitioners

The practitioners recalled that, prior to the COVID-19 pandemic, rent trust funds were rare and requests usually were denied because the court would set trial quickly, usually within a week or so. Accordingly, there is not a robust history of how rent trust funds should be handled. This only really became an issue after the pandemic, when procedure changed, and proceedings were much more protracted. Only recently have judges begun to require written, rather than oral, requests for rent trust funds although the statute does not require a motion.

Practitioners suggested that the Judiciary have uniform policies regarding rent trust funds. Different circuits handle requests differently. On Maui, the amount of back rent that the judge orders is determined on a case-by-case basis. The tenant's claim of inability to pay the amount of back rent does not impact the judge's decision of whether to order a deposit into the rent trust fund.

Maui judges also will provide in their orders that no late payments will be accepted. This is a useful policy to adopt in all circuits. There have been instances in which a tenant does not make payments to the rent trust fund but, after a writ has been issued, the tenant puts all of his or her money into the rent trust fund. In these instances, the tenant is left with no home and no money.

Practitioners also commended the judges for moving payment due dates to accommodate pay schedules of the tenants. For example, often the tenants' only income is Social Security or other benefits, which may require moving the payment due date.

Rent trust funds help move cases along. Tenants should be informed that paying money into the rent trust fund does not mean the case stops. If tenants heard this from judges, they might be more likely to reach out to landlords even if they are paying money into rent trust funds.

Some practitioners see issues with oral requests for rent trust funds. The statute requires a request, and the court rules say that any request must be made by motion. There also is a recent Supreme Court case holding that any oral motion must be made at a hearing or at trial. Oral motions may not be made at a status or pretrial conference. The better practice may be to prepare a motion and to serve it with the complaint to be heard on the return day. After the return day, it may make more sense to invest effort into a motion for summary judgment.

5. Trials

Trials in District Court can move much more quickly than circuit court trials.

- What are some effective practices that the judges have seen when attorneys conduct trials in District Court?
- What are some common pitfalls?

6. Conduct of Attorneys at Hearings and Other Proceedings

- What conduct of attorneys is not effective and/or reduces attorneys' credibility in district court?

Topics 5 and 6 were discussed together because they covered similar and overlapping subjects.

<u>Judges</u>

When one party is represented by an attorney, and the other party is self-represented, there are issues regarding exhibits. The judges prefer handling the admission of exhibits at the beginning of a trial, so the trial runs smoothly. The judges will first check to see if there is an agreement to admit some or all exhibits. The judges

encourage attorneys to ensure that self-represented parties have seen the exhibits and that the parties can deal with objections in advance.

The judges noted that the attorneys do not need to be overzealous in cross-examination. If the attorney is paying attention to the judge, the judge will try to communicate that he or she understands the point, so the attorney can move on.

Judges encourage communication between counsel. Organization and preparation are helpful. Grandstanding and creating a "circus" do not help. District Court judges have a heavy caseload and attorneys should narrow the issues and present meaningful evidence on those issues. It also is important that attorneys know when to make appropriate objections. Insignificant objections only slow the trial down.

Generally, the judges find opening statements helpful because the statements quickly lay out the facts. However, opening statements are not required. For example, in criminal cases there is no opening statement. It is important that attorneys do not make arguments in opening statements but simply present the facts.

The judges are cognizant that attorneys must present well for their clients in court and that clients expect a certain level of advocacy from their attorneys.

Practitioners

The practitioners inquired whether pretrial memoranda are useful. The judges explained that pretrial memoranda are generally useful to them. The memoranda also are helpful to opposing parties, so they are aware of the issues to which they should respond. The judges prefer to have pretrial memoranda as early as possible. The general rule of earlier is better applies to all filings in District Court.

The practitioners asked what factors judges consider when ruling on a request by a party for written closing arguments, which can be costly to prepare. Depending on the case and the volume of the evidence presented, preparing a written closing argument could be similar to experiencing the whole trial again.

The judges explained they will not order written closing memoranda if the facts are clear and there are no questions about the law. However, if there are "close calls," they may order written closing memoranda and may even request briefing on certain issues.

Typically, in complex cases, the judges feel that written closing memoranda benefit the parties. The amount of the claim and the complexity of the case are factors the judges consider in ruling on a request to submit such memoranda.

7. Conclusion

The judges concluded the conference by requesting the practitioners to inform the Committee of any issues they want to bring to the judges' attention.

IV. REPORT OF THE FAMILY LAW GROUPS

A. COMMON TOPICS

1. Civility

Lawyers and judges have reported a concerning increase in the lack of civility in all practice areas.

The group discussed whether the COVID-19 pandemic was a significant factor contributing to the increase of lack of civility and felt it was important to address the matter now to emphasize the importance of practicing civility in and out of the courtroom at all times.

Examples of practitioners engaging in uncivil behavior varied among the circuits. This was also true regarding how the different judges handled unprofessional conduct either directly before them or reported to them. The practitioners suggested it is helpful when the lack of civility or unacceptable conduct is brought to their attention that the judges address it in court. For example, judges should intervene when attorneys are late to court or fail to appear, especially when other parties and counsel are waiting in the courtroom. Practitioners appreciated when judges hold attorneys and/or parties to the deadlines outlined in prior court orders. However, it is also important that judges apply the standard fairly and without bias.

Overall, it appeared that the primary factor contributing to the lack of civility was communication or the lack of communication. The consensus was that if practitioners communicated with one another more frequently, particularly before coming to court, they may be able to avoid court all together or at least have less contested issues. Everyone agreed that communication with opposing counsel before court appearances may save parties the time of having to come to court. Continuances and extensions of time can also be agreed upon in advance thereby eliminating needless motions to compel or enforce.

In discussing how to improve civility, some practitioners reported in the past they were required to bring to court a copy of The Guidelines of Professional Courtesy and Civility for Hawai‘i Lawyers (Guidelines).

Despite acknowledging the increase in the lack of civility, the overall consensus was that the Guidelines should not be monitored or enforced by the Office of Disciplinary Counsel because the Guidelines are not disciplinary rules, but best practice standards. The group felt that the courts should uphold proper courtroom demeanor and enforce the rules when they are violated. The courts should also set a good example for litigants. The group further felt that the practitioners should work on building relationships with one another and avoid adopting their clients' emotions.

One possible and practical solution to promoting civility was to make the Hawaii Professionalism course(s) a continuing legal education requirement similar to the requirement on ethics.

2. Training and Continuing Education

- What additional judicial training do attorneys suggest judges should have and why?

The Family Court judges attend mandatory seminars in the spring, fall and an annual family law symposium. In addition, they have presentations and training on various issues such as domestic violence, military issues in family law, and working with Child Welfare Services (CWS). These trainings are held monthly and sometimes during the judges' lunch hours.

Per diem judges also have mandatory seminars held in the spring and fall.

As to future trainings, the group found it helpful if judges made clear decisions and articulated the basis for their decisions, including what was taken into consideration. Training on the Hawai‘i Rules of Evidence and the Uniform Child Custody Jurisdiction and Enforcement Act would be beneficial for the court to make clear and concise rulings. Efficient courtroom management was another issue that was acknowledged as being helpful.

- What areas of continuing education do judges suggest attorneys should have, and why?

The group consensus was that practitioners should be offered training in civility and professionalism to include how to handle clients and in particular managing clients

reasonable expectations. Understanding courtroom procedure and decorum would be beneficial for all practitioners as would refreshers on writing clearly and concisely.

Presenting cases efficiently and knowing how to work with opposing counsel is key to the efficient use of courtroom time. Scheduling was another topic of concern relating to the best use of courtroom time.

Training in how to deal with a narcissistic personality, and its characteristics, and how to work with them in family law cases was also raised. There was a suggestion for the Family Law Section to look at Association of Family and Conciliation Courts speakers for training for attorneys. The group felt that attorneys and judges should receive the same training so that everyone understands and abides by the same rules.

There was significant discussion about the use of Custody Evaluators and Best Interest Fact Finders. The group acknowledged improving civility also helps in retaining these professionals. The group overall agreed that there needs to be more available resources for families in the court process.

3. Communication

- What communication processes or practices between the court and attorneys do you believe work well?

Direct communication between the court and practitioners was agreed to be the best method. For example, the group found it helpful for practitioners to be able to directly email the court clerk or chambers instead of first calling the calendaring clerk. Regarding Zoom appearances, it was suggested that uniformity and specificity of protocols would be helpful for everyone.

However, each circuit has different procedures relating to communications before and after court hearings. While uniformity among the circuits is always requested, the group recognized that each circuit is different and sometimes it is just not possible to have the same “direct” contact due to staffing shortages and the volume of cases.

Everyone agreed that judges should be informed ahead of time if there is a settlement, a continuance stipulation, or a request to appear remotely.

With e-filing, the group recognized how helpful the help line was for assistance when e-filing was first implemented for Family Court. Practitioners also appreciated the opportunity to speak directly with court staff regarding pleadings and documents that still needed to be filed conventionally. Everyone agreed that practitioners as well as their staff should have a good professional working relationship with the courts.

The judges suggested that practitioners communicate with one another before coming to court. The judges prefer practitioners being prepared to discuss whether a hearing is needed and the specific issues for a hearing.

For the CWS calendar, practitioners stated that they have a good working relationship with one another and the court officers. They had positive remarks regarding the efficiency of the court process for this calendar.

The group discussed what was helpful in terms of specific communications with the court. Regarding stipulations to continue, practitioners should include their unavailability. For requests to appear by Zoom, attorneys should indicate whether the other parties were informed of the request and have any objections. The group found it helpful when attorneys file status reports before a hearing to acknowledge what issues have been resolved.

The use of phones to record the court's ruling was found helpful by attorneys, especially when drafting orders. Attorneys were encouraged to ask court permission to record oral rulings even if the judge does not suggest it first. It was pointed out that the "phone ruling" is not an official ruling and must be deleted after use.

The group further discussed settlement conferences as a helpful means to keep a case on track and when held before a motion to set is filed. The court has set status conferences and granted Rule 16 conferences if it is procedural. Some judges set Rule 16 conferences *sua sponte* to help parties figure out issues. Courts have to consider their calendars when setting Rule 16 conferences which can be requested by calling the main line to speak to the clerk. The courts will not issue orders in Rule 16 conferences unless all parties agree. It is helpful to identify the settlement conference judge assigned to the case if it is in the First Circuit.

- What communication processes or practices between the court and attorneys do you believe should be improved?

The group discussed the process of filing in the Judiciary Electronic Filing and Service System (JEFS) and emailing courtroom clerks in order to expedite matters. Most attorneys will ask for permission before emailing the court clerks. However, for JEFS, attorneys are instructed to e-file first then email the court clerk.

When appearing via Zoom, it would be helpful if there was a method to acknowledge the parties and practitioners who are in the waiting area, so they are not left wondering if they are indeed connected.

The group discussed notifications as to the status of uncontested divorce cases. Specifically, the request was to have uncontested divorce cases processed expeditiously after the judge has approved or denied them.

The group also discussed notifications as to status of motions or ex parte motions. The group recognized that sometimes motions take longer to process than others. The question raised was what can be done to communicate with practitioners more efficiently regarding these types of situations to avoid having practitioners calling the court for status updates.

B. SPECIFIC TOPICS

1. Discovery Process

a. What types of communication between counsel are effective in order to avoid court intervention?

The group discussed best practices to handle discovery. Everyone agreed that the free flow of accurate financial information is helpful to resolve cases quickly and efficiently. There was a consensus that using informal discovery is much more affordable and efficient than formal discovery.

Practitioners should be forthcoming and proactive in providing their clients' financial information, particularly in divorce proceedings.

The group discussed the pros and cons of exchanging discovery via "traditional methods," i.e., exchange of actual documents versus using more current methods, i.e., Dropbox or links to one's actual server.

The group concluded that the best way to avoid court intervention was to communicate with one another often and to be courteous at all times. The exchange of information is necessary, and the faster practitioners realize it is inevitable that it will have to be disclosed, the faster and smoother a case can proceed and be resolved.

b. What is an appropriate "confer"?

Hawai'i Family Court Rule 37 provides that any motion specifying a failure to respond under clause (2) or (3) of this rule "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to secure the information or material without court action." Furthermore, in lieu of an order or in addition to the order, "the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

The group discussed what constitutes "confer" as this rule is slightly different from the Hawai'i Rules of Civil Procedure and the Federal Rules of Civil Procedure. The judges believed there was still a requirement to "meet" although the word was not included in the rule. This led to a further discussion as to what constitutes a "meeting."

Clarification in the Hawai'i Family Court Rule as to what constitutes a meeting was suggested. The group posited the requirement to "confer" was included in the rule to avoid practitioners having to file motions to compel. Different methods of "conferring" included meeting in person; meeting via Zoom; talking on the phone; and exchanging emails. All of these would suffice. The group discussed using one or more methods depending on the availability of the practitioners.

Judges, however, emphasized that sending an email to a practitioner with a deadline to respond or otherwise a motion will be filed does not suffice. Practitioners

need to communicate orally or in writing to discuss whether agreements can be made. However, the judges recognized that if several attempts at contacting the other side were unsuccessful then that requirement has been met by the initiating attorney, and the burden shifts to the nonresponsive attorney to explain why there has been no response or communication.

There was an overall consensus that complying with the discovery rules and communicating with one another was of utmost importance. The group found that emails were effective, but practitioners should also follow up with phone calls. Voice or in-person communications help establish better working relationships with other practitioners. "Follow up" is also key, and it is the responsibility of the practitioners to avoid court intervention. The group also appreciated and acknowledged that if judicial intervention is necessary that the judges should enforce the discovery rules not being followed.

c. How can the court help facilitate discovery? What processes could be changed to streamline discovery?

The group combined these questions as the questions seemed to overlap. The group discussed ways to help facilitate discovery more efficiently to avoid exorbitant litigation costs. Hawai‘i Family Court Rule 16 has proven to be useful in narrowing discovery requests. In some cases, the court can and has used Hawai‘i Family Court Rule 53 to appoint a discovery master. However, this rule is rarely used in discovery as it is costly.

Practitioners appreciate judges who enforce prior court orders and discovery deadlines by issuing sanctions and fees. The group noted firm deadlines to exchange information are necessary to ensure enforcement and compliance. Declarations in a motion to compel need to be specific and detailed as it will assist the court in enforcing compliance with firm deadlines.

Suggestions to streamline discovery included using a mediator to facilitate the prompt and accurate exchange of discovery; having the judges issue orders requiring parties to exchange or turn over specific documents; and, dispensing with the need for custodian of records for certain records.

The overall consensus was judges should impose sanctions for noncompliance whether discovery is formal or informal. The group noted that formal discovery should be used when communication between practitioners may not be effective.

2. Before, During, and After Court Hearings

a. What communication processes or practices work well for counsel before court appearances?

When attorneys regularly speak to one another, good relationships are fostered. Counsel in CWS cases that have trials set previously met a week prior to the hearing which made the hearing more efficient and perhaps this practice should be implemented again.

Depending on the circumstances, a suggestion was made for counsel to email opposing counsel to address outstanding issues prior to trial. For pre-decree or post-decree hearings, it will vary based on the attorney's determination relating to the admissibility of exhibits. It was agreed that discussing issues ahead of time streamlines the procedures for trials and other proceedings. Judges can help by reminding counsel to talk to opposing counsel. A distinction was made between being adversaries and being on either side of a case and understanding the process would be easier and less contentious if parties did not take things personally.

b. What communication expectations are there at court?

In terms of communication expectations at court, it was emphasized that attorneys should communicate in advance to give parties sufficient time to consider matters beforehand.

Everyone at court should be professional at all times. Practitioners should notify bailiffs or other court staff about the status of their cases so the court can manage the calendar efficiently.

For the CWS calendar, attorneys should be in touch with the social worker and the Deputy Attorney General in order to have a complete understanding of the case prior to the court hearing. Additionally, the CWS report needs to be provided in time for the parties to review and discuss it. The bottom line is that attorneys need to communicate

with each other and be prepared; therefore, arriving at court early and being in court early helps facilitate the entire process.

c. What communication processes or practices work well in relation to court orders?

The group found it helpful to record the court decision, and to prepare the order sooner rather than later. The court appreciates letters requesting extensions, which also helps the clerks more easily keep track of the orders.

A suggestion was made to extend deadlines, so counsel has adequate time to review proposed orders. This will avoid situations where counsel receives a document at the last minute. Any response, including a short and brief one, is better than no response at all. The adversarial process will not be hindered if attorneys work with and respect each other.

The group related how conversations change when parties meet in person as opposed to appearing on Zoom. Some found that being in court facilitates agreements and the exchange of documents. Hearings in divorce cases are in person and there is a noticeable difference in parties working out agreements in person compared to when they appeared remotely. There were still some who believed that Zoom appearances saved attorneys time and being in person does not always achieve settlements. The liberal approach is to allow Zoom appearances for non-evidentiary hearings. When attorneys communicate before the hearing, it will save the court time. Attorneys need to be held accountable and when attorneys do not communicate with each other, the court has reserved rulings until the parties do so.

At pretrial, attorneys appreciate the court inquiring of counsel as to whether they discussed the case as a reflection of the court's expectations. Time will be saved if the parties inform the court ahead of time that an agreement has been reached. The court may bring attorneys in to explain the court's time constraints and the court's expectations then attorneys can appropriately discuss matters outside of chambers with their clients. It is helpful for the court to share thoughts or inclinations on issues or have a side bar to point out what is in dispute to reach an agreement.

For the TRO calendar, the court may prioritize cases where the parties have an agreement, and this may encourage parties to settle. In the Second Circuit, the court is considering reintroducing calendar call. The group discussed favoring oral rulings and the opportunity to ask for clarifications to avoid having to file motions or Rule 58. If necessary, the court may make an oral ruling on another day and will allow parties to appear by Zoom.

The group found it helpful when parties are at court to work out the details of proposed orders and to ask the court for assistance with such orders. The court is willing to meet with attorneys to provide inclinations and feedback for an order. Rule 58 was emphasized in terms of what can be included in a court order and how it may cause delays if opposing counsel refuses to sign the order. The rule also requires opposing counsel to submit objections which will take more time in finalizing an order. Some suggestions were to use mediation as a resource or to obtain the transcript or video of the hearing and to summarize it if parties cannot recall specific details. In the past, the court allowed oral decisions to be recorded and it may be appropriate to permit this when counsel is preparing orders.

At Legal Aid where pro se litigants are involved, there are problems explaining orders or receiving orders four to six weeks late. For CWS cases, the deputy attorney general prepares the order, and the parties are able to review the written order prior to the court finalizing it. In these cases, the court may expedite an order so parents who do not have a viable mailing address can have a copy in hand when they leave court. The group found that preparing the order at court will result in it being filed sooner and circumvents the need for Rule 58.

3. Working with Pro Se Litigants

a. What communication processes or practices work well for counsel?

It appears there are more litigants choosing to represent themselves recently, and it is important to work well with them. The group acknowledged that it is necessary to have empathy to be able to better relate with them.

The group agreed that there needs to be respect for one another. The group noted it is extremely helpful to put things in writing or summarize information in an email. Attorneys should be cordial and avoid legalese. Pro se litigants may be apprehensive to speak with attorneys. Often, they may distrust the practitioner representing the other side and may only want to speak before a judge.

Best practices in this situation is to do most if not everything in writing. This is best for both the practitioner and the pro se litigant. One should not avoid communicating with a pro se litigant, but always try to communicate and be professional.

b. How can the court help facilitate cooperation and communication with pro se individuals?

It is helpful for the court to briefly explain the process to pro se litigants, particularly requiring them to speak to the attorney on the other side and exchange contact information. The informational speech should be directed to both parties, so it does not appear partial to one side. The group emphasized that no one should feel that they are being held to a different standard because they either have or do not have an attorney representing them.

Examples of this was particularly prominent when there is a contested hearing or trial. The group recognized the difficulty in asking the court to receive things into evidence-some feel it is unfair that the court is more lenient on pro se litigants because they do not know the rules. At the same time, the court acknowledged that it needs to balance courtroom procedures and rules to be fundamentally fair to all parties.

Court orders should be detailed and have clear due dates so that everyone knows what is expected of them. Here, attorneys suggested financial consequences or sanctions for abusive behavior caused by either the pro se litigant or the attorney. The judges indicated that they have had training on “toxic litigants,” and they are aware of how difficult it is for attorneys handling clients and dealing with the other side.

The group discussed how mandatory initial disclosures can be helpful in facilitating agreements from the start. The court should explain to the pro se litigant that no one is trying to take advantage of them. Also, the Family Law Section could consider creating

a committee on initial disclosures. The Family Court Rules Committee meets regularly and could discuss initial disclosures as well.

Litigants who represent themselves could also be encouraged to obtain an attorney, referred to particular resources for more information, and informed about self-help centers at the courthouses. Another issue is that some pro se litigants do not have addresses and therefore perhaps service by email could be allowed. Although the court may allow pro se litigants some leeway, the court must attempt to protect the record and find a balance because case law requires fairness.

In terms of JEFS, some pro se litigants are registered and there are procedures online to assist them in registering. A suggestion was made to have the proposed committee on initial disclosures consider having self-represented litigants register with JEFS or having them register as JEFS users within the Judiciary. Pro se litigants will be able to easily obtain documents in JEFS if they are registered users. The group also discussed providing a copy of Hawai‘i Family Court Rule 8 to the pro se litigant. When working with a pro se litigant, the attorney should explain why they are representing a party and provide them with information, like pay stubs.

V. REPORT OF THE CIRCUIT COURT CRIMINAL LAW GROUPS

A. COMMON TOPICS

1. Civility

Lawyers and judges have reported a concerning increase in the lack of civility in all practice areas.

There was a consensus that lack of civility is not a significant issue in the criminal bar. Attorneys and judges work frequently with each other, which promotes civility and collaboration. There was also a consensus that civility guidelines should not be included in the Hawai‘i Rules of Professional Conduct or enforced by the Office of Disciplinary Counsel (ODC). The participants agreed that issues that have arisen have been and should continue to be addressed by the individuals involved or by informal involvement of the court. It was suggested that education on civility would be the appropriate remedy if there was a significant concern rather than involving ODC. It was also related that ODC referrals would be counterproductive as it could potentially harm existing relationships and unnecessarily damage careers. The participants also discussed how civility can often be subjective, making enforcement of rules difficult and creating a potential administrative burden for ODC. Defense attorneys opined that enforcement by ODC of civility guidelines could have a chilling effect on zealous advocacy.

2. Training and Continuing Education.

- What additional judicial training do attorneys suggest judges should have, and why?

All judges attend bi-annual, mandatory training conferences. Additionally, they are allowed to attend seminars and conferences on their own and may request that the Judiciary fund the tuition and travel expenses. Attorneys suggested it would be helpful to be informed on the specific topics on which judges receive training. Attorneys stated it would be beneficial for judges to receive training on topics ranging from education on evidentiary issues to the operations of treatment programs and correctional facilities.

Due to the increased presence of electronic and digital evidence, including cellular phone data, email accounts, and social media, it is also important for judges to be

educated on these topics. Likewise, training should be given on forensic evidence such as DNA analysis, “shaken baby” syndrome, and ballistics so judges are competent to address these evidence-related issues.

There was a strong consensus that judges should visit the correctional facilities. As judges are tasked with making decisions about releasing or incarcerating an individual, attorneys believed it was important for judges to be educated about actual confinement conditions.[1] It was noted that prosecutors from the various circuits have toured the correctional facilites and found such tours informative and educational. Attorneys also requested judges receive training on the operations of the various substance abuse treatment programs. Understanding criteria for admission, the application process, the program specifics, and waitlists for available bed space would assist judges in making informed decisions when treatment is a concern or under consideration.

It was also recommended that judges receive cultural sensitivy training particularly for Native Hawaiians defendants who are overrepresented in the criminal justice system. The judges should understand societal disparities and consider culturally-based programming. Other recommendations for judges’ training topics included: the dynamics of domestic violence to aid the court in understanding sensitivities of victims;[2] national practices for speciality courts; consensus among judges for the specialty court application process; the process for competency evaluations under HRS § 704 and the preparation of orders containing the appropriate language to ensure timely transport and placement of defendants.

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[1] On December 1, 2023, seven First Circuit criminal judges and additional court staff members toured Oahu Community Correctional Center. They were able to visit a number of areas in the facility including various inmate modules, intake services, the video-teleconference room, the library and the visiting area. They were unable to tour the medical unit or the mental health module. Tour participants were able to ask questions of the correctional officers and other staff. It was reported that the participants found the tour to be of great value.

[2] At a recent judicial conference, judges received training on behavioral health and trauma-informed responses. The training addressed the trauma that can occur during courtroom proceedings for both defendants and victims.

- What areas of continuing education do the judges suggest attorneys should have, and why?

Judges believed attorneys would benefit from further training in motions practice, especially pretrial motions and motions in limine. Judges rely on motions to make informed decisions. Some attorneys wait until the eve of trial to fully address and litigate important evidentiary issues. Robust and timely motions allow for better records, comprehensive rulings, efficient trials, and fewer appellate issues. Attorneys suggested the implementation of a discovery deadline in conjunction with a trial order to improve motions practice and to prevent opposing counsel from late disclosure of discovery in order to cure a pretrial motion issue.

Judges expressed the importance of improving the development of the overall record. It is not enough for attorneys to state their position without substantiating or articulating the basis for their position. The sentencing factors set forth in HRS § 706-606 were highlighted as an example. Attorneys often state their position on sentencing without articulating which statutory considerations apply to their argument and why It was also noted that the presentence investigation report (PSI) does not always provide all the necessary information about a defendant's background. Defense counsel should consider supplementing the record with a sentencing memorandum or more comprehensive oral arguments to provide the court better insight at the time of sentencing. Judges also requested attorneys be diligent about ensuring a clear record is made when proceedings are electronically recorded. There have been instances where parts of the recording are inaudible, resulting in an incomplete record.

Continuing education on jury instructions was also suggested. Issues relating to jury instructions create appellate issues and additional training for both attorneys and judges would be beneficial to minimize appeals.

3. Communication

- What communication processes or practices between the courts and attorneys work well? What processes should be improved?

The participants agreed that email is the preferred method of communication as it memorializes communication between the parties. While the Judicial Electronic Filing and Service System (JEFS) has been a great asset to the criminal system, attorneys are concerned that courts often rely on JEFS to correspond with counsel. This becomes problematic when courts set or reschedule hearing dates and do not otherwise notify counsel other than through the JEFS. If the case is an older case or in the post-sentencing stage, the attorney assigned in JEFS may no longer be employed at the same office and therefore, the notifications will not be received by the current attorney assigned to the matter. A separate email from the court to the appropriate offices, especially on older cases, would be helpful. It was suggested that a hyperlink be made available within JEFS notification emails to allow parties to access filed pleadings directly through the email. Attorneys also stated it would be helpful to include opposing counsel on email requests submitted to the courts for hearing dates to ensure advance notice of the dates.

The benefits of pretrial conferences and status conferences were also discussed. First Circuit attorneys explained that not all judges conduct pretrial conferences, or the conferences are conducted on the same day as the trial call. Conferences held separately from trial calls facilitate candid dialogue about case issues and provide an opportunity for counsel to receive input from the court. It was requested that pretrial conferences be utilized by all judges. Third Circuit attorneys stated that courts, especially in Hilo, conduct regular pretrial conferences, which are beneficial to the plea negotiation process.

First Circuit has a Criminal Administration division, which helps streamline cases, promotes efficiency, and ensures defendants with multiple cases are assigned to the same judge. In the Second and Third Circuits, there is no system in place to monitor case assignments. This results in a defendant with multiple cases being assigned to different judges. Addtitionally, attorneys in the Second and Third Circuits are often assigned to cases by courtroom designation, which means the same defendant will also have multiple

attorneys representing them. Better communication within the courts to ensure the same judge handles all of a defendant's cases would foster efficiency and eliminate the need for attorneys and courts to transfer cases to different judges for consolidation.

B. SPECIFIC TOPICS

1. Sentencing Considerations

- The length of probation terms in Hawai‘i ranks amongst the highest in the nation. HRS § 706-623 authorizes the court to impose shorter terms of probation. How often is this utilized? What are the arguments for and against shortened probation?

Participants were provided with a study conducted by the Pew Charitable Trusts that addressed the varying length of probation terms across the country and how shortened terms may promote more meaningful supervision and facilitate improved success on probation.[3] There was a consensus that Hawai‘i's current probation model could be improved. A probation officer's caseload can exceed 125 defendants although best practices recommend 35 to 40 defendants.

Currently, probation terms for felony cases are typically set at four or five years,[4] regardless of the defendant's record or the circumstances of the underlying offense. Motions for early termination of probation can be filed and are often granted. There was a consensus that courts are open to granting motions for early termination of probation when a defendant is compliant and has met milestones, such as completion of treatment

[3] The Pew Charitable Trusts. (Dec. 2020). *States Can Shorten Probation and Protect Public Safety.* https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety

[4] HRS **§ 706-623 Terms of probation.** (1) When the court has sentenced a defendant to be placed on probation, the period of probation shall be as follows, unless the court enters the reason therefor on the record and sentences the defendant to a shorter period of probation:
(a) Ten years upon conviction of a class A felony;
(b) Five years upon conviction of a class B or class C felony under part II, V, or VI of chapter 707, chapter 709, and part I of chapter 712 and four years upon conviction of any other class B or C felony;

programming. In the First Circuit, judges presiding over the misdemeanor domestic violence calendar regularly grant early terminations of probation as a matter of practice after a defendant has completed all requisite classes or treatment. This has proven to provide an incentive for defendants to complete probation requirements and allows the probation department to focus on those who need extra supervision. It was noted that early termination requests are often encouraged by probation officers.

Third Circuit attorneys shared that sometimes judges will terminate probation early, despite a defendant's non-compliance, due to overcrowded conditions in the correctional facilities. In those situations, judges will impose jail time and once the jail sentence is completed, the court then terminates probation which avoids prolonging the case. A concern was raised that this practice does not adequately address the defendant's failure on probation and does not provide meaningful rehabilitation.

In the First Circuit, it is common for plea agreements to prohibit future motions for early termination of probation. Defense attorneys stated they only agree to the condition to secure otherwise favorable plea agreements. The imposition of this condition may disincentivize defendants from reaching probation milestones and does not consider each defendant's individual circumstances.

There was a consensus that requests for shorter probation terms at the time of sentencing are infrequent. However, it was noted that Kona judges often grant conditional discharges for drug possession cases and will set the supervision term at two years.

Participants disagreed as to whether shortened probation terms would improve the probation system. Some believed shortened terms could be detrimental as they may limit defendants access to probation resources. Others believed that the ability to request the early termination of probation was sufficient to address any concerns about burdensome probation terms.

Other participants believed shortened probation terms should be codified consistent with the national trends. The focus should be on goal-based and not time-based supervision. It was noted that lengthy probation terms can be anxiety-provoking for defendants. Even when in compliance, defendants are fearful of the possibility of a

negative interaction with their probation officer, a false positive on a drug test, or an unintended technical violation such as missing an appointment. Attorneys shared examples of defendants being on probation for more than 10 years for the same case because of probation revocations often initiated near the latter part of their probation terms. Some attorneys expressed that it is common for defendants to struggle with compliance when they first start probation, but do not receive increased attention or support due to the overwhelming number of probationers caused by Hawai‘i‘s lengthy probation terms. It was noted the highest rates of recidivism are seen in the early phase of supervision, and the probation departments should be able to focus their resources on monitoring the most high-risk and high-need probationers. It was suggested that increased probation review hearings would allow the parties to track a defendant’s compliance and enable the court to intervene before a revocation motion is filed.

- Are there non-traditional sentencing options that should be considered?

In the First Circuit, juveniles are incentivized by earning “discharge credits,” which correspondingly reduce the length of their supervision by one month for every month of compliance. It was suggested that a similar system be utilized for adult probationers. Some attorneys also suggested that a defendant’s pre-trial time should be credited toward their post-conviction supervision. Defendants are often on supervised release with probation-like requirements or conditions of bail for lengthy periods of time pending the resolution of their case without receiving any credit. Defendants who are incarcerated during the pre-trial phase of their case are credited that time as a part of their sentence; the same credit should apply to those on pre-trial supervision and conditions.

Electronic monitoring as a sentencing option is not currently viable in the Third Circuit. There are only five monitoring devices; however, with additional resources, electronic monitoring could be imposed as an alternative to incarceration. It was suggested that options other than traditional electronic monitoring, such as phone applications, could be explored.

Other recommended sentencing alternatives were house arrest and the increased use of community service specific to the underlying offense. Attorneys also encouraged

judges to be creative with sentencing and focus on the particular needs of each defendant.

2. Change of Plea and Sentencing Practices

- HRPP (11)(f)(1) authorizes the court to participate in discussions leading to plea agreements. Do the parties seek the court‘s participation in plea negotiations? Why or why not?

In the First Circuit, HRPP Rule 11 plea agreements are often negotiated, and judges routinely approve such agreements.[5] There was a consensus among First Circuit practitioners that Rule 11 agreements help facilitate resolutions of cases because it provides certainty to all parties. However, the practitioners were divided as to whether the court should be actively involved in the plea negotiation process. Some believed that effective negotiations among the parties could be derailed by the court’s involvement. Others expressed the court‘s input was beneficial because it can help the parties reach an agreement. The First Circuit prosecutor’s office requires approval from as many as three supervisors to authorize a plea agreement. It can be helpful to secure such approval if the court has provided insight and supports a proposed resolution for a case. Some courts promptly schedule the initial pretrial conference after the case has been assigned. It was suggested that it would be more productive if the courts gave adequate time to the attorneys to thoroughly review the case, provide discovery, and confer with either the defendant or complainant before scheduling the first conference.

Second Circuit practitioners stated judges rarely accept Rule 11 plea agreements, are not actively involved in the plea negotiation process, and will generally not give

[5] HRPP Rule 11 (f)(1) IN GENERAL. The prosecutor and counsel for the defendant, or the defendant when acting pro se, may enter into plea agreements that, upon the entering of a plea of guilty or no contest to a charged offense or to an included or related offense, the prosecutor will take certain actions or adopt certain positions, including the dismissal of other charges and the recommending or not opposing of specific sentences or dispositions on the charge to which a plea was entered. The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.

sentencing inclinations. Attorneys believed it would be beneficial to have regularly scheduled pretrial conferences to help facilitate resolutions.

In the Third Circuit, some divisions will bind themselves to Rule 11 agreements, while others will not. Several Kona practitioners reported never having resolved a case by way of a Rule 11 plea agreement and noted limited opportunities for meaningful pretrial conferences due to the judge‘s heavy dual civil-criminal calendars. Hilo practitioners reported that the courts are involved in pretrial discussions and will discuss the case issues, needs of the defendant, and sentencing possibilites with the parties. It was noted, however, that there is often a delay in scheduling a change of plea hearing due to the court‘s crowded calendars.

The Fifth Circuit reported that one judge regularly accepts Rule 11 plea agreements and places sentencing inclinations on the record, which pracitioners believe assists the resolutions of cases. The other circuit judge will not bind the court to Rule 11 agreements or place sentencing inclinations on the record unless there is a special circumstance.

- What are the best practices for change of plea and sentencing hearings?

Prior to a change of plea or sentencing, it would be beneficial to know whether the defendant has other pending charges. The First Circuit reported instances where a case is being screened by the prosecution while the same defendant has either negotiated a plea agreement or has been sentenced on a separate case. Some attorneys expressed the delayed charging of a new case already known to the prosecution is inefficient and detrimental to defendants as it results in delayed resolution and often unnecessarily extends the time a defendant remains in custody. Third Circuit prosecutors reported ongoing efforts to tailor their case management system to ensure any uncharged cases are flagged, and they often resolve uncharged matters by incorporating them into a defendant’s plea agreement.

At sentencing, judges would appreciate improved articulation of the sentencing factors. Even at Rule 11 sentencing hearings, the parties should still address why the agreed upon terms satisfy the statutory sentencing criteria.

3. Specialty Courts and Diversion Programs

- How accessible are the available Special Court and Diversion Programs? Should they be expanded? What are the barriers to doing so?

There was a consensus that it would be beneficial to the criminal system if more defendants were accepted into specialty courts or offered diversion programs. A lack of funding and resources have limited accessibility and expansion. It was noted that best practices for specialty courts is to have a maximum of 125 active cases.

The First Circuit reported a shortage of probation officers and although best practices recommend 30 to 50 cases per probation officer, current caseloads exceed those numbers. The First Circuit currently has a Drug Court, Mental Health Court, Veteran's Court, and launched a Women's Court in the beginning of 2023. Women's Court accounts for the unique needs of women in the criminal system where most participants have substance or trauma-related issues.

The First Circuit has recently started a Circuit Court Jail Diversion program modeled after Miami-Dade County's diversion project. Individuals with a serious mental illness and no history of violence, who are charged with Promoting a Dangerous Drug in the Third Degree can qualify for the program. The goal is to have individuals assessed soon after arrest, and if they qualify, to create a diversion plan for them that includes treatment. Successful completion of the program will result in a dismissal of an individual's case. There have been significant challenges with the assessment phase of the program, but alternative screening options are being explored.

The Second Circuit reported a successful Drug Court program with 100-125 active participants. It was recognized that the Veteran's Court could be improved with better structure and additional federal funding. The Miami-Dade diversion model was presented to the Second Circuit; however, lack of available resources such as alternative housing and limited mental health personnel made launching a similar program impossible.

The Third Circuit reported the Drug Courts and Veteran's Courts were doing well but expressed the need for a Mental Health Court to address the increasing numbers of criminal defendants with mental illnesses. There was once a robust Jail Diversion

program in the District Court, and it was believed a similar model could work well in Circuit Court. The District Court program has experienced a decline in participants, likely due to lack of resources.

The Fifth Circuit reported that although their Drug Court has been successful, additional resources are needed to accommodate more participants.

Practitioners questioned the practice of automatically excluding violent offenders from all specialty courts. It was expressed that some criminal offenses are deemed violent, but the actual underlying facts are not severe enough to warrant exclusion. It would be preferable to evaluate individuals on a case-by-case basis. It was reported that the First Circuit has moved away from automatically disqualifying applicants for certain violent offenses and instead considers the circumstances of each defendant.

Participants believed a specialty court or diversion programs for family court cases would also be beneficial. Domestic violence situations present unique needs for both the offender, the victim, and their families. Therapeutic counseling for all parties with a diversion component is needed in the criminal system.

VI. REPORT OF THE DISTRICT COURT CRIMINAL LAW GROUP

A. COMMON TOPICS

1. Civility

Lawyers and judges have reported a concerning increase in the lack of civility in all practice areas.

- Should the civility guidelines be included in the Hawai‘i Rules of Professional Conduct and be enforced by the Office of Disciplinary Counsel?

There was a consensus that civility guidelines should not be included in the Hawai‘i Rules of Professional Conduct or enforced by the Office of Disciplinary Counsel (ODC). Civility issues are often simply resolved by the court.

Judges have observed inappropriate courtroom attire and decorum, especially during remote proceedings, in addition to unprofessional language used in written pleadings. Judges stated informal discussions with the attorneys have been sufficient to resolve concerns but additional training on the civility guidelines would also be beneficial. Hawai‘i Rules of Penal Procedure (HRPP) Rule 53 was noted as another option for judges to address questionable attorney conduct.[1] It was suggested that judges in each circuit consider holding informal brown-bag discussions with practitioners to solicit further feedback on civility issues. There was a consensus that awareness of the civility guidelines should start in law school with continued civility refresher training throughout one’s career.

[1] HRPP Rule 53. REGULATION OF CONDUCT IN COURTROOM.
(a) Required notice. Attorneys shall advise the court promptly if a case is settled or a matter will not proceed as scheduled. An attorney who fails to give the court and opposing counsel such prompt advice may be subject to sanctions as the court deems appropriate.
(b) Effect of failure to appear or prepare. An attorney who, without just cause, fails to appear when required or unjustifiably fails to prepare for a presentation to the court necessitating a continuance may be subject to sanctions as the court deems appropriate.

2. Training and Continuing Education

- What additional judicial training do attorneys suggest judges should have, and why?

Criminal court is often stressful and emotional for defendants, complainants, and witnesses. Attorneys recommended judges receive training on courtroom control and de-escalation techniques especially for pro se litigants. It was noted that both judges and attorneys would benefit from such training.

Additional training on the technological platforms used by the court in remote proceedings was also recommended. Attorneys stated continued use of remote proceedings was efficient and accessible, and the judges' fluency with features of the platforms used would promote efficiency.

- What areas of continuing education do the judges suggest attorneys should have, and why?

Attorneys appearing in District Court are often less experienced with trials and would benefit from training on trial skill fundamentals. Judges would like to see increased training in the areas of evidentiary foundation and effective use of objections. It was recommended the attorneys attend trial academies when available to perfect their trial skills.

3. Communication

- What communication processes or practices between the courts and attorneys work well? What processes should be improved?

Participants discussed the importance of accessibility to, and readily sharing, information between the courts and attorneys. It was recommended that the Prosecuting Attorney's offices and the Office of the Public Defender provide the courts and each other with a list of their respective attorney phone numbers and email addresses. It would also be beneficial to exchange courtroom assignments and schedules, so attorneys know who to contact for a particular case. Attorneys appreciate when the courts distribute calendars to the attorneys ahead of time. Private practitioners requested they be included in the

exchange of information since information is often only shared with and between the government agencies.

Attorneys suggested it would be helpful for courts to notify attorneys in advance regarding the order in which cases will be called. District Court calendars are often heavy, and attorneys may be able to handle other matters while the court hears other cases.

Judges encouraged attorneys to seek feedback from the courts after hearings or trials. There was a concern raised whether judges should provide feedback if a defendant has been found guilty because of the possibility of an appeal. The attorneys agreed the court's feedback was of great value and appreciated judges who were willing to meet with them and provide feedback.

B. SPECIFIC TOPICS

1. Sentencing Considerations

- The length of probation terms in Hawai‘i ranks amongst the highest in the nation. HRS § 706-623 authorizes the court to impose shorter terms of probation. How often is this utilized? What are the arguments for and against shortened probation?

Participants were provided with a study conducted by the Pew Charitable Trusts that addressed the varying length of probation terms across the country and how shortened terms may promote and facilitate more meaningful supervision and improved probation results.[2]

Participants agreed that it is uncommon for District Courts to impose shortened probation terms, and attorneys do not routinely request it. However, it was noted that Second Circuit judges will entertain arguments for shorter probation terms.

Participants had varying opinions on whether courts should impose shorter probation terms at the time of sentencing. It was stated that the current statutory

[2] The Pew Charitable Trusts. (Dec. 2020). *States Can Shorten Probation and Protect Public Safety.* https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety

sentencing scheme provides consistency and avoids disparate sentencing.[3] Filing a motion for early termination of probation was discussed as an option for cases where a shortened term of supervision is appropriate.

Some judges encouraged attorneys to file motions for early termination of probation when a defendant is compliant and has completed all necessary terms of supervision. It was noted that this practice incentivizes defendants to comply with probation and demonstrates that probation is effective. However, some attorneys expressed it is difficult to track cases and file early termination motions that will meaningfully shorten a defendant's term of probation. These motions are often filed close to the completion of probation and by the time the motions are calendared, probation is almost completed rendering the motion moot. It was suggested the courts permit attorneys to submit non-hearing motions for early termination of probation to help streamline and make the process more efficient.

The participants discussed the impact of HRPP Rule 11 plea agreements on motions for early termination of probation. A question was raised whether filing such a motion violated Rule 11 plea agreements that provided a probation sentence. Some participants believed the option to file an early termination motion should be negotiated in advance and included in the plea agreement. Others believed that unless otherwise

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[3] HRS § 706-623 Terms of probation. (1) When the court has sentenced a defendant to be placed on probation, the period of probation shall be as follows, unless the court enters the reason therefor on the record and sentences the defendant to a shorter period of probation:

(c) One year upon conviction of a misdemeanor; except that upon a conviction under section 586-4, 586-11, or 709-906, the court may sentence the defendant to a period of probation not exceeding two years; or

(d) Six months upon conviction of a petty misdemeanor; provided that up to one year may be imposed upon a finding of good cause; except upon a conviction under section 709-906, the court may sentence the defendant to a period of probation not exceeding one year.

stated in the Rule 11 agreement, the defendant should have the option to move for early termination of probation and prohibition of such future motions should be included in the agreement, if deemed necessary.

A concern was raised about the efficiency of imposing District Court probation on defendants already on probation with the Circuit Court. Often different probation officers are assigned to monitor cases which can inefficiently deplete the probation department's resources.

The Second Circuit places defendants on District Court supervision only when a deferred acceptance of plea has been granted. The courts do not require formal supervision by the probation department, and the judges monitor compliance by scheduling proof of compliance hearings which helps conserve the probation department's resources. In contrast, Fifth Circuit defendants are routinely placed on District Court probation.

Attorneys requested judges be flexible with sentences for out-of-state defendants. Hawai‘i has a large population of transient District Court defendants, and probation sentences make it difficult for them to relocate to the mainland. Probation sentences often keep these defendants within the state without a support system when an out-of-state family is willing to arrange travel to the mainland for the defendant.

- Are there non-traditional sentencing options that should be considered?

The participants recommended the courts consider various sentencing alternatives. Judges encouraged attorneys to suggest non-traditional sentencing options. Ankle monitoring as an alternative to incarceration was discussed, but cost and lack of resources limit its utility. The Fifth Circuit does not have ankle monitors, and the First Circuit only utilizes ankle monitors for pre-trial release. Defendants are often required to pay for the use of a monitoring device, and it may be cost-prohibitive for indigent defendants.

Deferred prosecution agreements were another option discussed. It allows the parties to enter into an agreement prior to a plea which results in the ultimate dismissal of the case if certain conditions are met.

The First Circuit's Driving While Impaired (DWI) Court program has worked well to create different sentencing options for successful participants. Repeat DWI offenders enter a plea prior to admission and are immediately sentenced while a motion for reconsideration or a motion for reduced sentence is filed. The sentence is stayed pending successful completion of the program, at which time the motion for reconsideration or reduced sentence is granted.

Attorneys recommended judges consider imposing community service specific to the charged conduct. The Judiciary has a limited list of approved community service organizations and should consider expansion of the approved list to facilitate diverse and specialized community service options.

2. Specialty Courts and Diversion Programs

- How accessible are the available Specialty Court and Diversion Programs? Should they be expanded? What are the barriers to doing so?

Participants discussed the need to expand and improve access to Community Outreach Court (COC). Currently, First Circuit defendants require a referral to COC by the Office of the Public Defender. Private attorneys should be able to make independent referrals. The need for a designated case manager is critical to the success of the COC program. The Second Circuit did not receive legislative funding for a COC case manager, whereas the First Circuit received funding. The Second Circuit's current case manager position is a volunteer. The lack of funding for COC case manager positions has been a significant barrier to expanding the Second Circuit's COC program. Other circuits have also been unable to launch a COC program due to the lack of funding. COC should be available in all circuits and the legislature should consider state-wide implementation rather than by individual circuits.

Participants also discussed the benefits of the Restricted License Program which allows individuals who have drivers' license stoppers for unpaid traffic fines to negotiate a payment plan with the court to pay off their fines in exchange for a temporary restricted drivers' license. However, participants noted the backlog of requests in the First Circuit.

The Second Circuit currently restricts applicants to those without pending traffic violations and reconsideration of this policy should be considered to assist more people.

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