HAWAII STATE BAR ASSOCIATION

JUDICIAL ADMINISTRATION COMMITTEE

REPORT OF THE 2013 BENCH-BAR CONFERENCE

DON JEFFREY GELBER

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The Judicial Administration Committee of the Hawai‘i State Bar Association was established for the purpose of permitting the Bar Association to maintain a "close relationship with the Judiciary on matters of mutual concern to the bench and bar" and to promote the "improvement of the Judiciary and [the] administration of justice." To fulfill this purpose, the Judicial Administration Committee, in cooperation with the Judiciary, from time to time convenes a conference of invited participants from the bar and selected participants from the bench (traditionally referred to as a "Bench-Bar Conference") to discuss selected topics that the Committee considers timely, in the hope that those discussions will result in suggestions or recommendations that will improve the administration of justice in the state courts.[1]

The 2013 Conference – the subject of this report – followed a prior Conference held in 2012.[2] Several of the proposals and recommendations made at the 2012 Conference resulted in or influenced certain new procedural rules and legislation (some enacted and some now under consideration). A brief review of those judicial and legislative actions provides an appropriate postscript to the 2012 Conference and, in some respects, helps explain and place in context the work of the 2013 Conference.

THE 2012 CONFERENCE

At the 2012 Bench-Bar Conference, the participants concluded and recommended that telephonic appearances of counsel at non-evidentiary hearings be allowed. In response, the Hawai‘i Supreme Court adopted Temporary Rule 16.1 of the Hawai‘i Rules of Civil Procedure and Temporary Rule 58 of the Hawai‘i Rules of Penal Procedure, which, subject to certain limitations, permit trial courts to allow counsel to appear by telephone or other electronic means.[3]

Similarly, the attorney participants at the 2012 Conference supported, and the judicial participants did not oppose, the expanded use of wireless electronic devices in the courtroom. In response, the Supreme Court amended Rule 5.1 and adopted Temporary Rule 5.3 of the Rules of the Supreme Court of the State of Hawai‘i, which, subject to the limitations therein

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[1] The members of the Judicial Administration Committee and the participants in the 2013 Bench-Bar Conference are set forth in the appendix that follows this report.

[2] The Bench-Bar Conferences are convened from time to time but not necessarily annually.

[3] Temporary Rule 16.1 of the Hawai‘i Rules of Civil Procedure and Temporary Rule 58 of the Hawai‘i Rules of Penal Procedure were both adopted July 29, 2013. Each temporary rule shall be effective from January 1, 2014, through December 31, 2014, "unless further extended."

stated, permit the expanded use of electronic devices, such as laptops, tablets, cell phones, smart phones, and similarly functioning devices.[4] Although the amendment to Rule 5.1 and new Temporary Rule 5.3 were scheduled to become effective at the same time as the Temporary Rules permitting telephonic and electronic appearance of counsel, the effective date has been postponed because of the need to assure that the use of electronic devices with a video feature does not put jurors and witnesses at risk.

The 2012 Conference also considered the inconsistency or conflict between federal immigration rules and state rules when non-citizen immigrants (i) wish to plead guilty or no-contest and be granted a deferred acceptance of the plea (with the prospect that the charge will be dismissed if the defendant does not engage in further criminal behavior for a stipulated period), or (ii) wish to enter the Drug Court program, but are required first to stipulate to the "factual basis" of the charge. In each of these situations, the plea and the stipulation can trigger a deportation (or bar re-entry) notwithstanding the fact that the defendant may otherwise be an appropriate candidate for the relief sought. In addition, statements made at sentencing in cases involving domestic violence may trigger deportation.

In 2013, the Legislature enacted Act 279, which requires a statutorily-prescribed advisement by the court to a defendant, before the commencement of trial, the entry of a plea of guilty or *nolo contendere*, or an admission of guilt or of facts, that the plea or admission may have adverse consequences respecting the defendant's immigration status, and that the defendant has a right to advice from counsel about the specific impact that the case may have on the defendant's immigration status. The state Judiciary has amended the required colloquy between the bench and the defendant and is considering proposed amendments to the relevant rules of penal procedure to ease the friction between state judicial administration and federal enforcement of immigration laws. Although the statutorily-prescribed advisement ensures that a defendant will be fully advised before he or she takes any action that might imperil his or her immigration status, given the constitutional supremacy of federal law, the state Legislature and the state Judiciary cannot entirely resolve the conflict. A comprehensive resolution will require changes to federal immigration law.

In addition to its expressed concern about the adverse impact of immigration law on defendants wishing to enter, and who are otherwise qualified candidates for, the state's Drug Court program, the 2012 Conference questioned the sufficiency of legislative funding for the Drug Court program and the allocation of funds among the various circuits. In its 2013 biennium budget, the Judiciary sought, and the Legislature granted, restored funding for the First Circuit and increased funding for the Third Circuit.

At the 2012 Conference, the District Court civil law participants concluded that the ability to demand and obtain a jury trial for claims starting above $5,000 was out of step with the cost of providing and conducting the trial. They recommended that the threshold amount for jury trials be increased and that, in addition, the jurisdictional cap for District Court civil proceedings be increased to the "$40,000 range." The 2014 Session of the Legislature is now

[4] The amendment to Rule 5.1 and new Temporary Rule 5.3 shall now be effective from July 1, 2014, through December 31, 2014, unless further postponed or extended.

considering a bill for the submission to the public of a proposed amendment to the state constitution to increase the threshold amount (*i.e.* "the value in controversy") for jury trials in suits at common law from an amount in excess of $5,000 to an amount in excess of $10,000. The Legislature is also considering statutory revisions that would provide for the transfer of cases to the Circuit Court, or the commencement of cases in the Circuit Court, where a jury trial is demanded and the amount or the value of the property claimed exceeds $10,000 and to provide that the District Courts shall have jurisdiction in all civil cases where the amount or the value of property claimed does not exceed $40,000 (except that, as under current law, the monetary or value limitation would not apply to claims and counterclaims brought in summary possession or ejectment actions).[5]

THE 2013 CONFERENCE

The 2013 Conference was held on September 27, 2013, in Honolulu. The participants on behalf of the Judiciary were selected by the Chief Justice. Participants on behalf of the bar were selected by the Committee. Extensive efforts were made to achieve a broad representation of attorneys who practice in various areas of civil law and criminal law; attorneys who practice predominantly before the Circuit Courts and those who practice before the various District Courts; attorneys who represent the private sector, and those who represent various agencies of government, including the Office of the Attorney General, the Office of the Public Defender, and the offices of the county prosecutors. The Chief Justice, three Associate Justices, 19 judges, and 108 attorneys and other participants attended the Conference.

The Conference was divided into five separate groups. Two groups addressed civil practice in the Circuit Courts; one group addressed criminal practice in the Circuit Courts; another group addressed civil practice in the District Courts; and the remaining group addressed criminal practice in the District Courts. Each section considered proposed topics thought to be of common interest to those who practice or preside in each of the various courts, and selected topics more particularly related to the court in which the participants presided or appeared. The discussion in each section was guided by a "lead judge" and a "lead attorney," and a report of the proceedings of each section was prepared by a "reporter." This report is a summary of the major topics addressed at the 2013 Conference and the conclusions and recommendations of the participants.

COMMON TOPICS

Expanding the Use of Technology in the Courtroom

In light of the conclusions and recommendations reached at the 2012 Conference and the promulgation of the Temporary Rules permitting telephonic appearances in limited situations, the participants at the 2013 Conference considered the implementation of Temporary Rules, principally involving the use of teleconferences and the prospect of future proceedings by

[5] See H.B. Nos. 1844, 1845, and 1846, House of Representatives, 27th Legislature, 2014, State of Hawaii, and Hawaii Rev. Stats. §§ 604-5, 666-7.

videoconference. While the participants generally favored the increased use of telephonic appearances and telephonic proceedings, including, where appropriate, both non-evidentiary and evidentiary proceedings, many questioned the need for and the expense of, and anticipated administrative problems in conducting, proceedings by videoconference.

With respect to appearances and proceedings by teleconference, there was a clear consensus that such technology should be liberally permitted. Some participants, however, noted that telephonic systems in some courtrooms needed to be improved and that the procedure for arranging telephonic appearances varied from court to court. There was concern expressed that, when the Temporary Rules became effective, mechanical or administrative problems might make telephonic hearings with multiple participants difficult to manage. Nonetheless, even prior to the effective date of the Temporary Rules, trial courts have increasingly permitted telephonic appearances, and the Family Court of the First Circuit has permitted, in some circumstances, evidentiary proceedings by teleconference.

The initial impetus for permitting telephonic appearances was a desire or need to reduce or eliminate the expenditure of time and money required for an attorney based on one island to travel to another island for a hearing that the attorney (or the attorney's client) did not believe warranted an appearance in person. The Conference participants were in general agreement that the same consideration may also apply even if the attorney seeking to appear by telephone is based in the same circuit or the same island, and that the ability to appear telephonically should not be geographically limited. A majority of the participants also recommended that a uniform procedure for requesting permission to appear by telephone be adopted statewide and not vary from courtroom to courtroom.

With respect to conducting proceedings by video conference, the Conference participants were generally more guarded. Several questioned the need for permitting proceedings by video conference, especially in light of the inherent expenses required to establish adequate facilities for such proceedings. The Conference discussed the advisability and practicality of setting up a dedicated room in each courthouse for video conference proceedings, but noted that any such arrangement in a courthouse where multiple judges presided would involve logistical and administrative difficulties in scheduling the use of the facility. Equipping each courtroom with the ability to hold proceedings by video conferencing would require a substantial legislative appropriation. Moreover, although the court at Kapolei is equipped to take testimony by video conference, the system has at times had technical problems.

The Conference concluded that, with respect to proceedings by video conferences, appropriate representatives of the state Judiciary should confer with the federal district court to consider and evaluate its experience with proceedings by videoconference and determine whether it would be appropriate to adapt that system for use in the state trial courts. If appropriate to do so, the Conference participants recommended that proceedings by video conferences be tried first in a specialized court of limited jurisdiction, such as the Land Court.

Ho'ohiki, E-Filing, and Related Issues

There was broad consensus that the Ho'ohiki docket information system was outdated, cumbersome to use, and difficult to navigate. Moreover, there was considerable doubt the system could ever be made to work at a reasonable cost. In light of the Judiciary's stated intention to move to an electronic filing system applicable to all state trial courts, the general recommendation of the Conference participants was that the electronic filing system hereafter adopted be substantially similar to that employed by the federal courts. In this regard, there was some concern expressed by the participants about the effect of an electronic filing system on *pro se* parties. Some participants noted that the Bankruptcy Court allows *pro se* parties to file documents in paper form and were of the view that some accommodation for *pro se* parties might be in order. The general consensus at the conference was that the sooner a uniform system of electronic filing for state trial courts is developed the better.

Allowing Wi-Fi Capability for Trial

The Judiciary participants in the District Court civil group reported that the use of Wi-Fi capability for trial purposes had not been requested or permitted in the District Court. Some Circuit Court participants reported that some Circuit Courts currently allow parties to set up Wi-Fi systems and present testimony by video, but that at least one civil circuit court has denied such a request. The common sentiment expressed by many at the Conference was that, as the courts move towards a broader use of technology, the Judiciary should install Wi-Fi capability in all courts. In addition to the presentation of testimony by video, a number of attorney participants asserted that Wi-Fi capability would facilitate proceedings by allowing attorneys to retrieve information more quickly.

ISSUES RELATED TO CIVIL PRACTICE

Admissibility of Medical Bills and Records

In personal injury cases, plaintiffs are required to submit evidence that medical expenses incurred by the plaintiff are reasonable, appropriate, and necessary before such expenses are admissible at trial. The Circuit Court civil sections of the Conference addressed the question whether there should be a uniform system or procedure regarding the admissibility of medical bills at trial. Although there was general agreement that the authenticity of the bills themselves was rarely questioned, participants who represent personal injury claimants and those representing defendants could not agree on any procedure that would reduce the time needed to address the reasonableness, appropriateness, and the necessity for the expenses represented by the medical bills.

Jury Instructions on Workers' Compensation Liens

An injured worker who has recovered on his or her workers' compensation claim retains the right to pursue common law tort claims against a third party (a person or entity other than the employer or a co-employee) who caused the injury. Generally, evidence of the workers' compensation recovery is deemed irrelevant and inadmissible, and the workers' compensation

carrier has a lien (for the amount it has paid) against the plaintiff's recovery from a third party for the same injury. In *Sato v. Tawata*,[6] the Hawai‘i Supreme Court held that, notwithstanding the general prohibition that the amount received from the employer (or its insurer) shall not be admissible in a civil action to recover damages from a third-party tortfeasor, "disclosure of workers' compensation evidence, including the amount, may be appropriate where some relevant purpose for allowing its admission develops in the trial."[7]

One of the Circuit Court civil groups considered whether, in light of *Sato v. Tawata,* there should be a jury instruction for the disclosure of the plaintiff's workers' compensation award and the lien of the workers' compensation carrier when the trial court has determined in such civil tort cases that a "relevant purpose" exists for the admission of such evidence. The group recommended that the civil jury instruction committee determine whether the civil "pattern" instructions should include a standard jury instruction pertaining to workers' compensation awards and liens.

Expert Witness Discovery and Deadlines

Unlike the federal rules, the state discovery rules do not set deadlines for disclosure of expert witnesses and the production of expert reports. There was general agreement among the attorney participants who are involved in Circuit Court civil cases that there is a lack of consistency between different state trial courts regarding deadlines for expert reports. The consensus among these participants was that having a uniform rule setting forth the deadline for disclosure of expert witnesses and the production of expert reports is both desirable and necessary. Defense counsel pointed out that, at least in those cases where experts are required (*e.g.*, malpractice cases), the rule should require early disclosure by the party having the burden of proof so that defense counsel does not have to await the final naming of witnesses to have this important information.

The Conference participants also considered whether the court should have a consistent policy or rule for discovery of expert witness materials in advance of depositions. The participants were of the view that a rule similar to the federal rule should be adopted setting forth what types of communications are discoverable and the information an expert report must contain. The consensus of the participants was that a uniform rule would "streamline the trial process; ensure that each party is treated equally; be beneficial for the settlement process; and prevent disputes and delays amongst the parties." The Conference participants representing the bench noted that any uniform rule would need to be reviewed and approved by the Civil Rules Committee.

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[6] 79 Haw. 14, 897 P.2d 941 (1995).

[7] The "relevant purpose" in *Sato* was to permit the defendant to present evidence that the amount received from the workers' compensation insurer as compensation for lost wages provided a "disincentive" for the plaintiff to return to work.

Discovery Disputes

The bane of most trial judges is the need to resolve discovery disputes in addition to the other matters on their already-crowded calendars. Unlike the federal court,[8] the state trial courts do not have a procedure for prompt resolution of discovery disputes, nor does the present procedure mitigate the impact of discovery disputes on the trial judge's calendar. A discovery dispute that gives rise to a motion to compel discovery will normally be heard approximately 30 days after the dispute has erupted. A non-hearing motion may be addressed and decided more quickly, but only after some substantial period of delay. Under the federal system, as adopted in the District of Hawai‘i, discovery disputes are resolved by magistrate judges in the first instance, on simultaneously-submitted letter briefs (not to exceed five pages, *inclusive* of all exhibits), followed, if necessary, by a conference (either in person or by telephone). The magistrate's order may be appealed to the district judge, but rarely is.

The consensus of the Conference participants addressing this issue was that the state Judiciary should consider designating a discovery judge or permit the employment of a discovery master (for example, a retired judge or a retired attorney) to serve in a similar role and resolve disputes quickly. In a slight departure from the federal model, participants recommended that although telephonic conferences following the submission of letter briefs should be permitted, in-court "hearings" should generally not be allowed.

Although there was considerable discussion concerning the advisability of the more frequent use of sanctions in connection with orders compelling discovery, no consensus was reached. A substantial portion of the attorney participants and the judicial participants favored leaving discovery sanctions to the discretion of the trial judge and contended that any imposition of sanctions other than in accordance with existing rules would be improper.

***Pro Hac Vice* Counsel**

Supreme Court Rule 1.9 provides that a non-resident attorney, who is actively licensed in another state, a United States territory, or the District of Columbia, "may be permitted to associate himself or herself with a member or members of the Hawai‘i bar (local counsel) in the presentation of a specific case at the discretion of the presiding judge or judges." Other than providing that "[t]he petition or motion for *pro hac vice* appearance and any subsequent documents submitted on behalf of a party must be filed by local counsel," the rule does not specify or suggest the role that the local counsel or the *pro hac vice* counsel shall play in the presentation of the case. It is nonetheless common practice for the moving papers seeking, and the order permitting, the appearance of *pro hac vice* counsel to provide that the local counsel with whom the *pro hac vice* counsel is associated shall "actively participate" in the presentation of the client's case.[9] There is a lack of uniformity among state court judges

[8] Local Rule 37.1(c), United States District Court, District of Hawai‘i.

[9] *Cf.* Local Rule 83.1(e)(5), United States District Court for the District of Hawai‘i: "The associated attorney [local Hawai‘i counsel] shall participate in all court proceedings unless otherwise ordered by the court, but need not attend depositions or participate in other discovery."

regarding the manner in which local counsel must meet a requirement of continued active participation. Some courts require that 50 percent of the trial work be done by local counsel; others have required that local counsel be lead counsel at trial; and others have simply required that local counsel remain actively involved. There was agreement by both groups addressing this issue that there should be a uniform standard for determining what conduct constitutes "active participation," "substantive involvement," or "active involvement" (or any similar phrase) by local counsel; that there should be some limitation on the frequency with which out-of-state counsel can appear *pro hac vice*; and that Rule 1.9 should be amended to include a requirement that a *pro hac vice* applicant be required to disclose the dates and the case names and numbers of each prior *pro hac vice* appearance in Hawai‘i and a requirement that the application for such admission confirm that the applicant is in good standing in the jurisdiction in which his practice is based.

Elimination of the Face-to-Face Meeting Requirement

Rule 12(b)(6) of the Rules of the Circuit Courts provides that a pretrial statement (which is required before a case can be placed on the "Ready Calendar") must recite that each party (or its lead counsel) conferred "in person" with opposing counsel "in a good faith effort to limit all disputed issues . . . and considered the feasibility of settlement and alternative dispute resolution options." To eliminate any doubt about the meaning of the phrase "in person," the rule specifically states that "[a] face-to-face conference is required under these rules and shall not be satisfied by a telephonic conference or written correspondence."

The consensus of the attorneys who addressed this issue was that telephonic conferral should be deemed sufficient and that the rule should not mandate a face-to-face conference.

Appeals of "Good Faith Settlement" Determinations

In cases involving multiple defendants, Hawai‘i Revised Statutes, § 663-15.5 (commonly referred to as "Act 300") protects settling defendants from the indemnification and contribution claims of non-settling defendants if the trial court determines that the settlement between the plaintiff and the settling defendants is a "good faith settlement." The order making that determination is appealable, and often is appealed by non-settling defendants who would lose their indemnification and contribution claims against the settling defendants if the "good faith" determination stands.

The pendency of the appeal creates substantial uncertainty for all parties. The non-settling appellants do not know whether their indemnification and contribution claims will be restored to them and whether they should (or must) conduct discovery based on the assumption that they may be successful in that effort. The settling defendants, who in most cases have committed to pay funds to avoid not only the exposure to possible liability but also to avoid the expense of continued participation in the litigation, also face a quandary: If they do not participate in discovery and trial preparation, and the "good faith" determination is set aside, they will be less prepared for trial than would otherwise be the case; and if they continue to participate in the discovery and trial preparation process, they will be burdened with some of the expense that they sought to avoid by agreeing to the settlement. A stay of the trial court

proceedings pending the outcome of the appeal would obviate most of the foregoing problems, but given the length of time appeals normally take, a stay might prejudice the plaintiffs and, in some circumstances, the non-settling defendants.

It was the conclusion and recommendation of the Conference participants who addressed this matter that a procedural rule or statutory change which permits an expedited resolution of appeals of trial court orders granting or denying a "good faith" determination would be helpful and appropriate and would reduce (especially if coupled with a stay of the trial court proceedings pending appellate resolution) the uncertainty and costs that exists under current law and procedural practice.

Alternatives to Newspaper Publication of Notice

There are numerous statutory provisions that provide for legal notice by publication in a newspaper of general circulation in the circuit in which the legal proceeding is pending. In recent years, the First Circuit (which encompasses Oahu and about 70% of the state's population) arguably has had only one newspaper that qualifies as a newspaper of general circulation, and the cost of publication in that newspaper has increased dramatically. At the same time, the public appears to obtain its information from a number of sources in addition to conventional newspapers (in this regard, principally the Internet). The Conference was advised by a number of participants that the Legislature has been considering, and continues to consider, this issue and the Conference participants representing the bar generally supported the enactment of statutory provisions that would both comply with constitutional considerations of due process and also permit alternative methods of publication of notice, including publication of notice on the Internet at one or more designated websites (such as the Judiciary website, the Department of Commerce and Consumer Affairs website, and the Hawai‘i State Bar Association website). Traditionally, the Judiciary does not take a position on legislative proposals, especially those which the Judiciary may subsequently be called upon to review. Therefore, the District Court participants concluded that any legislative changes to broaden the means of publication of legal notices would have to be pursued by the bar or agencies of the executive branch rather than as a recommendation of the Conference.

Response Deadlines When the Notice Period for a Hearing Is Shortened

The Rules of the Circuit Courts provide that a motion that requires a hearing shall be heard on not less than 18 days' prior notice.[10] An opposing party may file a response not less than eight days before the hearing, and the movant may reply not less than three days before the hearing.[11] When a movant requests that the time for notice be shortened, and the court grants the request, the other party often complains that the time permitted for preparing and filing a response is inadequate. The situation is aggravated when the movant files the motion with the clerk of the court in one circuit as the *ex officio* clerk of the court where the action is

[10] Rule 7, Rules of the Circuit Court of the State of Hawai‘i.

[11] *Id.*

pending and notice of the hearing date is thereafter provided by first-class United States mail.[12]

The circuit court participants at the Conference recommended that the Rules Committee consider a revision of the rules governing hearings of motions on shortened time and that the revised rules provide (1) that, in such circumstances, notice be served promptly by facsimile transmission or by e-mail, and (2) that, when the notice period for the hearing has been shortened, the response time shall be measured from the date of receipt of notice (rather than setting a deadline based on a minimum number of days prior to the hearing).

District Court Practice

A number of issues related to District Court practice were addressed by the District Court Conference participants, including dealing with *pro se* litigants who often do not follow procedural rules and frequently do not serve documents, including exhibits, as required; delays inherent in calling one type of case first (for example, small claims cases), which pre-empts the court mediator's time and may delay the resolution of other cases; the inconsistency in practice of various District Courts in setting status conferences and trial-setting conferences; and problems that arise because of mistakes by *pro se* and other litigants in the use of court forms.

The Conference participants were unable to resolve any of the problems addressed but were generally in agreement that a better use of court forms might achieve a greater degree of consistency and that some of the problems encountered with *pro se* and other litigants in responding to a complaint might be addressed and ameliorated by placing the summons first in the complaint packet and emphasizing certain critical matters using larger print or bold-face or italicized typeface.

ISSUES RELATED TO CRIMINAL LAW PRACTICE

Special Issues Regarding Electronic Filing in District Court Criminal Cases

Electronic filing has been in effect in the District Courts for approximately a year but Conference participants reported that the system, which generally works, has some problems.

When attorneys electronically file motions and documents, the attorneys are supposed to receive, via e-mail, the notice of electronic filing and the notice of the court date. In some cases, on Oahu, one or both of the notices is not received. The sporadic nature of the receipt

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[12] Rule 2.1 of the Rules of the Circuit Court provides that:

> The respective clerks of the circuit courts shall be ex officio clerks of all the courts of record and as such may accept for filing complaints, notices of appeal and appellate briefs and may issue summons returnable in all such courts.

Although a literal reading of Rule 2.1 would not include motions, in practice the court clerks have accepted motions in their *ex officio* capacity.

of electronic notification has caused concern for Oahu attorneys. Conference participants suggested that the system should be consistent. It was recommended that, if possible, the e-mail notification should be sent in all cases, or there should be no notification at all.

Several participants also noted that, when a motion and the opposition are filed electronically, the judge, at the time of the hearing, did not in many cases have either the motion or the opposition, and sometimes neither document. The Conference participants recommended that steps be taken to ensure that the motion and any opposition are routed to the appropriate judge in a timely manner.

Electronic Signatures by Judges and Case Name in E-Mail

Participants suggested that the Judiciary Information Management System (known as JIMS) could be improved if judges were permitted to sign documents electronically (as is now done in some federal courts). That would shorten the time for the filing of orders, which are currently printed, signed by the judge, and then scanned back into the system. Conference participants also agreed that JIMS could be improved by including more information, such as the case name, in the e-mail subject line so that the recipient (judge or attorney) does not have to open the electronic filing to ascertain the subject matter.

Cash-Only Bail

In some cases, District Court judges, in setting bail for a defendant, require that the bail be posted only in cash, thus preventing the defendant from using a bail bond company.

Some participants were of the opinion that setting cash-only bail creates an unfair distinction between those who have money and those who do not. Those who have money can post cash bail, while those who lack money cannot. Additionally, if bail must be posted only in cash, the defendant may not be able to obtain the money because he or she is incarcerated and lacks access to a bank account. Finally, participants expressed concern that setting a cash-only bail is motivated by unstated reasons that should not be considered in setting bail. On the other hand, other participants indicated that cash-only bail is proper when there is a history of the defendant failing to appear in court. Some participants contended that cash-only bail motivates the defendant to appear in court, since he or she had to post his or her own money to get out of jail. Some members of the Judiciary explained that cash-only bail is only utilized after the defendant has missed court on more than one occasion.

The Conference participants agreed that setting cash-only bail is the prerogative of the judge. The Judiciary participants at the Conference, however, agreed that this issue will be discussed at the next meeting of judges.

Conversion of Fine to Community Service Work or Jail

Currently, if a defendant cannot pay a previously-imposed fine, the court can convert the fine to jail time, at a rate of $25 per day. District Court participants discussed whether the conversion rate is too low and should be changed. There was consensus that the $25 per day

conversion rate is too low and that judges should have discretion in determining the conversion rate after hearing argument from counsel.

New Court Advisement Concerning Alien Status

District Court participants discussed whether judges or attorneys can waive the revised "immigration advisory" in Chapter 802E of the Hawai‘i Revised Statues. The participants concluded that it is risky for attorneys to waive the advisement because the attorney may not have accurate information about the defendant.

Each circuit handles the advisement in a slightly different manner. In the Fifth Circuit, the shorter advisement is given at commencement of the arraignment calendar. If the defense attorney explains that the case is not an immigration-sensitive case, then the longer advisement is not given. If the defense attorney does not make that disclosure, however, the long advisement is given. In the Second Circuit, the short form is read, en masse, and then the long form is read for specific cases. The practice on Oahu varies. Every circuit agreed that time constraints and heavy calendars make the requirements of the new legislation problematic. The Conference participants suggested that having copies of the colloquy for interpreters may make the process more efficient.

Bail Reports

Previously, on Oahu, a defendant would be arrested on a bench warrant, a judge would issue an Order Pertaining to Bail, thus setting bail without seeing the defendant, and the defendant who did not post bail would be held approximately a week before appearing in court. The procedure has changed so that, currently, defendants in custody now appear in court on the next regularly scheduled court date after arrest pursuant to the bench warrant. In Family Court criminal cases and in some preliminary hearing cases, bail reports are prepared within a two-day or three-day period, but the attorneys do not receive the reports before the arraignment or preliminary hearing. In District Court criminal cases, the Intake Services Center staff prepares bail reports, and allows attorneys to review the bail reports at the initial appearance hearing. The Intake Services Center staff collects the bail reports after the initial appearance even if the defendant is held in custody.

The District Court participants agreed that the new procedure is better for defendants. The participants recommended that the attorneys receive the bail reports before the initial bail hearing. The participants also expressed concern that bail reports are sometimes not received timely by the presiding judge. Finally, the participants agreed that attorneys should be able to keep the bail reports.

Pretrial Conferences and Sentencing Inclinations

Both District Court and Circuit Court criminal law participants reviewed the matter of pretrial conferences and whether the court should, at that time, provide an indication of the court's inclination regarding the sentence if the defendant pleads guilty or *nolo contendere.*

On Oahu, District Courts do not set pretrial conferences because of insufficient court time. In other circuits, pretrial conferences are set in many, if not most, cases. Some judges give sentencing inclinations at the pretrial conference, while others do not. Many participants acknowledged that it may be difficult for attorneys to advise defendants whether to plead guilty or no contest if there is no indication of a sentencing inclination from the judge.

Criminal law Conference participants had varying views with respect to sentencing inclinations. Some expressed the opinion that judges should never give sentencing inclinations during pretrial conferences for several reasons: they do not know the facts; there is a potential for miscommunication; it is the attorney's job to advise the defendant whether to go to trial or to enter into a plea agreement; and the indication of the court's views on sentencing (in advance of hearing the evidence) compromises the independence of the Judiciary. Some expressed an opinion that judges should give sentencing inclinations because doing so assists in resolving cases.

There was no consensus among the participants as to how the availability of pretrial conferences should be addressed and whether sentencing inclinations should be given. It was agreed that issues regarding pretrial conferences and sentencing inclinations should be referred to the appropriate working committees.

Defendants Who Are in Custody Seeking Trial

The District Court participants discussed whether a defendant who is in custody seeking trial should be given priority on the trial calendar.

The participants agreed that usually, the defendant in custody should be (and usually is) given priority. In some cases, when the defendant is serving an existing term, or is being held on a felony matter, the participants agreed that the defendant need not be given priority.

The participants had varying views with respect to Family Court criminal cases. Some believed that a defendant who is in custody should not be given priority because there are so many other cases on the calendar and the defendant is in custody because he or she is accused of particularly egregious conduct. Others believed that the custody defendant should definitely be given priority because his or her liberty interest is being restrained, which (in their view) trumped any other issue. There was no consensus; but it was agreed that the appropriate Family Court working committee will discuss this matter.

Responsibility for Determining Whether Defendants Are in Custody

There is a problem in the First Circuit when a judge issues a bench warrant because of the nonappearance of the defendant, and the defendant is in custody without the knowledge of the court, prosecutor, or defense counsel. This awkward situation raises some questions: Should judges require prosecutors to determine whether defendants are in custody before they request bench warrants? Do the prosecutors, as law enforcement officers and officers of the court, have a duty to ensure that requests for bench warrants are based on a good faith belief that the defendant is not already in custody?

The Conference criminal law participants suggest that two computer applications might help determine whether defendants are in custody: jailexchange and www.vinelink (vinemobile is a mobile phone application of vinelink). Those familiar with these applications find that they work fairly well in determining the current status of defendants.

Ensuring That the DPS Serves Outstanding Warrants in a Timely Manner on Defendants in Custody

Incarcerated defendants are often held beyond their proper release dates because the Department of Public Safety (the "DPS") does not check for outstanding warrants until defendants are about to be released. If there is a long-outstanding warrant, which is then served, the incarceration is extended. Worse, defendants are often arrested on these outstanding warrants after they are released, resulting in loss of jobs, residences, and, if homeless, all or most existing property. Moreover, they have no opportunity to receive credit for time served and they will have lost the chance to resolve the new charges (or related matters) while they were in custody

It is inefficient to expend State resources needlessly to find, arrest, and house defendants who were in custody when a warrant was issued.

The problem apparently is more prevalent in the First, Second, and Third Circuits and is apparently not a problem in the Fifth Circuit. In large part, the comments of the Conference criminal law participants seemed to indicate confusion and inconsistent practices within DPS.

At a minimum, the criminal law participants at the Conference concluded that representatives of the DPS and the Judiciary need to meet and address problems caused by the failure to serve outstanding warrants promptly on defendants in custody. In addition, although no consensus was reached, the criminal law Conference participants suggested that (1) legislation might be considered to authorize judges to address after-sentencing credit for time served if information beneficial to the defendant comes to light after the sentence is imposed; (2) a rule or legislation might authorize the dismissal of an unserved warrant if it was issued before, and reasonably could have been served before, defendant is sentenced on a prior charge; and (3) there should be a single location (electronic or otherwise) where all existing warrants (related to a specific defendant and otherwise) may be reviewed by an arresting officer.

Right to Plead "No Contest"

Rule 11 of the Hawai‘i Rules of Penal Procedure provide that "a defendant may plead not guilty, guilty or nolo contendere." It was reported at the Conference that some judges and some prosecutors prohibit defendants from pleading no contest. It was the consensus of those participating in the criminal law sections of the Conference that the court may consider the defendant's plea in imposing a sentence, and a defendant should not be prohibited from entering a plea of *nolo contendere* and accepting the consequences of such a plea.

The Waiting Period to Get Into Drug Court and Other Specialty Courts

Circuit Court criminal law Conference participants noted that, in the First Circuit, it can take six or seven months to get into the Drug Court and longer to get into the Mental Health Court.

Due to the lengthy delay, trial judges are concerned about the delay in the disposition of pending cases involving defendants who seek access to such specialty courts. Moreover, it now appears that the defendants affected by the lengthy delays are now relying on other means for resolving their cases. The recommendation of the Conference participants addressing this issue is that a discussion needs to be initiated in the Judiciary (including the Chief Justice if appropriate) to see whether, through administrative measures, the delay can be overcome and the remedies provided by such specialized courts can be made more readily available.

Video Teleconferencing for Sentencing

Conference participants noted that there has been a movement to allow defendants who are located out-of-state at the time of sentencing, and who have plea agreements, to be sentenced via video teleconference, thus avoiding the attendant expense of traveling to and from Hawai‘i for pleas and sentencing. Pursuant to the Interstate Compact Act, a cooperating state's probation official has to be available to witness the defendant signing the terms and conditions of probation or deferral. Some cooperating states refuse to fulfill this responsibility.

The probation department appears to take the position that, when the Interstate Compact Act applies, the department should not witness the signing of the terms and conditions of probation via teleconference. The Conference participants addressing this issue recommended that representatives of the Judiciary and representatives of the probation administration confer to determine the method whereby sentencing and the execution of terms and conditions of probation or deferral can be achieved by video teleconference.

CONCLUSION

The Judicial Administration Committee submits this report of the proceedings of the 2013 Bench-Bar Conference for review and consideration by the Judiciary and by the Hawai‘i State Bar Association, and for such further action as they deem appropriate.

REPORT OF THE
2013 BENCH-BAR CONFERENCE

CONFERENCE PARTICIPANTS

THE COMMITTEE ON JUDICIAL ADMINISTRATION

Committee Co-Chairs:	Honorable Simeon R. Acoba Jr. Associate Justice, Supreme Court of Hawaii Steven J. T. Chow
Members:	Honorable Richard W. Pollack Associate Justice, Supreme Court of Hawaii Honorable Joel August Judge (Ret.), Second Circuit Court Honorable Ronald Ibarra Judge, Third Circuit Court, Big Island Drug Court – Kona Honorable Shirley Kawamura Shimizu Judge, District Court, First Circuit Honorable Karen T. Nakasone Judge, First Circuit Court Honorable Catherine H. Remigio Judge, Family Court, First Circuit Honorable Randal G. B. Valenciano Judge, Fifth Circuit Court Dennis Chong Kee Kahikino Noa Dettweiler Vladimir Devens Don Jeffrey Gelber William A. Harrison Edward C. Kemper Carol K. Muranaka Lester D. Oshiro Audrey Stanley

CIRCUIT COURT – CIVIL LAW GROUPS

Lead Judges:	Honorable Ronald Ibarra Judge, Third Circuit Court, Big Island Drug Court – Kona Honorable Joel August (Ret.) Judge (Ret.), Second Circuit Court
Lead Attorneys:	Roy J. Bell Keith K. Hiraoka
Reporters:	Steven J. T. Chow Honorable Karen T. Nakasone

Participants: *Group I*

Alfred B. Castillo Jr.
Newton John Chu
Dennis K. Ferm
Rhonda L. Griswold
C. Michael Heihre
Harvey E. Henderson Jr.
Steven T. Iwamura
Francis L. Jung
Gregory Wayne Kugle
Mei-Fei Kuo
April Luria
William M. McKeon
Michael J. Matsukawa
Melvyn M. Miyagi
Randall Craig Whattoff
Calvin E. Young

Group 2

Robert Joseph Borns
Rex Yoshio Fujichaku
Gary G. Grimmer
Regan Moriaki Iwao
Robin M. Kishi
Summer M. M. Kupau
Bruce A. Larson
Laurel K. S. Loo
David J. Minkin
Duane Richard Miyashiro
Brenda Elizabeth Morris
Zale T. Okazaki
Jeffrey S. Portnoy
Kenneth S. Robbins
Loretta A. Sheehan
Craig K. Shikuma
Douglas C. Smith
Craig Parker Wagnild
Deborah K. Wright
Richard N. Wurdeman

CIRCUIT COURT – CRIMINAL LAW GROUP

Lead Judge:	Honorable Randal G. B. Valenciano (Judge, Fifth Circuit Court)
Lead Attorney:	William A. Harrison
Reporter:	Lester D. Oshiro
Participants:	Honorable Joseph E. Cardoza Judge, Second Circuit Court Honorable Randal Lee Judge, First Circuit Court Honorable Greg K. Nakamura Judge, Third Circuit Court Susan L. Arnett William C. Bagasol Birney B. Bervar L. Adrian K. S. Dhakhwa Janice T. Futa Brook Hart David Hayakawa Craig William Jerome Tracy Ann Jones Keith M. Kaneshiro Katherine Puana Kealoha Robert D. S. Kim Carol S. Kitaoka Justin Francis Kollar Howard K. K. Luke Clarissa Yandoc Malinao Darien W. L. C. Nagata Stanton C. Oshiro Thomas M. Otake Mitchell David Roth David A. Sereno Richard Wayne Stacey Carson F. Tani Christopher D. W. Young

DISTRICT COURT – CIVIL LAW GROUP

Lead Judge:	Honorable Gerald H. Kibe Judge, District Court, First Circuit
Lead Attorney:	Dennis William Chong Kee
Reporter:	Edward C. Kemper
Participants:	Honorable Melvin H. Fujino Judge, Family Court, Third Circuit Honorable Hilary Benson Gangnes Judge, District Court, First Circuit Honorable Adrianne N. Heely Judge, District Court, Second Circuit Russ S. Awakuni David W. H. Chee Renee Masako Furuta Steven Guttman Edmund W. K. Haitsuka Jill Mariko Hasegawa Louanne L. Kam Dew Kaneshiro Kenneth K. S. Lau Sheila P. Lippolt Henry T. Nakamoto Cheryl A. Nakamura Allan Y. Okubo Jason F. Oliver William J. Plum Daniel J. Y. Pyun Jennifer Rie Sugita Richard A. Yanagi Reginald K. T. Yee Guy Christopher Zukeran

DISTRICT COURT – CRIMINAL LAW GROUP

Lead Judge:	Honorable Catherine H. Remigio Judge, Family Court, First Circuit
Lead Attorney:	Alen M. Kaneshiro
Reporter:	Audrey Stanley
Participants:	Honorable Shirley M. Kawamura Judge, District Court, First Circuit Honorable Kelsey T. Kawano Judge, District Court, Second Circuit

Honorable Dean E. Ochiai
Judge, First Circuit Court
Honorable Barbara P. Richardson
Judge, District Court, First Circuit
Honorable Trudy K. T. Senda
Judge, District Court, Fifth Circuit
Honorable Barbara T. Takase
Judge, District Court, Third Circuit
Honorable Robert M. Browning (for part)
Judge, Family Court, First Circuit
Bronson Avila
William M. Bento
Jason R. Burks
Hayley Y. C. Cheng
Brian Alexander Costa
Byron Y. Fujieda
Richard D. Gronna
Matthew Mitsuo Kajiura
Megan Kelly Kau
Barry J. Kemp
Marcus Leslie Landsberg IV
Trisha Yoshimi Nakamura
Jeen Hee Kwak Pang
Clinton Gregory Piper
Richard H. S. Sing
Kimberly Bryn Mari Taniyama
John M. Tonaki
Jerry A. Villanueva

JUDICIARY ADMINISTRATION

Participants:

Rodney Maile
Administrative Director of the Courts
Iris Murayama
Deputy Administrative Director of the Courts