

Hawai'i State Bar Association
Committee on Judicial Administration

2014 CIVIL LAW FORUM

Ali'iolani Hale
Supreme Court Building, Room 101

Tuesday, October 21, 2014

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INTRODUCTION

As described in the Hawaii State Bar Association (“HSBA”) Board Policy Manual, the Committee on Judicial Administration (“JAC”)¹

maintains a close relationship with the judiciary on matters of mutual concern to the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinates activities of the HSBA relating to improvement of the judiciary and administration of justice.

Following a successful 2013 Bench Bar Conference, the JAC developed a forum concept to focus on certain issues in the criminal area² and separately in the civil area.³ The Civil Law Forum occurred on Tuesday, October 21, 2014 with the participation of 19 judges, seven court administrators, eight guests, and 54 attorneys.

WELCOME (Associate Justice Simeon R. Acoba (ret.))

Associate Justice Simeon R. Acoba (ret.) welcomed attendees and remarked that the interaction between the Judiciary and the bar benefits judges, lawyers, and ultimately clients and the public because the dialogue makes the judicial system more efficient and equitable. Justice Acoba thanked the members of the panels, the HSBA Committee on Judicial Administration, and the Judiciary staff. He described the Civil Law Forum as an adjunct to the bench-bar conferences and described the Judiciary’s accessible, diligent, and receptive approach to responding to the bar’s comments.

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

² The Criminal Law Forum took place on Tuesday, September 23, 2014.

³ The Civil Law Forum Committee members included Steve J.T. Chow, Judge Karen T. Nakasone, Judge Catherine H. Remigio, Judge Joel E. August (ret.), Judge Randal G.B. Valenciano, Kahikino Noa Dettweiler, Edward C. Kemper, Dennis W. Chong Kee, Don J. Gelber, Judge Ronald Ibarra, Justice Pollack, Justice Acoba (ret.), and Carol K. Muranaka. Teri-Ann E.S. Nagata, Jeffrey Hu, and Kyleigh F.K. Nakasone served as Reporters.

OPENING REMARKS (Chief Justice Mark E. Recktenwald)

Summary: The Judiciary welcomes the bar's thoughts on proposed reforms of the civil justice system.

Chief Justice Recktenwald thanked the organizers and attendees. He noted that the earlier bench-bar conferences led to real changes, developments, and advances, including new or proposed rules regarding telephonic appearances, pro hac vice admissions, and electronic devices. Chief Justice Recktenwald has written articles for the *Hawai'i Bar Journal* explaining what was proposed at the conferences and what the Judiciary has done to respond. The Judiciary's commitment to the Civil Law Forum was reflected in the attendance of all four chief circuit judges and court administrators from across the state. The Civil Law Forum builds on the bench-bar conferences by allowing the Judiciary and bar to discuss issues in greater depth.

Chief Justice Recktenwald put the Civil Law Forum into context nationally. He described the increased focus in the last five years on reforming the civil justice system. For example, a 2009 report by the America College of Trial Lawyers, which includes several thousand attorneys from across the county, concluded that the civil justice system takes too long and costs too much. Having judges more actively involved in case management has always been raised, but the lack of resources is an issue. The 2009 report acknowledged the issue and suggested that the key may be to identify cases for which a higher level of management is appropriate. Certain jurisdictions have started pilot case management programs.

The Hawai'i Supreme Court has looked at reform in the area of electronic discovery. The Court asked the Hawai'i chapter of the American Judicature Society to look at the issue, and a committee chaired by Judge Katherine G. Leonard and William C. McCorriston proposed new rules on the subject. These rules were then considered by the Judiciary's Committee on Rules of Civil Procedure, which recommended rules that will go into effect on January 1, 2015.

Other reforms being considered and implemented include new Federal Rules of Civil Procedure that are pending before the Judicial Conference, and an expedited civil action program in Texas for cases worth less than \$100,000. Chief justices in other states have formed a task force chaired by Chief Justice Thomas A. Balmer of Oregon that is considering a civil justice reform initiative. The task force will provide its recommendations next year.

Chief Justice Recktenwald asked attendees to share their thoughts on whether these initiatives should be considered for Hawai'i. Some initiatives might be premature at this point, but others, like mandatory initial disclosures, pursuant to Federal Rules of Civil Procedure Rule 26, might be appropriate. It would be very helpful for the Judiciary to be informed of the attendees' sense of whether it is time to establish a task force.

But more important than a potential task force is having the presence of the attendees at the Forum who convened to share their thoughts on making the civil litigation process fair and efficient in every case. Chief Justice Recktenwald stated that the presence of the attendees was very important to the Judiciary.

I. ENVIRONMENTAL COURT UPDATE (Associate Justice Michael D. Wilson)

Summary: The Judiciary welcomes the bar's suggestions for the new Environmental Court.

Associate Justice Wilson provided an update on the Environmental Court, which he described as a concept on the verge of being implemented.

Justice Wilson asked attendees to ask themselves why they were in Hawai'i and what they cared about. One concern that has been engraved in the Hawai'i Constitution is the protection of the environment and, more specifically, natural beauty. This concern led to the creation of the Environmental Court. Like Vermont, the only other state with an Environmental Court, Hawai'i has turned to the Judiciary to implement its environmental values. Other values that have been implemented through federal and state judiciaries include safe working conditions, equal treatment of races and genders, and the rights of the accused.

The idea for the Environmental Court was conceived on Maui. The resulting legislation, Act 218, provides a new tool for the Judiciary, but the Environmental Court will really be a new tool for the entire bar. Court matters may include review of environmental impact statements, for example.

Act 218 stated that environmental disputes were dealt with in a variety of courts, leading to inconsistent application of the laws. To provide the necessary vigilance and stewardship, Act 218 created the Environmental Court and assigned it broad authority. Justice Wilson will present a report at the end of December regarding the number of cases that would qualify for the Court and the Court's implementation plan. He asked attendees to provide their constructive criticism and ideas.

Article XI, Section 1, of the Hawai'i Constitution requires a balance between development and the conservation of natural beauty and natural resources. Under Act 218, this balance must be specifically addressed by the Judiciary. Article XI, Section 9, protects individuals' environmental rights. Because of these provisions, the Hawai'i Environmental Court will be unique to Hawai'i as well as a model for other states.

Act 218 places responsibility for stewardship of natural resources among the Judiciary, the civil bar, and the criminal bar. Statistics show that most of the cases before the Environmental Court will be criminal cases. For example, the Environmental Court will be responsible for enforcing criminal provisions regarding clean parks, clean water, and protections for fish and coral.

Any suggestions by the Bar for the Judiciary would be gladly received.

In response to a question regarding the Environmental Court judges, Justice Wilson noted that Act 218 requires that judges be designated to the court. Designations will be made by the chief judges of each circuit, subject to approval by Chief Justice Recktenwald. Justice Wilson explained that judges will be designated on the district court and circuit court levels. The number of cases that these judges will hear is difficult to determine.

II. DISCOVERY DISPUTES (U.S. Magistrate Judge Kevin S.C. Chang, Steven J.T. Chow)

Summary: The U.S. District Court's Local Rule 37.1 would expedite the resolution of simple discovery disputes while minimizing the burden on trial judges and the fiscal impact on the Judiciary.

Steven J.T. Chow, who co-chairs the HSBA's Judicial Administration Committee with Justice Acoba, provided some background on the committee, which strives for improvement of the Judiciary and the administration of justice. Chow explained that, through Justice Acoba's leadership as co-chair for the last two years, the committee has developed the bench-bar conferences, the Criminal Law Forum, and the Civil Law Forum. Discussions during the bench-bar conferences have led to the development and exploration of new rules. The Judiciary, under the leadership of Chief Justice Recktenwald, has followed up on every topic discussed to explore the feasibility of potential reforms.

One topic discussed was discovery disputes. The bench-bar conferences looked at developing a procedure that would expedite resolution of discovery disputes while minimizing the burden on trial judges and the fiscal impact on the Judiciary. One suggestion was to implement a rule like that of the U.S. District Court's Local Rule 37.1.

Judge Kevin S.C. Chang described the history of Local Rule 37.1. Local Rule 37.1 was drafted by Magistrate Judge Barry M. Kurren after attending a conference on the mainland more than twenty years ago. There is now a version of Local Rule 37.1 in every federal district court in the country.

Local Rule 37.1 is one of the few federal court rules that would translate well in state court. The rule is effective because it begins with attorney cooperation. Local Rule 37.1(a) requires counsel to confer in good faith to attempt to limit or eliminate the need for a discovery motion or expedited assistance. Counsel must certify compliance with this requirement before they can take advantage of the expedited procedure.

The expedited procedure in Judge Chang's courtroom is for counsel to call the courtroom manager, who sets the deadline for letter briefs in three to five days. Counsel provides simultaneous letter briefs, limited to five pages in length. Some lawyers will incorporate other briefing but, if too much material is provided, the Court may instruct counsel to file a motion.

Judge Chang noted that certain matters are not suitable for resolution under Local Rule 37.1. For example, for disputes regarding e-discovery or waiver of privilege, Judge Chang often prefers to have a more complete record. If the dispute involves a request for *in camera* review, the suitability of Local Rule 37.1 tends to depend on how many documents are at issue. If five to ten documents are involved, the expedited procedure may be sufficient. If 30 to 200 documents are in issue, the expedited procedure probably would be inadequate.

In response to a question regarding conferences with the Court, Judge Chang stated that the three magistrate judges tend to examine the letter briefs and issue rulings without a conference. If Judge Chang believes a discovery conference would be beneficial, he will conduct the

conference by telephone to minimize costs. But more often than not, he simply will issue a one- or two-sentence decision. Decisions are generally provided within a few days. Local Rule 37.1 provides an opportunity for an appeal to a district judge, but such appeals are rarely filed.

Judge Chang assumed that, if the state courts were to adopt a similar rule, there would be no immediate appeal of the decisions. This, along with other benefits of Local Rule 37.1, would provide real advantages to state judges. The procedure is fair, and it saves time and resources. It would eliminate the need for motions and hearings, giving state court judges more time to do other things. The initial screening and decision making is quick. From a case management perspective, the procedure offers an interesting opportunity to set the scope of discovery in a way that will have some precedential impact in other discovery disputes. From an operational perspective, the procedure involves little additional work for court staff.

There may, however, be aspects of the procedures that state court judges would dislike. Some judges may dislike having disputes popping up on short notice. In federal court, however, the number of Local Rule 37.1 disputes is very low. The Magistrate Judges estimate that they resolve Local Rule 37.1 disputes an average of two to three times a month. Some judges may dislike increased accessibility to the court, but Judge Chang noted that, even under the current rules, lawyers may request discovery or status conferences. Some judges may want more complete records or more formal hearings but, for minor discovery disputes such as the location or date of a deposition, Judge Chang thought that judges' time would be better spent on other matters.

In response to questions, Judge Chang provided additional information. He does not set aside dates or times to handle expedited discovery disputes; he takes them as they come in. Judge Chang has not noticed common or recurring disputes or issues. One major difference between state court judges and federal magistrate judges is caseload. But Judge Chang believes Local Rule 37.1 is nevertheless a good option because it gives judges a rare opportunity to create free time.

With respect to e-discovery, Judge Chang believes cases benefit from active, hands-on case management. In general, however, lawyers have come to understand that e-discovery can be a double-edged sword. Disputes over e-discovery have been an issue but not one that the magistrate judges have been unable to manage. In this area, Judge Chang tends to appoint a special master from the mainland.

Judge Chang does not set a discovery conference in every case. Scheduling conferences, however, are set in every case. Scheduling conferences tend to primarily involve scheduling, but one issue that Judge Chang tries to raise at every scheduling conference is an early settlement conference or alternative dispute resolution. He will sometimes set a further scheduling conference in thirty days to discuss alternative dispute resolution. If discovery is necessary before alternative dispute resolution, Judge Chang will attempt to limit the discovery to what is essential.

Judge Chang discussed the proposed revisions to the Federal Rules of Civil Procedure regarding discovery. It is anticipated that these revisions will be adopted by the U.S. Supreme Court and then forwarded to Congress for approval.

The proposed amendment to Rule 1 adds language requiring cooperation among lawyers. Parties—like courts—should construe and use the Federal Rules to ensure the just and efficient resolution of disputes. Effective advocacy depends on the cooperative and proportional use of procedure.

The proposed amendment to Rule 26 requires that courts include proportionality in their analysis of the proper scope of discovery. This consideration is not entirely new, but the Advisory Committee's note states that the proposed amendment restores proportionality as factor in defining the scope of discovery. It is not clear how this will be considered in Hawai'i courts because Hawai'i's Rule 26 differs. The factors enumerated under the proposed Federal Rule 26 are similar to, but broader than, the existing factors under Hawai'i Rule 26.

In response to a question, Judge Chang stated that he has not yet had a case in which he was required to consider the proportionality factors. In his experience, disputes about the scope of discovery have involved disagreements over whether discovery is relevant to a claim or defense, rather than whether discovery is proportional. One interesting issue will be dealing with the assumed disparity between the resources that parties can devote to discovery.

Judge Chang concluded by discussing sanctions and said that he rarely imposes sanctions under Local Rule 37.1. Although parties have requested sanctions, the record on a Local Rule 37.1 dispute is very limited. It is difficult for parties to address both the issue of the discovery dispute and the issue of sanctions in the same five-page letter. In addition, if sanctions are imposed, they are likely to be appealed. Discovery sanctions are better sought in a motion to compel, which is subject to rules that require the imposition of sanctions.

Chow closed by noting that Chief Justice Recktenwald may call for further study of the issue, perhaps by a newly formed committee.

III. DISCLOSURE OF MEDICAL RECORDS AFTER *COHAN v. AYABE* (Michael N. Tanoue, Bert S. Sakuda, Ward F.N. Fujimoto, John C. McLaren).

Summary: The form Health Information Privacy Agreement and Stipulated Qualified Health Information Protective Order distributed to attendees offer a starting point for parties to address the balance between constitutional protections for plaintiffs' health information and insurers' record-keeping requirements.

John C. McLaren provided some background on the issues raised by *Cohan v. Ayabe*, 132 Haw. 408, 322 P.3d 948 (2014). McLaren explained that he drafted the petition for mandamus in *Brende v. Hara*, 113 Haw. 424, 153 P.3d 1109 (2007). In *Brende*, the Hawai'i Supreme Court prohibited collateral uses of protected health information without the plaintiff's consent. After *Brende* was decided, the courts were deluged with voluminous motions for protective orders because *Brende* did not resolve what provisions could be appropriately included in protective orders. Charles Crumpton was asked to chair a committee of lawyers that would draft a proposed protective order form to reduce or eliminate the need for motions. The committee proposed a protective order that was never formally adopted by the Judiciary but was widely used since 2008 until the decision in *Cohan*.

Michael N. Tanoue described the consequences of *Cohan* for insurance companies. Tanoue noted that Hawai'i statutes require insurance companies to maintain records for certain periods to ensure that insurance companies conduct business appropriately in this State. Property and casualty insurers are required to maintain records for a minimum of five years after the "close of a transaction," which most insurers interpret as five years after a settlement, judgment, or conversion of an arbitration award into a judgment and in which the appeal period has run. Workers' compensation insurers are required to keep records for eight years after the close of a transaction, which theoretically may be decades after a work-related injury. Insurance companies must maintain records and provide access to them for periodic reviews. The records are also needed to defend against complaints that consumers may file against insurers. These regulatory obligations affect accreditation, reviews, ratings, and solvency for insurers.

Accordingly, when *Cohan* was decided, insurers were left to decide how to comply with *Cohan* while also complying with statutory mandates. Insurers proposed revisions to the form protective order to address *Cohan* but also to explicitly acknowledge the numerous statutory obligations of insurers.

Ward F.N. Fujimoto commended McClaren and Bert S. Sakuda for working with insurance counsel after *Cohan* was decided. Fujimoto noted that many insurers are based on the mainland and must comply with requirements of other states. Aside from statutory and regulatory compliance, the insurers' primary interest is in evaluating cases and in closing files.

Fujimoto noted that the procedural history of *Cohan* was one of total involuntariness. The plaintiff's refusal to consent to the protective order and authorizations threatened to put the entire arbitration at a standstill. Fujimoto pointed out that a key feature of the current form is a signature line for plaintiffs even on the protective order. Parties have recognized the need to balance the theoretical right to medical privacy against the need to resolve cases in way that allows fair compensation to plaintiffs.

Bert S. Sakuda shared his view that *Brende* and *Cohan* hold that, notwithstanding the regulatory requirements imposed on insurers, medical information may not be used outside the relevant litigation. Plaintiffs' lawyers had agreed on forms of authorizations and protective orders that gave up some of the rights protected by *Brende* and *Cohan*. Sakuda noted that *Brende* and *Cohan* were decided on mandamus, so the insurers' record-keeping obligations were not before the Court and were not addressed. Sakuda believes that insurers' concerns regarding their obligations must be raised separately with either the Insurance Commissioner or with the courts if insurers must move to compel plaintiffs' consent.

Tanoue pointed out that *Brende* includes footnote 6, which provides that the revision to the protected order was not intended to affect the record-keeping obligations of insurers. *Brende* also discussed the need to balance the requesting party's need for the information against the harm to the plaintiff. In *Cohan*, the plaintiff did not object to the provision that was intended to track *Brende*'s footnote 6. In Tanoue's view, this leaves open the possibility for insurer's record-keeping obligations to be balanced against plaintiff's privacy interests.

Sakuda acknowledged that *Brende's* footnote 6 addresses the record-keeping obligations of insurers. But in *Cohan*, the Court struck all of the provisions of the HSBA's form authorization. Given that result, the reasonable conclusion is that private health information cannot be used for other purposes.

Tanoue described the forms being circulated as an effort by a small group of lawyers interested in reaching agreement on a stipulated protective order that allows certain limited uses beyond what *Cohan* would appear to allow. The forms are intended to be a practical solution, but they are not final forms. The forms may be used as starting points for discussions.

McLaren remarked that he probably would not recommend that his clients sign a stipulated order that was as limited as *Cohan* suggests. If insurers are involved, they must have access to medical records to evaluate the case. Insurers also must set reserves in specific case. If insurers consistently under-reserve, then they may need to liquidate assets to pay claims, which may affect their solvency. If insurers consistently over-reserve, then they may increase premiums. It would be difficult for McLaren to recommend signing a form that would hamper insurers' ability to evaluate cases and meet their record-keeping obligations.

Fujimoto remarked that lawyers want to avoid a return to the voluminous motions for protective orders that preceded *Brende*. In his view, individual plaintiffs with the advice of counsel are free to do what they want with constitutional rights. Plaintiffs may agree to a limited waiver of their privacy rights to further the ultimate goal of just compensation.

Sakuda agreed that the use of the proposed forms is a matter of expediency. Under his reading of *Cohan*, the plaintiff is in the driver's seat because statutes in contravention of constitutional provisions are void. The only question is whether there is a compelling state interest that can overcome the plaintiff's privacy rights.

McLaren noted that the constitutional right to privacy was adopted in 1978. Did the electorate intend to void the existing regulatory laws governing insurers? This apparently was not discussed and is a hard issue. The concurring opinion in *Cohan* suggests that disclosure required by law could be a compelling state interest and sets forth insurance regulations as an example.

Fujimoto noted that the discussion had been focused on state regulatory requirements, but there is also a growing body of law on Medicare secondary payor rights. What happens when the state right to privacy conflicts with obligations of liability insurers to report under Medicare requirements? Would the state right be preempted? Would state courts have jurisdiction to adjudicate whether the state right is preempted?

Tanoue suggested that the information reported to Medicare is limited to International Classification of Diseases ("ICD") 9 codes that reveal what body parts were injured, for example. Medicare does not receive voluminous medical records. In fact, much of what is reported to Medicare is publicly available because the injuries are often discussed in court.

Sakuda recalled that there was formerly little concern about medical privacy. But for many years, insurers used paper files, and there were limited opportunities for inappropriate disclosure.

Today, because most records are electronic, the possibility of inadvertent or surreptitious dissemination is increased. Because of that, plaintiffs are much more concerned about the privacy of their records.

McLaren noted that the proposed forms allow for reporting to Medicare. In his view, ICD9 codes are private information that is protected. On the subject of authorization, McLaren noted that, when authorizations are subject to an attached protective order or confidentiality agreement, re-disclosures are limited. For example, medical records cannot be re-disclosed for purposes of third-party databases. McLaren is happy to receive suggestions for improvements to the forms.

Attendee Gail Y. Cosgrove shared that the proposed forms have not percolated through the medical malpractice bar. She shared two concerns. First, *Cohan* seems to indicate that all records must be returned physically. In a recent case, the chair of the Medical Inquiry and Conciliation Panel held that it did not have the jurisdiction to order the return of medical records. At least one participant in that proceeding refused to sign the proposed forms, leaving the MICP without the medical records. Another concern is that the proposed forms include a continued enforceability provision that seems open-ended.

McLaren responded that when the HSBA committee was formed in 2008, there was no medical malpractice representative on the committee. The focus was on automobile injury and premises liability cases. This was not intentional, but the focus was on addressing the bulk of tort litigation. He repeated that the proposed forms were not final and that he was happy to have feedback from the Judiciary and bar.

McLaren also shared an anecdote about disposing of twenty bankers boxes of medical records after the conclusion of a case. *Cohan* seems to require the return of medical records. Technically, HIPAA requires return to the health care provider but, in practice, this requirement is not followed. Another concern is that *Cohan* requires immediate return. What does this mean? Parties previously agreed to return records within thirty to ninety days.

In response to a question about resistance from medical providers, the panel shared that providers typically require signed authorizations for the release of medical records. The panel typically attaches both the authorization and the protective order as exhibits to the subpoena.

IV. PUBLICATION OF LEGAL NOTICES ON THE INTERNET (Edward C. Kemper, Jeffrey S. Portnoy, William J. Plum)

Summary: Edward C. Kemper served as moderator for the panel of William J. Plum, an advocate of internet legal publication, and Jeffrey S. Portnoy, a defender of traditional publication notice.

William J. Plum intrigued the afternoon crowd with the 21st century concept of providing legal notice via the internet. Plum insisted this was about moving towards a long-term, practical, and more efficient method.

Currently, the Honolulu Star-Advertiser is where most legal notices are published. Plum estimated that the price to publish a foreclosure notice on the Star-Advertiser would be around \$2,000 to \$2,400. He also noted that all parties, not just big banks, need to publish. Plum pointed

out that the entity which owns Star-Advertiser owns almost all other major local publications in the state, due to a merger several years ago. Pre-merger, the Star-Bulletin charged below \$600 per notice, and Advertiser \$800 per advertisement. After the merger, the price increased to \$1,000 per advertisement. Currently, it costs \$2,200 per advertisement.

Plum asked the members of the audience if they read the newspaper daily. How many people really do? He suggested utilizing State websites for publications instead. Certain notices could be posted on the State DCCA website for around \$300, similar to the way some foreclosure notices are posted. This could be an economical and effective alternative to newspaper publication. Plum argued for the expansion of such state publication websites.

With internet access increasing every day, an easy and cost effective way to receive notice could involve simply checking a designated website for pending cases. Plug in your name and receive notices. Plum also suggested the goal is to make the public aware of the process through a gradual phase in. When the public is made aware of the websites, people will check the sites. Plum mentioned that the HSBA Collections Section offered a bill last year to expand internet publication. Unfortunately, the endeavor was unsuccessful.

Jeffrey S. Portnoy defended the traditional publication summons. Legal notice has always been by publication in a newspaper of general circulation. Portnoy recited statistics that show seven out of ten adults in Oahu read the Star-Advertiser, in printed form or online, whereas 70% of the population may not have access to a computer. These are the very people who need notice. Portnoy believes newspaper readers will eventually flip to the notice section, whereas with the internet, people will need to make an effort to navigate to the applicable site.

The debate between traditional publication summons and internet publication is one of notice versus economy. Big banks and attorneys say that they do not want to pay more for notices. But, this may be losing focus of the bigger picture and forgetting why notices are required in the first place? Lawsuits affect people's lives. In some cases, people are losing their homes. Notices published in a newspaper may not be effective 100% of the time. But would notices published on the internet truly be more effective? If price is the primary issue, there should be other ways to address the problem. The monopoly of the Star-Advertiser should not be the reason to move away from newspaper notice. Daily readership of the newspaper is about 325,000, with online readership being a higher figure. Portnoy pointed out that Midweek is also a medium for publication, with huge readership and does not require a subscription.

Plum also proposed a compromise: The party giving notice would publish the name(s) of the person(s) being noticed or being summoned in a newspaper of general circulation, together with information of where the notice or summons would be obtained (such as a government website, the court, and/or the attorney giving notice or causing a summons to be issued). The names of all persons being noticed would be listed in alphabetical order by the newspaper, making the publication more likely to be noticed. The cost of publishing such listing should be much less than publishing notices and summons as is the current practice.

Portnoy argued that the most effective notice to the largest number of people was still newspaper publication. He also reminded everyone that the newspaper is not responsible for the

content of the notice; rather, content is controlled by the courts. Portnoy suggested that the judiciary should be lobbied to allow a change in the content of such notice.

V. MEDIATION CONCERNS (Collaborative Divorce; Circuit Court Rule 12.2, Alternative Dispute Resolution; Timing; and Other Issues) (Justice James E. Duffy (ret.), Judge Joel E. August (ret.), James K. Hoenig, Keith W. Hunter)

Summary: A panel of experienced mediators shared their thoughts on a variety of topics.

Judge Joel E. August began his presentation by expressing his concern that disputes between apartment owners and AOA Boards relating to the application, interpretation, and enforcement of declarations, by laws and house rules are placing an excessive burden on a judicial system, which is struggling with the problem of how to make the courts more available to more litigants. He indicated that his comments on the reform or interpretation of HRS § 514B-161 to 163, inclusive, were intended to curb access to the courts for the resolution of condominium disputes, without limiting access to justice for the parties involved in those disputes.

As to HRS Section 514B-161, Judge August made the following comments:

In situations where neither an AOA Board nor an owner request mediation, judges should use their inherent powers under Hawai'i Circuit Court Rule 12.2 to order an appropriate ADR process at the earliest possible opportunity and couple that with the expectation that both sides will act in good faith to reach a resolution of the dispute. HRS Sections 161(b)(2), (3), and (4) appear to lift the statutorily imposed requirement to mediate in actions to collect assessments, personal inquiry claims and actions against an AOA, its Board or agents for amounts in excess of \$2,500. However, when no insurance is available to defend or indemnify if ADR processes are employed, there is nothing to prevent the courts from using its Circuit Court Rule 12.2 powers to require mediation in those cases.

If, in fact, there are insurance policies being issued to AOAOs and their agents, which exclude coverage because alternative dispute practices are employed to resolve a dispute, such clauses in the policies would appear to be against the public policy of the State.

Even though Section 161(c) appears to lift the mandate to mediate when such a proceeding is not completed within two months from commencement, judges should use their Circuit Court Rule 12.2 powers to keep the process going when there are legitimate bases for doing so.

As to HRS § 514B-162, Judge August had the following thoughts:

On the surface, Section 162 appears to impose arbitration on disputes between owners and AOA Boards/agent when requested by one of said parties. However, he said, all that glitters is not necessarily gold.

First, the arbitration proceeding as established in this statute is non-binding, since the following section (HRS § 514-163) provides the opportunity for a trial de novo to an unhappy litigant.

Second, Section 162(b)(7) provides that arbitration is not required when a claim against an AOA, its board or its agents is in excess of \$2,500 and insurance coverage is unavailable because of an ADR exclusion in the policy.

Third, Section 162(c) appears to invite courts to use their inherent discretionary powers to determine that “the subject matter of the dispute is unsuitable for disposition by arbitration” based upon a number of criteria, including but not limited to: (1) the magnitude of the potential award; (2) issues of broad public concern; (3) the possibility that complex discovery issues may arise; and (4) when disposition by arbitration would not provide substantial justice to one of the parties in the absence of complete judicial review.

Judge August invited judges to be conservative in their granting of dispensations from the arbitration process unless they truly enjoyed presiding over month-long trials dealing with disputes that apartment owners and AOA boards frequently have. He reminded the attendees that experienced arbitrators are familiar with sizeable damages claims, discovery issues, matters of public concern and equitable principles.

The closing comments of Judge August concerned HRS § 514B-163, which guarantees a trial de novo to any party who has submitted a dispute to arbitration under Section 162. In his view, if the goal is to maximize swift and just determinations of AOA/owner disputes and at the same time reduce trial burdens placed on the judicial system, one solution is to repeal Section 163 and make arbitration binding.

If repeal is not possible, Judge August suggested that at least the statute should be amended to define which party is the prevailing party for purposes of assessing costs, expenses, and attorneys’ fees. His recommendation was the adoption of a formula similar to that found in Rule 25 of the Hawaii Arbitration rules promulgated for the Court Annexed Arbitration Program (“CAAP”).

Keith W. Hunter discussed some of the experiences he had while serving as a mediator in Hawai`i and on the mainland. In the 30 years since Hunter has moved here, Hawai`i has been in the vanguard of establishing when and where parties mediate. In Hawai`i, mandatory mediation provisions are commonly contained in standard contracts. Circuit Court Rule 12.2 allows judges to compel parties into mediation. Many times, mediation concludes in a settlement before proceeding to litigation. Hunter commented that rules similar to Rule 12.2 are still a rarity on the mainland. Hawai`i has been a leader in this regard.

Hunter listed the different ways that parties end up in mediation. Parties who all agree to participate in mediation are more likely to reach agreements on their disputes, whereas, parties who are contractually obligated or compelled to mediation sometimes have more difficulty. Hunter discussed Circuit Court Rule 12.2, which, in his opinion can be helpful or unwieldy. In particularly difficult cases, “co-mediation” is often successful. This type of mediation involves the mediator partnering up with the presiding judge to resolve the dispute. Parties stipulate to allow the trial judge to work together with the mediator to resolve the case.

Overall, Hunter believes that because Hawai'i is a small place that values relationships, mediation can and does work well. Contrary to mainland opinion where mediating might be considered a weak position, people in Hawai'i view mediation as a positive opportunity to get things done.

Justice James E. Duffy discussed Hawai'i laws mandating disclosures by arbitrators, mentioning two recent ICA decisions on appeal: *Nordic PCL Const., Inc. v. LPIHGC, LLC*, 133 Haw. 451, 330 P.3d 389 (Ct. App. 2014) cert. granted, No. SCWC-11-0000350, 2014 WL 2587689 (Haw. June 10, 2014), and *Noel Madamba Contracting, LLC v. Romero*, cert. granted, No. SCWC-12-0000778, 2014 WL 4919963 (Haw. October 1, 2014).

In *Nordic*, one of the parties complained that the arbitrator failed to give adequate disclosure of his financial and fiduciary relationship with the attorney for one of the other parties. The complaint was made after an eighteen month-long arbitration proceeding, and weeks after the arbitrator issued his award. So, in a small legal community like Hawai'i, what types of relationships require disclosure, and when should disclosure be made?

Justice Duffy discussed the governing disclosure statute, HRS § 658A-12, and addressed a few problems that it poses. Subsection (b) states that “[a]n arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.” This language often leaves arbitrators with more questions. What warrants disclosure? Serving on bar committees? Shared children’s activities? The “reasonable person” standard is supposed to be an objective one. But, in Hawai'i’s a small legal community, attorneys have contact with each other all the time. Many attorneys have relationships that span over years.

Justice Duffy pointed to *Daiichi Hawaii Real Estate Corp. v. Lichter*, 103 Hawai'i 325, 82 P.3d 411 (2003), where the Court noted, “[t]he relationship between the arbitrator and the party's principal must be so intimate—personally, socially, professionally, or financially—as to cast serious doubt on the arbitrator's impartiality. If all arbitrators' relationships came into question, finding qualified arbitrators would be a difficult, sometimes impossible, task.” *Id.* at 342, 82 P.3d at 428, (quoting *Washburn v. McManus*, 895 F.Supp. 392, 399 (D.Conn.1994)).

Justice Duffy concluded that the solution is to form guidelines with regards to disclosure. There should also be deadlines for when challenges to arbitrator’s disclosure are made. As a general rule, Justice Duffy recommended that problems should be brought up prior to the proceedings. Otherwise, parties might strategically wait until after they lose the arbitration to bring up these challenges.

In response to a comment that laws are sometimes made by people who do not understand the practicalities of law practice, particularly in the context of large firms who routinely manage hundreds of cases, Justice Duffy suggested asking the courts and the HSBA for guidance.

James K. Hoenig discussed certain trends in the field of ADR and family law. While ADR in Hawai'i has been progressive in many areas of law, family law has lagged behind in the last 25

years. Hoenig believes that mediation is a positive alternative to the court system, especially for family law cases, because mediation is geared towards maintaining relationships and encouraging parties to work together.

Hoenig discussed several different projects aimed at reducing the case load for family law judges. About ten years ago, the Volunteer Settlement Master Program was initiated in family court. Through this program, family law practitioners volunteer three (or more) hours of their time to conduct free and confidential settlement conferences for divorcing couples.

Other programs include the Paternity Mediation Program and the Collaborative Divorce Pilot Project. The Collaborative Divorce Pilot Project was launched in January 2014. It provides legal resources and information to parties who are going through a divorce without an attorney.

Hoenig informed the audience that approximately 5,000 divorce cases are filed in Hawai`i every year. If just 100 of these cases were diverted to arbitration, roughly 2,000 hours of court time would be saved. This is equivalent to the time of one full-time judge.

VI. TOPICS FOR THE 2015 BENCH-BAR CONFERENCE; CHANGES AFOOT IN THE CIVIL JUSTICE SYSTEM (Don J. Gelber)

Summary: The Civil Law Forum considered possible topics for the 2015 Bench-Bar Conference.

Don J. Gelber began his presentation by addressing an undeniable fact of civil litigation. A vast majority of cases are just too expensive for most litigants. Driven by this fact, various pilot programs, initiated in several mainland jurisdictions, have been implemented to make litigation more cost efficient. Many of these programs surround the idea of expedited trials. These expedited trials involve strict limitations on the amount of time that an attorney has to present his/her case, limitations on discovery that are more proportional to the amount at stake, agreements to waive certain appeal rights, and statutory caps on the amount of recovery for specific claims. What would happen if trials were set three to six months from filing, instead of ten to twelve months, with a prohibition on certain pretrial motions, and automatic document production? Civil litigation would be more accessible and less costly. Are these types of expedited trials possible in Hawai`i?

Another possibility would be taking certain issues out of the courts altogether. Could more legal claims be better suited for specialized boards and agencies, similar to the way workers' compensation claims are handled? Specialized courts, for example, a business litigation court, may be another option to consider. Should Hawai`i change its pleading rules to require fact-based pleadings instead of notice pleadings?

The Forum participants did not consider the reform proposals at this time; however, they proposed the following be considered at the 2015 Bench-Bar Conference:

1. *Smaller Circuit Court Civil Cases:* It was proposed that plaintiffs in Circuit Court cases should be allowed to proceed with discovery and trial using the more streamlined district court procedures.

2. *Jury Trial Limitations*: It was proposed that the conference consider ways in which the right to a jury trial may be limited or eliminated from certain classes of cases. Practitioners should discuss whether they want to petition the legislature to raise the \$5,000 minimum for jury demands.
3. *Appellate Practice*: Some participants suggested that the award of attorneys' fees and costs in appellate cases be reviewed and considered.
4. *Insurance Coverage Mediation*: It was suggested that a proposal that disputes of insurance coverage be subject to compulsory mediation (presumably in the context of, and together with, mediation of the claims giving rise to the insurance coverage dispute) be considered.
5. *Discovery Matters*: Several participants suggested that variations between Hawai'i's discovery rules and the federal discovery rules be reviewed, with a view to modifying Hawai'i's rules if the federal rules are found to be preferable. Among the areas mentioned were rules governing initial disclosures, discovery plans, and the treatment of communications (both written and oral) with designated expert witnesses.

VII. CONCLUSION

The overall marks for the 2014 Civil Law Forum were high. The comments below illustrate that the attendees found the program valuable:

- *The panel discussion on Cohan v Ayabe and the protective order/confidentiality agreement was helpful and balanced on both sides. The publication summons discussion was also interesting (and entertaining thanks to Mr. Portnoy).*
- *Medical records discovery was not relevant to my practice, but it was very interesting and necessary to know.*
- *I appreciate the opportunity to interact with judges outside of the courtroom. I appreciated hearing from Judge Kevin Chang and the comparisons with Federal Court.*
- *All of the topics were of interest. I was able to share with others in my firm information on topics that are not in my practice area.*
- *Seemed well organized Judges should feel free to speak up*
- *I enjoy hearing "war" stories from the lawyers and concerns and issues raised by the judges. This is helpful in evaluating how to proceed in the case and whether to bring motions or not.*
- *This is a wonderful opportunity to speak informally with the Judges; with positive results for the bench and bar.*

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

CIVIL LAW FORUM PARTICIPANTS

Justice Simeon Acoba (ret.)
Michelle Acosta
Scott C. Arakaki
Judge Joel August
Russ Awakuni
Bert Ayabe
Lisa Bail
Judge Joseph Cardoza
Judge Jeannette Castagnetti
Alfred Castillo, Jr.
Judge Derrick Chan
Judge Kevin Chang
David Chee
Dennis Chong Kee
Steven Chow
Jeffrey Crabtree
Judge Virginia Crandall
Charles Crumpton
Noa Dettweiler
James Duffy
Rex Fujichaku
Ward Fujimoto
Judge Hilary Gangnes
Don Gelber
Gary Grimmer
Steven Guttman
Jill Hasegawa
Michael Heihre
Harvey Henderson
Andrew Hipp
Jim Hoenig
Jeffrey Hu
Keith Hunter
Charles Hurd
Judge Ronald Ibarra
Steve Iwamura
Regan Iwao
Ed Kemper
Janice Kim
Robin Kishi
Judge Blaine J. Kobayashi
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Gary Okuda
Lester Oshiro
William Plum
Justice Richard Pollack
Chris Porter
Jeffrey Portnoy
Daniel Pyun
Matthew Pyun
Chief Justice Mark E. Recktenwald
Judge Catherine Remigio
Colin Rodrigues
Bert Sakuda
Sherrie Seki
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Judge Barbara Takase
Mike Tanoue
Judge Randal Valenciano
Justice Michael Wilson
Tracey Wiltgen
Deborah Wright
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