

# REPORT OF THE JUDICIAL ADMINISTRATION COMMITTEE

on the

## 2015 BENCH-BAR CONFERENCE

Friday, October 23, 2015

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## I. INTRODUCTION

The Judicial Administration Committee of the Hawai'i State Bar Association ("HSBA") is charged with the responsibility of making recommendations for the improvement of the judiciary and the administration of justice. To fulfill this responsibility, the Committee convenes a conference, usually every two years, of lawyers invited by the Committee and judges and administrative court personnel designated by the Hawai'i Supreme Court Chief Justice to consider selected matters of current interest to the bench and the bar and to make recommendations for consideration by the HSBA and the Judiciary that the conference participants believe will improve the administration of justice in Hawai'i courts.

The 2015 Bench-Bar Conference was held on October 23, 2015, at the Hawai'i Convention Center. The participants represented members of the bench and the bar involved in civil and criminal matters in both the circuit courts and district courts in each of the state's judicial circuits. In all, there were 149 participants, consisting of 124 lawyers and 25 judges and court administrators. The Conference was divided into five sections or groups: two groups considered civil matters in the circuit courts, three additional groups separately reviewed civil proceedings in the district courts, criminal proceedings in the circuit courts, and criminal proceedings in the district courts. The separate reports of each section or group (and the combined report of the two circuit court civil groups) are submitted below.

The 2015 Conference considered topics of common interest and importance to all participants, whether they practice or preside in civil or criminal proceedings and whether they do so in the circuit court or the district court.

The common topics were the *Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers* and the *Principles of Professionalism for Hawai'i Judges*.

### A. Professional Courtesy and Civility

In 2004, the Hawai'i Supreme Court decided that it would attempt to influence the behavior of lawyers in areas that defy rule-making: professional courtesy and professional civility – principally, if not entirely, related to lawyers engaged in litigation. Rule-making generally requires that the conduct required and the conduct prohibited be reasonably definable and not of its nature discretionary or unlimited. Acts of discourtesy are limited only by the imagination of the actor, and lawyers have almost unlimited imaginations. Moreover, the professional behavior that the Supreme Court sought to address is largely

discretionary – matters of accommodation and consideration that extend beyond the requirements of the Rules of Court and the Code of Professional Responsibility (for example, granting an adversary an extension of time in addition to the period permitted by an applicable rule).

The Court wisely decided to adopt guidelines. The *Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers* are “aspirational” and were adopted in the hope that they would “assist all in the legal profession and the justice system in conducting themselves in a manner that is fair, efficient and humane.”<sup>1</sup> One might think that it is demeaning to members of a so-called learned profession to remind them, as the preamble to the *Guidelines* states, that “[t]he practice of law is an honorable and dignified profession” and provide instruction on matters of courtesy and civility. It would, however, be worse to fail to instruct those in need of such instruction.

The *Guidelines* admonish lawyers not merely to adhere to the Rules of Court, but, in discretionary matters, to accommodate the interest of others when doing so will not diminish the interest of their own clients. For example, when scheduling various matters, lawyers should “consider the scheduling interest of opposing counsel, the parties, witnesses, and the court” and not “withhold consent to a request for scheduling accommodations”; a “lawyer should agree to reasonable requests for extensions of time when the legitimate interests of his or her client will not be adversely affected”; a lawyer should refrain “from using the mode, timing or place of serving papers primarily to embarrass a party or a witness”; and he or she “should not use any form of discovery, the scheduling of discovery, or any other part of the discovery process as a means of harassing opposing counsel or the opposing party.”<sup>2</sup>

The *Guidelines* deal with the quality of professional behavior, not compliance with rules. For example, a lawyer’s dealing with non-party witnesses “should be courteous and designed to leave the witness with an appropriately good impression of the legal system”; in court, a lawyer “should conduct himself or herself in trial and hearings in a manner that promotes a positive image of the profession, assists the court in properly reviewing the case, and displays appropriate respect for the judicial system”; and the lawyer who manifests courtesy and civility “[d]oes not engage in any conduct during a

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<sup>1</sup> See introductory paragraph to the *Guidelines*.

<sup>2</sup> See *Guidelines*, Section 1(a), (b), Scheduling; Section 2, Continuances and Extensions of Time; Section 3(d), Service of Papers; Section 7, Discovery.

deposition that is likely to offend others necessarily present and would violate prevalent standards of behavior in judicial proceedings.”<sup>3</sup>

There were clear differences among the participant groups concerning whether professional discourtesy or lack of civility was a problem and whether anything needed to be done to promote or enforce adherence to the *Guidelines*. The civil circuit court groups were of the view that incivility is rare but not non-existent. There was, however, no consensus among or within those groups as to the magnitude of the problem. On the other hand, the district court civil group reported that for the most part, civility is not an issue. The circuit court criminal group also reported that incivility and discourtesy were not a major problem or a concern among the circuit court criminal lawyers. The district court criminal group expressed concern that motions were being filed without an adequate basis, but did not attribute the problem to a lack of compliance with rules or an improper standard of behavior. Rather, the group believed that problem arose when filing counsel has not yet received or reviewed discovery made available by opposing counsel, and proceeded to consider the potential benefits of pre-trial conferences, setting motion deadlines, and providing discovery electronically.

The circuit court civil groups – the only groups that perceived a problem worthy of significant discussion -- identified two types of primary offenders: repeat offenders and young attorneys. It was suggested that a number of steps could be taken to emphasize the importance of the *Guidelines* and the court’s expectation that the *Guidelines* will be followed. First, judges could attach the *Guidelines* to the court’s trial setting order or other appropriate order and take the opportunity to express the court’s expectation that the *Guidelines* will be followed. Second, seasoned/supervising attorneys could, and should, take responsibility for and guide junior attorneys in adherence to the *Guidelines*. (With regard to advising lawyers in matters of civility, Judge Gary Chang, in an informal, but entertaining piece in the *Hawaii Bar Journal*, provided the following: “The mighty [referring to ‘strong’ lawyers] cast compassion and compliments. The weak hurl insults and one-up-manship. Be the mighty!”<sup>4</sup>) Finally, more attorneys should advise their clients that adherence to the *Guidelines* should never be equated with weakness or a lack of vigor in protecting the client’s interest.

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<sup>3</sup> See *Guidelines*, Section 9, Dealing with Nonparty Witnesses; Section 12, Trials and Hearings; Section 7(a)(10).

<sup>4</sup> 19 *Hawaii Bar Journal* No. 1, p. 20. Judge Chang was also moved to quote, but not cite, Shakespeare: “And do as adversaries do in law, strive mightily, but eat and drink as friends.” Here is the cite: *Taming of the Shrew*, act 1, sc. 2 (1593-94); *but see King Henry IV, Part 2*, act 4, sc. 2 (1596-99): “The first thing we do, let’s kill all the lawyers.” This last quotation may be misunderstood. In the play, it is spoken by a would-be tyrant who intends to remove obstacles to tyranny.

There was a sharp division within the Conference concerning the status of the *Guidelines*; that is, whether the *Guidelines* should continue as standards of behavior, or whether an attempt should be made to convert the *Guidelines* into specific and enforceable rules. One of the groups at the Conference was entertained with the story of an attorney who was admonished by the court for not adhering to the *Guidelines of Professional Courtesy and Civility* and responded, in his own defense, that they are only guidelines. The presiding judge was not impressed: “In this courtroom,” he said, “they are rules.” The circuit court civil groups felt that in order to persuade attorneys to be more civil, the *Guidelines* will undoubtedly need more “teeth.” The majority of those two groups agreed that the *Guidelines* needed to be enacted as its own set of rules in order to carry out its full intent. As mentioned above, the circuit court criminal group found that lack of courtesy and civility was not a major problem or concern. The district court civil group, specifically including the participating judges, reported that the *Guidelines* should remain as guidelines and should not be incorporated into court rules. The group expressed concern that, if the presiding judge were to be the enforcer of such rules, it might adversely affect the ongoing trial. The district court criminal group did not specifically comment on matters of courtesy and civility, but focused instead on procedural matters affecting criminal practice in the district courts.

## **B. Principles of Professionalism for Hawai‘i Judges**

At the same time that the Hawai‘i Supreme Court provided guidelines of professional courtesy and civility for lawyers, it promulgated *Principles of Professionalism for Hawai‘i Judges*. The distinction between guidelines and principles is elusive. The *Principles* are not less instructive than the *Guidelines*. Every one of the enumerated fifteen principles states what a judge should or should not do. For example, “a judge should be courteous, respectful and civil to lawyers, parties, witnesses, court personnel, and all other participants in the legal process”; “a judge should maintain control of the proceedings . . . to ensure that all proceedings are conducted in a civil and respectful manner by counsel and the parties”; “to the extent possible, a judge should give all issues in controversy deliberate, informed, impartial, and studied analysis and consideration and explain, when necessary, the reasons for the decision of the court”; “a judge should not employ hostile, demeaning or humiliating language in opinions or in written or oral communications with other judges, lawyers, parties, witnesses or court personnel”; and “a judge should not impugn the integrity or professionalism of any lawyer on the basis of the lawyer’s client or cause.”<sup>5</sup> If anything, the *Principles*, in many respects, are more pointed than the *Guidelines*.

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<sup>5</sup> See *Principles of Professionalism for Hawai‘i Judges*, paragraphs 1, 2, 7, 9, 12.

The consensus of the circuit court civil groups was that the judges in Hawai'i are professional, courteous, and fair, but the participants expressed concern over the fact that the courts are overloaded with cases. The attorney participants expressed particular concern with time wasted at so-called "cattle-call" hearings and untimely (delayed) disposition of motions, orders, and/or judgments. The practitioners suggested that the court consider limiting the time for argument; taking easier motions first before trying more complex matters; segmenting the calendar (that is, scheduling only one motion when there are multiple parties or complex legal issues, and allotting more time for that motion, before proceeding to another motion or group of motions); and, if a judge has an inclination, providing it at the outset of the hearing (but, as stated below, other groups disfavored the court's statement of an inclination at the commencement of argument).

The circuit court criminal group reported a concern that most judges might not be aware of the *Principles* and that the Judiciary should do more to make sure all judges are aware of the 15 adopted principles. Of particular concern was the situation, which often occurs in criminal law practice, where a lawyer is scheduled to appear in multiple courtrooms on the same day and is delayed in one courtroom, causing the lawyer to be late at a subsequent hearing, sometimes resulting in an unfavorable comment by the presiding judge (possibly in front of the lawyer's client).

Four concerns were raised by lawyers in the district court criminal group. Although isolated and anecdotal, the number and nature of the concerns warrant attention. One participant expressed concern that a judge referred to a particular ethnic group as "these people," which implied that the judge lumped together all defendants of that particular ethnicity and did not consider each defendant's case as a specific, unique case. Another participant reported that judges sometimes essentially challenge young attorneys to appeal the judges' rulings if the attorney is not happy with the rulings and are confrontational in dealing with young attorneys. A third participant expressed doubt that all judges routinely read motions and opposing memoranda prior to the court hearing. Finally, participants in the group noted that, on occasion, judges made informal, sometimes flippant and dismissive, comments in chambers that were off-the-record but nonetheless had a significant and adverse impact on attorneys and parties. All participants in the district court criminal group found that these instances raised legitimate concerns and the Judiciary should remind judges of their obligation to adhere to the *Principles of Professionalism for Hawai'i Judges*.

The district court civil group was primarily concerned with judges who are late in commencing proceedings. One of the *Principles* states that the judge "should be punctual in convening trials, hearings, meetings, and conferences and [should] notify counsel or

*pro se* parties promptly if the judge becomes aware that a matter will not begin when scheduled.”<sup>6</sup> The consensus of the district court civil group was that it would appreciate being informed when a judge anticipates being late.

### **C. Reform of the Civil Justice System**

One of the topics considered by the circuit court civil groups was reform of the civil justice system. Civil litigation reform has, in recent years, been a topic of interest in many jurisdictions. In 2009, the Institute for Advancement of the American Legal System and the American College of Trial Lawyers Task Force on Discovery and Civil Justice published a report of 29 proposed principles related to judicial management, pleadings, discovery, and experts, all aimed at an attempt to improve the judicial system. In 2015, the Task Force published *Reforming Our Civil Justice System: A Report on Progress & Promise*, in which it reviewed developments since its previous report and set forth a new set of Principles for Civil Justice Reform (now reduced to 24). Chief Justice Recktenwald, in his opening remarks, encouraged the participants to share their thoughts on the various topics, particularly the topic of civil justice reform.

The numerous proposals made and the various pilot programs undertaken in other jurisdictions involve such fundamental matters as establishing specialized courts, changing the rules of civil pleading (generally changing from notice-based pleading to fact-based pleading), and limiting discovery, trial time, and the right to a trial by jury (depending on the circumstances and amounts involved and other circumstances). These proposals raise constitutional concerns and fundamental questions about the importance of discovery, the right to a jury trial, and whether a client’s right to recover will be short-changed by cutting off discovery and trial time. The dilemma is succinctly stated by the unanswered question: What is the appropriate balance between expedience and fairness? The overwhelming consensus of the circuit court civil groups was that reform *is* necessary and that deciding exactly what kind of reform should be implemented will require much more time than a single conference permits.

The circuit court civil groups proposed that the Judiciary and the HSBA form a committee to consider, in detail, the numerous and varied suggestions for civil law reform, the experience of pilot programs and reforms that have been implemented elsewhere, and provide recommendations for reforms that might be considered at the next Bench-Bar Conference for possible implementation in Hawai‘i.

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<sup>6</sup> See *Principle 4*.



#### **D. Topics Applicable to Civil or Criminal Proceedings**

The Conference also covered selected topics more particularly applicable to civil and criminal practice in the circuit and district courts.

The circuit court civil groups also considered matters related to court-appointed mediators and court-appointed masters; the scope and powers of court-appointed arbitrators; and whether and under what circumstances third parties with an interest in the outcome of the proceeding (such as insurers or indemnitors) might be encouraged or compelled to participate in court-ordered mediation. The district court civil group considered, in addition to the common topics, matters related to the procedures employed in connection with summary possession proceedings; whether pretrial briefs should be required; and whether final orders on all issues in a case are required to trigger a right to appeal.

In addition to the common topics, the circuit court criminal group considered, among other things, the availability of police department transcripts of interviews of complainants, witnesses, and defendants; the delay in the entry of a judgment pending the commencement and completion of a restitution hearing; the problem caused by the lack of available qualified interpreters; the issuance and service of bench warrants on individuals already in custody; and the reduction of bail when the offenses charged are reduced. The district court criminal group considered matters related to a Judiciary Electronic Filing and Service System (“JEFS”) and the Judiciary Information Management System (“JIMS”); the timely conclusion of restitution hearings and orders; the effort to combine the trial of an infraction and the underlying crime when both are charged; and service of subpoenas by e-mail.

The discussions, conclusions, and recommendations of the various Conference groups on these and other topics are set forth in the reports below.

## II. COMMON QUESTIONS DISCUSSED

### A. Guidelines of Professional Courtesy and Civility for Hawaii Lawyers

By order of the Hawaii Supreme Court, on August 27, 2004, the *Guidelines of Professional Courtesy and Civility for Hawaii Lawyers* were adopted. The aspirational Guidelines cover the following fourteen topics: scheduling, continuances and extensions of time, service of papers, punctuality, writings submitted to the court, communications with clients and adversaries, discovery, motion practice, dealing with nonparty witnesses, ex parte communication with the court, settlement and alternative dispute resolution, trials and hearings, privacy, and documents modification. The discussion may include, but is not limited to the following:

- Are courtesy and civility being equated with weakness, and do they seem inconsistent with zealous representation of the client?
- Are motions being filed sparingly, only in good faith, and when the issue cannot be otherwise resolved as stated in Section 8 of the Guidelines?
- Are lawyers punctual in communications, hearings, meetings, depositions, or other scheduled events?
- Are attorneys fully prepared for court appearances?
- Are meetings, hearings, and discovery scheduled without problems? Are continuances or extensions of time agreed to reasonably?
- When is it appropriate, if ever, to call the judge's chambers regarding matters taken under advisement?
- What is the appropriate attire for status conferences?
- Should the Guidelines be attached to discovery orders and other types of orders by the court?

#### 1. Circuit Court - Civil Groups 1 and 2 Discussion

The group noted that practicing law in Hawaii is a uniquely enjoyable experience because attorneys in Hawaii practice with "aloha," are courteous towards each other, and are particularly mindful that they are part of a small community where they will run into opposing counsel time and time again. The general consensus among the group was that incivility is rare, but not nonexistent. Several members of the group felt that Guidelines were not being sufficiently adhered to by current litigators, but there was no clear consensus relative to the magnitude of the problem. Many participants felt that primary offenders include (1) a select group of "repeat offenders" whom the courts are likely already aware of and (2) young attorneys. In this regard, no particular age group is responsible for problems arising from lack of civility.

The group consensus was that in order to persuade attorneys to be more civil, the Guidelines will undoubtedly need more “teeth.”

Maui, Kona, Hilo, and Kauai representatives in the group stated that practitioners on their respective islands are generally very courteous. Problems occur more often when Honolulu attorneys fly over to the neighbor islands, bringing “fights” with them.

One of the judges suggested attaching the *Guidelines* to court orders. Another judge encouraged seasoned attorneys to mentor young attorneys who do not fully understand the way that Hawaii lawyers operate. When a young attorney who appeared before this judge was rude to opposing counsel, the judge took some time to talk to the attorneys after the hearing. That was enough to resolve the problem.

The practitioners in the group appreciated both suggestions and agreed that both would be helpful. It was also noted by the group that young attorneys may not even know the *Guidelines* exist. Because the legal profession is a self-policing one, seasoned attorneys and judges should take the time to mentor young attorneys and encourage them to be cooperative and civil.

When written pleadings contain personal attacks on opposing counsel, the attorneys appreciate assistance from the court. The problem is often alleviated if, prior to hearing arguments on the merits of the motion, the court makes a quick comment on the record regarding the inappropriateness of personal attacks in pleadings. If the problem continues, then the court’s comments are part of the record and can be cited to later on in the case.

There were also a number of opinions expressed regarding the change from a small bar to one wherein members do not have regular personal contact, including the extensive use of electronic means of communications rather than telephone discussions, lack of adherence to the meet and confer requirements contained in the Rules of Circuit Court (“RCCH”), and counsel acceding to the demands of hard-nosed clients.

A series of suggestions were offered to help minimize these problems. Suggestions included (1) judges taking the opportunity at trial setting to highlight the fact that he/she is attaching the Guidelines to the court’s trial setting order, which elevates the guidelines, in this instance, from being merely aspirational, to binding; (2) that judges be more explicit regarding their expectations of civility and professionalism (e.g. attaching copies of the *Guidelines* to court orders, speaking to all counsel when violations are seen in submissions to the court, strict enforcement of the meet and confer rules, etc.); (3)

seasoned/supervising attorneys taking the responsibility to guide junior attorneys in adherence to the *Guidelines*; and (4) all attorneys advising clients that courtesy in scheduling is not to be equated with weakness.

The majority of the group agreed that the *Guidelines* should be/need to be enacted as its own set of rules in order to carry out its full intent. The *Guidelines* should not be incorporated into the Rules of Professional Conduct, but rather, enacted as its own set of court rules similar to Hawaii Rules of Civil Procedure and RCCH, enforceable by the courts.

## **2. Circuit Court - Criminal Group Discussion**

The consensus of the participants was that courtesy and civility was not a major problem or concern amongst the circuit court criminal lawyers.

The only matter discussed under this topic was: When is it appropriate, if ever, to call the judge's chambers regarding matters taken under advisement?

If one party is concerned about a pending decision of the court, all agreed that contacting the court with the consent and knowledge of opposing counsel is appropriate. The contact of the court is through the court staff and not to the judge directly. The judges agreed that it was not a problem or concern for attorneys to do that, and a couple of the judges encouraged the attorneys to contact the court if a matter was pending for a substantial period of time.

If the inquiry to the court is not "substantive," then the consensus was that it would be totally acceptable to call the judge's clerk and inquire, for example, "Has the order been filed?" If the concern amounted to more than just an administrative concern, then it would be appropriate that there be notice and consent by opposing counsel for the inquiry to be made.

The question came up as to what is the appropriate remedy when inquiry is made as to the status on a pending motion and the response from the clerk is that the matter was still under advisement. Judge Ibarra responded that he felt it was appropriate for counsel to contact the Chief Judge's staff so that the Chief Judge could follow up directly with the judge in question. Judge Ibarra mentioned that he and other Chief Judges are sent a list of cases from their judges as to matters that were taken under advisement. This is one means of making sure that judges make timely decisions.

### **3. District Court - Criminal Group Discussion**

Some participants expressed concern that motions are filed without an adequate factual basis, including when the filing counsel has not yet received or reviewed discovery made available by opposing counsel. That concern led to a broader discussion concerning the potential benefits of the Court establishing pre-trial conferences and motions deadlines, particularly to help avoid situations where (i) a defendant appears at trial but is not represented by counsel, and (ii) defense counsel seeks a continuance at trial because counsel has not filed timely dispositive pretrial motions prior to trial. From there, discussion turned to the desirability of providing discovery electronically.

With respect to pre-trial conferences and motions deadlines, following the Bench-Bar Conference, the following procedures have now been adopted in the First Circuit: (1) At arraignment in cases in which the defendant is represented by private counsel, the judge now typically will instruct that all motions must be filed at least 14 days before trial. (2) In cases in which the defendant pleads not guilty and is not yet represented by counsel, the judge will now set a trial date, and will also schedule a status hearing three days prior to the trial date. However, if—before leaving the courthouse on the date of arraignment—the defendant chooses to call the Office of the Public Defender (“PD”) and make an appointment with the PD, the judge will then cancel the status hearing, and will reschedule trial to a date three weeks after the date of the defendant’s meeting with the PD. With that, defendants represented by the PD should be able to file dispositive motions prior to trial, and should also be ready for trial at the first trial setting.

With respect to electronic discovery, attorney Jonathan Burge volunteered to assist the HSBA in offering training to attorneys regarding the use of the Judiciary Electronic Filing and Service System (“JEFS”) in electronic discovery. In the First Circuit, the PD and the Honolulu Prosecutor’s Office (“Prosecutor”) have set up a system by which discovery is requested and provided online in some instances; however, the Prosecutor’s office is not yet able to provide electronic discovery to the private defense bar. All participants agreed that electronic discovery must be kept confidential, but use of JEFS is not sufficiently secure to ensure confidentiality. All participants agreed that all attorneys must learn to use JEFS and to request, provide, and access electronic discovery, and that a committee should be formed to investigate expanding electronic discovery, improving confidentiality of electronic discovery, and suggesting potential rule changes to assist in electronic discovery.

Participants from the other circuits do not have the same concerns regarding the above topics. These concerns are limited to Oahu.

#### **4. District Court - Civil Group Discussion**

For the most part, civility is not an issue. If there are issues, they often occur between represented and unrepresented parties, such as when an unrepresented party appears at the answer date and is very upset that the trial is not scheduled for that day. As to unrepresented parties, it is, of course, difficult to require adherence to the *Guidelines* if they do not know the *Guidelines* exist. If the *Guidelines* were incorporated into rules, there is a question as to who would enforce them. If the judge is the designated enforcer of such rules, then the additional question is: How would that affect an ongoing trial?

The judges generally felt that the *Guidelines* should remain guidelines. Other remedies (show cause, contempt, etc.) can be used to address questionable conduct or the issue can be raised in a pretrial conference.

Among the attorneys, it was observed that most of the questionable conduct occurs outside of the courtroom (depositions, discovery, etc.), but it seems to be more of a problem in circuit court cases. The attorneys should be reminded about the *Guidelines* either within the various sections of the bar association; an article published in the *Hawaii Bar Journal*; having a CLE course on the *Guidelines*; or a pamphlet prepared by the Office of Disciplinary Counsel to be given to attorneys and parties. Many of the problems are with pro se parties who have no knowledge about the *Guidelines*.

Consensus: The *Guidelines* are fine as guidelines rather than rules. It would be helpful to provide reminders to the bar and to potential clients, perhaps through the *Hawaii Bar Journal*, Judiciary website, HSBA website, and CLE programs. The most difficult issue will be reaching pro se parties.

#### **B. Principles of Professionalism for Hawaii Judges**

On August 27, 2004, the Hawaii Supreme Court adopted the *Principles of Professionalism for Hawaii Judges*. There are fifteen principles enumerated as follows:

1. A judge should be courteous, respectful and civil to lawyers, parties, witnesses, court personnel, and all other participants in the legal process.
2. A judge should maintain control of the proceedings, recognizing that judges have both the obligation and the authority to ensure that all proceedings are conducted in a civil and respectful manner by counsel and the parties.
3. A judge should be considerate of the time schedules of lawyers, parties, and witnesses, and the expenses attendant to litigation, in scheduling trials, hearings, meetings and conferences.

4. A judge should be punctual in convening trials, hearings, meetings and conferences and notify counsel or pro se parties promptly if the judge becomes aware that a matter will not begin when scheduled.
5. While endeavoring to resolve disputes efficiently, a judge should be considerate of the time constraints and pressures imposed on lawyers, parties or other participants in the legal process.
6. A judge should allow a lawyer or pro se party to present a cause properly and to make a complete and accurate record, free from unreasonable or unnecessary judicial interruption.
7. To the extent possible, a judge should give all issues in controversy, deliberate, informed, impartial, and studied analysis and consideration and explain, when necessary, the reasons for the decisions of the court.
8. A judge should make all reasonable efforts to decide promptly all matters presented for decision.
9. A judge should not employ hostile, demeaning or humiliating language in opinions or in written or oral communications with other judges, lawyers, parties, witnesses or court personnel.
10. A judge should work in cooperation with other judges in this and other jurisdictions on matters relating to the availability of lawyers, parties, witnesses or court resources. A judge should not knowingly create a scheduling conflict with another judge's judicial proceeding.
11. A judge should ensure that court personnel act civilly and respectfully toward each other and toward judges, lawyers, parties, witnesses and all other participants in the legal process.
12. A judge should not impugn the integrity or professionalism of any lawyer on the basis of the lawyer's clients or cause.
13. A judge should avoid procedures that needlessly increase litigation expenses and discourage unnecessary litigation expenses.
14. A judge should refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss), or by the professional title of attorney or counselor while in the courtroom. In any proceeding, a judge should refer to all counsel in a like manner.
15. A judge should be courteous and respectful in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly. A judge should endeavor to work with other judges to foster a spirit of cooperation in the mutual goal of enhancing the administration of justice.

Are judges courteous, respectful, and civil to lawyers, parties, witnesses, court personnel, and other participants in the legal process? Are judges considerate of the

litigation expenses and the time schedules of lawyers, parties, and witnesses in trying to resolve disputes? Are judges in control of the proceedings? Are judges referring to counsel by surname preceded by the preferred title, Mr., Mrs., Ms. or Miss?

### **1. Circuit Court - Civil Groups 1 and 2 Discussion**

Consensus among the group was that judges in Hawai'i are professional, courteous, and fair. Of greater concern is the fact that courts are overloaded with cases. Problems arise because courts are constantly trying to balance their calendars with the attorneys' calendars. Practitioners were particularly concerned with time wasted at "cattle-call" hearings and untimely dispositions of motions, orders, and/or judgments.

The following requests were made by the practitioners in the group: (1) consider limiting the length of time that a party or attorney has for oral argument in order to keep the calendar moving, (2) take "easier" motions first so that less time is wasted by attorneys who have to sit around waiting, (3) when there are multiple parties and/or complicated legal issues involved, consider scheduling only one motion at a time and allotting more time for that motion before lining up the next group, (4) try to be mindful of attorneys who have to travel from another island, and (5) if judges have an inclination, they should give it at the beginning of the hearing.

The judges in the group responded by stating that they, and their fellow judges, are willing to be accommodating when attorneys make timely requests for accommodations. The simple truth is that courts are overloaded with cases. Attorneys should be mindful that their caseload is only a fraction of the courts' workload. The courts have to set multiple hearings every day; otherwise, parties would be waiting months to have their motions heard. If the bar can come up with a more efficient way for the courts to manage their caseload and schedule hearings, then the judges would be willing to consider it.

Regarding scheduling of trial dates, if the plaintiff wants an early trial date, but defense counsel's calendar simply cannot accommodate an early trial, then a practical solution might be to set an early trial date, with the understanding that defense counsel will file a motion to continue trial, if necessary, at a later time. Attorneys should be vocal at trial setting conferences and/or status conferences. If attorneys are candid with the court, then usually the court will try to accommodate them.

Additionally, it was noted that not everyone appreciates inclinations. Both attorneys and parties want to have their day in court. Inclinations often give the impression that the court has pre-judged a case before hearing arguments on the merits.



Complaints regarding inclinations are brought up during consideration of a judge's retention.

The group was then asked what the neighbor island courts should do when Honolulu attorneys fly over and ask to continue a hearing motion. The group consensus was that attorneys should work cooperatively to accommodate each other's schedules and not waste court time or incur unnecessary client expense. Ideally, this should not happen in civil suits. Attorneys should encourage each other not to let this happen.

Practitioners in the group sought guidance from the judges regarding the best way to contact the court with inquiries about the status of rulings on motions and judge trials "taken under advisement." There were concerns expressed that attorneys were reluctant to remind judges about particular cases out of fear that such actions would jeopardize their clients' outcomes. The judges in the group responded by saying that courteous calls to chambers are always welcomed. Attorneys should be confident that all rulings are decided on the merits and that judges will not be swayed by who makes the call or whether the court favors one attorney over another. The same applies to status calls regarding outstanding judgments, orders, and ex parte motions, so long as attorneys are respectful toward court staff. Another suggestion is to send a joint letter of inquiry on behalf of all parties involved. Of course, this would require all parties agreeing to submit the letter *and* that all parties want the motion to be decided quickly, which is not always the case.

It was also noted that judges already have an internal reporting system requiring them to report matters that remain undecided after a certain amount of days. However, this system has not eliminated the perception among some attorneys that decisions affecting their clients are often delayed for extended periods. Some members of the group thought that an unbiased third party should be available and/or designated to serve as a court liaison, similar to the function of the Hawaii State Trial Judges Association/Hawaii State Bar Association Committee. This option would be reserved for serious matters of concern only after a call to court chambers and/or joint letter of inquiry fail to accomplish the timely disposition of a motion, order, or judgment.

The group was also asked to brainstorm ways to ensure the timely receipt of ex officio filings. Should attorneys be required to fax filed copies to the court? Is that a waste of limited judicial resources? How can we ensure the courts' and opposing counsel's timely receipt of motions, opposition memorandums, reply memorandums, etc.? Should this be a topic for discussion in future bench bar conferences?

## 2. Circuit Court - Criminal Group Discussion

The first comment made on this topic reflected that most judges might not be aware of the *Principles of Professionalism for Hawaii Judges* and that the Judiciary should do more to make sure all judges are aware of these 15 adopted principles. One example which was mentioned was where attorneys are scheduled to appear in multiple courtrooms and are held up in a courtroom. When the attorney appears in the next courtroom, a judge might say something to the effect that “so you decided, I should be last?” Another example was given where a judge might say something in the courtroom in front of a client which may leave the impression that the attorney is not liked by the judge or the court favors the other side.

A suggestion was made that an attorney contact the court the day before to give notice that he or she may be late due to a scheduling conflict with another court. It was expressed that this might work with private counsel; however, with the Public Defender’s Office, it would not be realistic given the volume and the number of courts a deputy might have to cover.

Another issue raised during this discussion (which seemed to put defense attorneys in an awkward position) is that in Honolulu, the Prosecutor’s Office assigns a deputy solely to a specific courtroom, so in effect, the Prosecutor is always there and on time. On the other hand the defense attorney is required to travel between courtrooms and therefore is more susceptible to criticism and comments from the bench.

A related concern, which appears isolated to Maui District Court, is that if an attorney is not present in district court when his or her case is called, the system (JIMS) does not allow the attorney to make an appearance again until the end of the calendar. This may have a detrimental “ripple” effect on a circuit court case scheduled the same morning. In effect, although it is a district court problem, this affects same morning appearances in circuit court as well. Most of the other non-Maui practitioners, however, indicated that it is not a problem as cases can be called out of turn, in order to accommodate counsel who have scheduling issues. In other words, it may just be the way that a particular circuit/court systematically practices and is not related to a JIMS issue.

Another concern raised was where attorneys make a special appearance for another counsel due to scheduling conflicts. Some judges will not tolerate this conduct. Judge Ibarra commented that perhaps this is the type of topic that judges and attorneys would benefit from in a local bench-bar meeting. This led to an endorsement from Big Island attorneys who applauded the notion of each circuit having local bench bar

meetings. The Big Island attorneys, both in Kona and Hilo, praised Judge Ibarra for giving attorneys a chance to discuss such issues. The attorneys noted that the court has successfully addressed concerns raised by the attorneys and implemented changes which made Big Island courts more efficient and professional.

### **3. District Court - Criminal Group Discussion**

Four concerns came up in response to this topic. First, one participant expressed concern that a judge referred to a particular ethnic group as “these people,” which implied that the judge lumped together all defendants of that particular ethnicity and did not consider each defendant’s case as a specific, unique case.

Second, a participant reported that judges sometimes essentially challenge young attorneys to appeal the judges’ rulings if the attorneys are not happy with the rulings. Young attorneys can be very discouraged when a judge is confrontational and dares an attorney to appeal the judge’s ruling.

Third, one participant expressed doubt that all judges routinely read motions and opposing memoranda prior to court.

Finally, judges should realize that everything that is said in chambers conferences have a significant impact on the attorneys and parties; so judges should take care to not be too flippant or dismissive in their off-the-record comments.

All participants agreed that these are all legitimate concerns which the judges should relay to their fellow judges as useful reminders.

### **4. District Court - Civil Group Discussion**

Most of the discussion centered on judges who are late to proceedings for various reasons. The judges do set the tone. If the judges are punctual, they expect the attorneys to be punctual as well. Some judges try to explain to the parties why they are late. Maybe the issue is best addressed by the rules committee.

If the judges are punctual, for example, they can expect attorneys to be punctual in return.

Consensus: The parties would appreciate being informed if a judge is running late.

### III. SPECIFIC QUESTIONS DISCUSSED

#### A. CIRCUIT COURT CIVIL GROUPS 1 AND 2

##### 1. Court-Appointed Mediators and Court-Appointed Masters

The scope of powers that courts give to mediators, discovery masters, settlement masters, and other special masters needs clarification. Different circuit court judges use different forms of orders with different scopes of powers. Such powers sometimes include the following:

- a. The power to sanction for failure to participate meaningfully, hindering the process or bad faith conduct;
- b. The power to direct the attendance of decision makers and insurance adjusters;
- c. Striking claims, defenses or witnesses; dismissing claims, entering default;
- d. Awarding attorneys' fees and expenses.

##### Topics for discussion:

- Masters are not synonymous with Mediators.
- What should the scope of powers be?
- Should a standardized appointment order be developed?
- Would a check-the-box form with various options or alternatives work?
- Should Rule 12.2 be amended to provide the necessary details for situations that are not covered by the Rule?

##### **Discussion:**

Some members of the group have had cases in which the parties agreed to hire a mediator who would also serve as discovery master. This saves money by foregoing the cost of having an additional person familiarize himself/herself with the facts and law of the case. However, it was recognized by the group that this will not work for every case. Mediators and masters serve different functions and obviously, people have different skills. Some people are retained for their skills as a mediator and other are retained for their knowledge of the law and discovery rules. It was also noted that some mediators are non-attorneys, e.g., Keith Hunter.

While there was a general agreement among the attorneys that mediation at an appropriate time during litigation can be highly effective, there was also consensus that threats of sanctions by judges or mediators for an alleged failure to meaningfully

participate in mediation can be counterproductive. There was a consensus among the litigators present that an early conference with the court to discuss discovery, potential ADR methods, and the timing of a settlement conference would create greater efficiency in moving the dispute to settlement or trial.

At least in regard to commercial litigation, the trend is moving towards having both a mediator and a discovery master because of the sheer volume of records. This discussion prompted the group to raise another concern, which is the inadequacy of current discovery rules as they apply to electronic discovery. If possible, the HSBA and judiciary should consider assembling a group/committee to work on the reformation of discovery rules. Some members of the group even expressed interest in serving on such a committee in the future.

Although it was noted that the judiciary considered and ultimately rejected having the circuit courts adopt an expedited method for discovery disputes, it does not prevent parties from entering into agreements/stipulations on their own. Parties can stipulate to meet and confer first, and then, if an agreement cannot be reached, submit five-page briefs to the discovery master. This has worked well for some cases.

The group also raised the concern that discovery rules need to take into account proportionality. The costs involved in litigating discovery disputes should be proportionate to the ultimate value of the case. Thus, any decision regarding the use of mediators and/or masters and the scope of his/her powers, again, needs to be made by the parties and the court on a case by case basis, depending on the size of the case, complexity of issues, and ultimate value overall. Because of the recognition that each case is unique and that orders appointing mediators and masters should be tailored based upon the requirements of each case, there was no advocacy for amending Rule 12.2 or for the establishment of unified/standardized forms or orders.

The group also noted that litigation disputes should only be presented to the court and/or discovery master when there is a genuine controversy over the law. Attorneys need to work out issues on their own as much as possible before asking the court and/or master to get involved.

## **2. Appointment of Arbitrators and Scope of Powers**

What should an arbitrator's scope of powers be when one party is pro se in an arbitration proceeding?

## **Discussion:**

This topic was aimed to address concerns regarding arbitration proceedings in which an unrepresented party is forced to litigate against another party represented by counsel.

The following questions were posed to the group: How should an arbitrator treat an unrepresented party? In other words, does an arbitrator need to give unrepresented parties some leeway, or, hold them to the same standards as they would an attorney? How is an arbitrator expected to behave, especially in light of the fact that an arbitrator's role is so similar to that of a judge?

One of the judges in the group stated that whenever he is on the bench, he always tries to look at the merits of each case, no matter how skillful or unskillful the attorney is in presenting the arguments. When an unrepresented party appears before the court, he/she is treated the same way. Even if the unrepresented party has not conformed to the technical and/or procedural rules of the court, this particular judge will still determine the motion on the merits of the case.

The consensus of the group was that all arbitrators and lawyers are officers of the court and facilitators of justice. This means that counsel -- even when he/she is in the role of opposing counsel -- should select an arbitrator he/she believes will be fair, should present the merits of the arguments rather than attempt to trick someone with a procedural technicality, and should ultimately treat all parties with respect and civility.

There was also a consensus that, regarding an arbitrator's power to rule on dispositive motions, there is little the courts can do to protect unrepresented parties because judges usually do not become aware of the existence or results of an arbitration award until the prevailing party comes to the court for confirmation of an award.

What was not fully discussed is the statutory framework which provides arbitrators their powers during an arbitration proceeding. The Revised Uniform Arbitration Act ("RUAA") became effective in Hawaii in July 2002 and is codified as Hawaii Revised Statutes Chapter 658A. Specifically, section 15(b) of the RUAA provides an arbitrator with summary disposition powers. It is of significance that under the Protocols of Hawaii's largest provider of arbitration services, a party in an arbitration proceeding has the right to be represented "by legal counsel or by another authorized representative."

Finally, it was noted that under Hawai'i case law, an arbitration award can be reversed if it is against public policy.

### **3. Compelling or Encouraging Insurers and Other Potentially-Obligated Third Parties to Participate in Court-Ordered Mediation**

Special concerns involving cases of insurance coverage and other potentially-obligated third parties.

- Should disputes of insurance coverage and third party indemnitors be subject to compulsory mediation?
- Should there be a requirement that coverage issues be raised early in the case? What is the time frame for "early"? How would the requirement be enforced?
- A pretrial statement is required under RCCH 12(b), but the rule does not mandate a statement disclosing insurance coverage or third-party indemnification. Should RCCH 12(b) be amended in this regard?
- What would the requirement be for notice on the parties and trial judge?

#### **Discussion:**

Insurance coverage issues and the impact of carriers on mediations and the settlement of claims are prominent in a significant number of civil cases. Defense counsel present raised several concerns, including the fact that defense counsel are ethically prohibited from discussing or being involved with contractual coverage concerns of the carrier which has retained them to defend the insured. In addition, a carrier, even though it has issued a reservation of rights letter to the insured, may not decide to file a declaratory relief action until liability has been determined by a judge or jury.

It was noted that pursuant to Ruled 12.2(e), RCCH, "third persons with full settlement authority shall attend, in person, all ADR conferences scheduled by the neutral." Some court orders regarding mediation provide mediators with the power to compel the attendance of anyone with an interest in the outcome of the mediation or the subject action. At least one judicial participant indicated that such power should be used with caution; however, there was no advocacy to eliminate this power.

The group consensus seemed to be that for cases involving coverage disputes, coverage attorneys and/or adjusters need to be present at settlement conference and mediation *in person*. Settlement of the underlying case depends on whether or not the insurance company is willing to contribute money. Likewise, coverage disputes are resolved when the underlying case resolves.

The problem is that courts may not have jurisdiction over non-parties. If an adjuster or another third-party entity refuses to show up even after being ordered by the court, the court's options are limited.

It was suggested that judges work together. If an underlying case in state court gives rise to a coverage dispute in federal court, then the judges in both courts should work together, either to negotiate settlement or compel the attendance of key players and/or decision makers. It was also noted that many of the adjusters, especially local adjusters, are smart enough to realize that they will have many more cases before the same judge. In the long run, having a good reputation and working relationship with the court is beneficial for the adjuster and his/her insurance company.

The group also agreed that attorneys have dual obligations to serve their clients while also being officers of the court. Facilitating a meaningful settlement conference or mediation *by having all decision makers present* serves both these functions. If it is important for an adjuster to be physically present, then it is the attorney's obligation to convey that message to him/her.

Regarding third-party lien holders, it was suggested that judges cite to Hawaii Revised Statutes, Chapter 663, specifically, HRS 663-10, which requires "timely notice of third-party claims."

Several attorneys working for county corporation counsel offices indicated that claims against the county present special problems because settlements have to be approved by a county's legislative branch. These problems are particularly acute when a decision by a county council member may impact a political position vis-à-vis another council member or a mayor about litigation policies and use of county funds. One attorney indicated that he has tried bringing officials into the process by inviting a mayor and council member to attend portions of a mediation session.

While not listed as a topic of consideration for the Conference, there was a spirited discussion about the effects of alternative dispute resolution processes upon the practice of civil litigation. There was a general perception that the prevalence of ADR has brought in its wake a generation of civil practitioners who lack the skills and experience to try a case in court.

#### **4. Ho'ohiki – Online Access to Case Information**

- Is it possible to update the system?



- What changes would practitioners like to see in the system?

### **Discussion:**

There was a general consensus among attorneys present who utilize Ho`ohiki for access to case information that there are several aspects of the system which lead to frustration among users. Among the current issues are the timeliness of court minutes entered, the inability to access the most recent pleading at the commencement of a search, finding the correct case when several entries have the same last name, distinguishing between active and inactive cases, running blocks of texts, and the difficulty to search by a case or docket number. There was also a request made by practitioners for the appellate court notices that are emailed to the parties to provide more substantive descriptions of the actions being noticed, similar to federal court notices.

Rodney Maile, the Administrative Director of the Courts, provided an overview of improvements to the Judiciary's online data based system which is in progress. The next version of Ho`ohiki, as an Oracle data based system, should be operational by the end of March 2016. The group was also informed that the Judiciary Electronic Filing System is continuing to expand to encompass the circuit courts, starting with criminal cases initially, and civil cases immediately thereafter.

## **5. Reform of the Civil Justice System**

The Institute for Advancement of the American Legal System and the American College of Trial Lawyers Task Force on Discovery and Civil Justice published a report with twenty-nine proposed principles related to judicial management, pleadings, discovery, and experts, all aimed to improve the judicial system.

- Should we consider action on the principles, as applicable to Hawaii?
- Are there projects that have been implemented in other jurisdictions that would be feasible here?
  - (1) expedited civil action procedures in Alabama limit trial time to three hours per side and recovery to \$50,000.00, including interest and attorneys' fees;
  - (2) expedited business actions in Colorado require identification and narrowing of issues early on with active case management by the court; and
  - (3) a specialty court in Iowa with three designated business judges who only handle complex business cases (also utilized in Massachusetts and Ohio).
- Is it feasible to use the district court procedures for small, non-jury circuit court cases? What specific procedures should be implemented? What are some of the barriers to implementing reform?

### **Discussion:**

Everyone agreed that reform is necessary. There was an acknowledged hope among litigators that a properly managed expedited trial system might eliminate the Court Annexed Arbitration Program. The overall objective would be to determine a way to reduce the cost of litigation while preserving basic constitutional rights, including the right to a trial and the right to a jury, when applicable.

The group agreed that if judicial reform is going to be implemented, the judiciary and the bar should consider dedicating an entire day or HSBA committee to discuss it. Some attorneys expressed their concern over a “one size fits all” trial time limitation on cases valued under a predetermined threshold amount of potential damages because of varying evidentiary issues of cases and the potential impact of decisions on certain litigants even in small cases. Certain defense counsel voiced the opinion that predetermined limits on damages which could be awarded may encourage insurers to go to trial. Other counsel felt that expedited trial dates could be a motivation for early settlement conferences.

In the end, the group had more questions than answers, some of which include: Where are we going to get the resources? Is it appropriate to keep changing the courts’ jurisdictional limits? What about the importance of discovery and the right to a jury trial? We cannot shortchange client recovery by cutting off discovery and trial time. Can a balance be reached? Will expedited trials lead to trial by fire? Are proportionality rules appropriate? What will reform look like? Is a complete overhaul needed? Should we revise the rules and requirements for pleadings? How can we find a balance between expediency and fairness to all parties? How do we resolve the inherent conflict of cost versus justice?

The overwhelming consensus was that reform *is* necessary and that deciding exactly what kind of reform should be implemented will require much more time than a single conference permits. The group’s proposal to the judiciary and the HSBA is to form a committee specifically designated to the issue of judicial reform. Ideally, this committee would come up with a recommended plan of action, including specific recommendations for reform that can be presented for consideration to the group at the next Bench Bar Conference.

## **B. CIRCUIT COURT CRIMINAL GROUP**

### **1. Transcripts**

Prosecutors have stopped providing defense counsel with transcripts of Honolulu Police Department interviews (complainants, witnesses, and defendants). This has caused the Office of the Public Defender to pay the court reporters to transcribe the audio recordings, private counsel to pay outside court reporter services, and court-appointed counsel to petition the court for authorization for funds to have the interviews transcribed. As a result, significant delays in trial scheduling have occurred, often having such transcripts prepared on the eve of trial.

- Should transcripts of Honolulu Police Department audio/visual interviews of witnesses be transcribed immediately?
- Who should be responsible for preparing the transcripts?

#### **Discussion:**

This issue revolves around transcripts of police department tape and video recorded witness interviews. It appears that previously the Honolulu Prosecutor's Office would routinely provide defense counsel with such transcripts. However, recordings are now only transcribed sporadically. Prosecutors indicated that it is not a matter of the Prosecutor's Office having the transcript and not providing it, but that the Prosecutor's Office is no longer transcribing the statements due to cost considerations.

Although the Prosecutor's Office provides the defense with a copy of the audio/video recordings, logistically the un-transcribed recordings are difficult to use at trial. Therefore, defense counsel in preparation for trial now have the added burden of having the recordings transcribed at their expense. Pursuant to H.R.P.P. Rule 16, the transcriptions are then available to the Prosecutors for their use at trial.

There was no consensus as to whether the Police Department should shoulder the burden of transcribing the interviews. A question was then raised of whether in court-appointed cases attorneys may move the court for litigation expenses. The Judiciary response was that the court would generally grant such a request. It was then agreed that this issue may very well have a financial impact on the Judiciary budget.

## **2. Delay of Judgment Until After a Restitution Hearing**

In cases involving orders of restitution there is a significant delay between the conclusion of trial and change of plea, until the starting date of a sentence due to the necessity of conducting a separate restitution hearing.

- Should restitution hearings be timely scheduled and coordinated with the sentencing hearing so that the start of a defendant's sentence is not delayed?

### **Discussion:**

Ideally, the determination of restitution and sentencing should occur all at one time, so that there is a final appealable judgment. Sometimes, a judgment is entered to be followed by a restitution hearing and an amended judgment. If this occurs, then the defense has to file an appeal on the initial judgment with the very real likelihood of dismissing the appeal and having to file an appeal of the amended judgment.

A suggestion was made that the Judiciary look at setting some policy of requiring the presentence report to be completed on a date certain, prior to the sentencing hearing date. At present, in Honolulu, the presentence report is made available on the eve of sentencing.

## **3. Serving Subpoenas Via Email**

Rule 17, Subpoena, of the Hawaii Rules of Penal Procedure permits service by facsimile transmission. Rule 17(d) provides as follows:

(d) Service by facsimile transmission. Service of a subpoena may be made by facsimile transmission. The return of service shall declare that service was accomplished by facsimile transmission to a specific phone number, on a specified date and time, and shall state that the sender obtained confirmation from the person subpoenaed that the person received the subpoena. The printed confirmation from the sender's facsimile machine shall be attached to the return of service.

Fax machines are becoming obsolete. Land lines are slowly being eliminated and a fax transmission is less confidential. A proposed amendment to the rule could read: "If the party receiving subpoenas verbally agrees to receive a subpoena by email and has provided his/her email address . . . ." The attorney would file the subpoena with

the witnesses' email confirmation attached. Both fax and email transmissions have ways to verify that the subpoena was received in the event the witness fails to appear.

- Should the court amend H.R.P.P. Rule 17(d) to allow for service of subpoenas via email for witnesses?

#### **Discussion:**

Rule 17 of the Hawaii Rules of Penal Procedure permits service by facsimile transmission, and the question is whether the Rule should be expanded to allow service via email since facsimile transmissions are falling out of favor.

The consensus after discussion about potential problems of receipt confirmation was that Rule 17 be referred to the Penal Rules Committee for discussion and consideration. The underlying impression was that this vehicle for service would be more applicable to cooperating witnesses who would not need to be served by the police, sheriff or process server. Other than those cooperative witnesses, email confirmation raises the same kind of concerns raised by service by facsimile. In those cases how does one prove service, if the party is seeking sanctions for recalcitrant witnesses?

#### **4. Interpreters**

Situations have arisen, all too often, where an interpreter is not qualified/certified and as a consequence a mistrial is declared. Other times, a case may proceed for an entire day before it is discovered that the interpreter is not qualified/certified.<sup>7</sup>

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<sup>7</sup> In *State v. Han*, SCWC-11-0000814, decided June 19, 2013, the Hawai'i Supreme Court held that under *State v. Tachibana*, 79 Hawai'i. 226, 900 P. 1293 (1995) and *State v. Lewis*, 94 Hawai'i 292, 12 P.3d 1233 (2000), a colloquy between the judge and defendant involves a verbal exchange in which the judge ascertains the defendant's understanding of the defendant's rights. In *Han*, the supreme court found that Han did not fully understand his constitutional right to testify or not to testify and that the need for an interpreter during the trial was a "salient fact" requiring the family court judge to ensure that Han understood the rights that he was waiving.

In *In re Doe*, 99 Hawai'i 522, 57 P.3d 447, 459 (2002), the court held that "[i]n light of the constitutional protection afforded parental rights, we hold that, as an aspect of procedural due process, individuals must, as needed, be provided an interpreter at family court proceedings where their parental rights are substantially affected." The court stated that to assess whether an interpreter is necessary, trial courts should consider the Policies for Interpreted Proceedings in the Courts of the State of Hawaii Rule 1(A). The court ultimately determined that the mother did not demonstrate that she was substantially prejudiced by the absence of an interpreter at some of the hearings.

- Should there be an examination of the present interpreter qualification process?

**Discussion:**

Attorneys were surprised to learn that court interpreters are not required to demonstrate any proficiency in the language that they are interpreting. In order to be a court interpreter, one has to go to a two-day basic orientation workshop; pass a written English Proficiency Exam and the Hawaii Basic Ethics Exam, and clear a criminal background check. There is a concern about the abilities of current interpreters to be more than just bilingual, but to be able to interpret contemporaneously what is being said as the witness is testifying. What seems to happen often is that after the witness testifies, there is a break for the interpreter to translate, and it appears that the interpreter just gives his/her summary of what he/she believes is the gist of the witness's testimony.

There seems to be a need for uniformity in interpreters as many attorneys expressed their anecdotal concerns. The participants learned that if attorneys have specific issues with interpreters they can address them by contacting the Office of Equality and Access to the Courts at 539-4860, which would appreciate hearing of attorneys' comments and concerns.

Judge Ibarra commented that although an interpreter is "certified," as a matter of practice the court should question the interpreter on the record to establish his/her minimum competence to interpret the proceedings.

The consensus was that interpreters should be paid more in order to attract a better pool of qualified interpreters, as well as having the judge conduct a colloquy to ensure that the interpreter is qualified to do the job.

A concern was raised that counsel should be able to know in advance who the interpreter is going to be at trial so that counsel could use and work with the interpreter in counsel's meetings and preparation of client/witnesses. This would ensure that counsel is not surprised by an interpreter who may very well have a different skill level and who interprets differently from an interpreter the attorney had been using prior to trial. On that issue, it was suggested that the matter be raised with the trial judge. The attorney responded that he has had it both ways, a judge agreeing and another judge suggesting that the attorney went beyond interpretation into witness preparation.

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*In the Interest of M.B.*, No. 29222 (Haw. App. September 30, 2009), Summary Disposition Order (the right to an interpreter is not limitless).

Another suggestion was made that in order to obtain a high level of interpretation, the position should be professionalized. The response was that the Judiciary could not sustain full-time interpreters in all languages. If there was a need for interpreters who were available not only for the Judiciary, but for all executive and legislative agencies as well, then perhaps such a position which would service all State branches might be possible.

## **5. Expedited Bail Reports**

Intake Service Center has been preparing expedited bail reports so that there are release recommendations available at arraignment. Occasionally the deputy public defender at OCCC will have a copy of the bail report and is prepared to argue for release; however, the Court and the State do not have a copy. Therefore, the request for release is denied, and the defense is directed to file a motion for release with the assigned judge due to the failure of all parties to be provided with the report. (This practice is not a problem on Kauai, as Chief Judge Valenciano confirmed that all parties receive expedited reports.)

- Should the court authorize emailing of bail reports to the court and parties?

### **Discussion:**

Judge Perkins indicated that the courts get the bail reports at the time of initial arraignment; however, there is a system in place where defendants are categorized as low risk, moderate risk and high risk. For example, in a case of a moderate risk defendant, once a motion for bail reduction is filed the motion should be heard within two weeks. The problem in Honolulu is that almost no one is assessed as low risk and so bail hearings are normally not heard for at least two weeks after arraignment.

On the neighbor islands, bail reports are usually available at the first appearance. If a bail report is not available it is usually because the defendant was not cooperative. Bail hearings are readily heard at initial appearance.

It appears that in Honolulu, there needs to be perhaps a reevaluation of the low, moderate and high risk assessments and the preparation of bail reports, so that bail hearings can occur earlier than two weeks. There was a suggestion that a bail reform task force be implemented to look into this issue anew.

## **6. Lack of Parking at First Circuit Court**

In January 2015, two levels of parking for the public were removed and stalls from the bottom floor eliminated. In the event of high publicity cases, where large jury panels are required, there is insufficient parking for the prospective jurors. Jurors who are summoned to court under the threat of an Order to Show Cause or bench warrant are now even more stressed and annoyed because of the parking issues.

- Should the judiciary provide alternative arrangements for Circuit Court parking?

### **Discussion:**

Judge Ibarra indicated that the Judiciary does not control the parking structure at First Circuit Court. The problem was that when Family Court and Client Services moved out to Kapolei, it left a number of empty parking spaces in the parking structure. In order to increase parking revenue and use of the facility, the Department of Accounting and General Services decided to restripe the parking spaces and to offer more parking to employees.

## **7. Issuing Bench Warrants for Individuals in Custody**

The Department of Public Safety (“DPS”) has a custody list, which is updated daily. The defense gets an updated list, and one would assume the sheriffs have an updated list. Many times, the State asks for a bench warrant, and the Court issues it when a defendant is already in custody on another charge.

- What are the current coordination efforts between DPS, sheriffs, courts, and the Prosecutor’s office regarding the issuance of bench warrants on those in custody?
- Are there remedies to curtail the issuance of a bench warrant for an individual already in custody?

### **Discussion:**

The issue occurs when a defendant is in custody and there is an outstanding warrant. The warrant oftentimes is served just before the defendant is released. If the defense had knowledge of the outstanding warrant the matter might have been dealt with earlier, which could have resulted in time being served concurrently rather than tacking on additional or consecutive time for the defendant.



There had been previous discussions about this topic as to how this information could be discovered earlier and who might have the responsibility, but this seems to remain as an issue that has not been resolved.

One recommendation was that at the very least, if a person is incarcerated, the facility should do a warrant check long before the defendant is about to be released. Another vision is that the judge will have access on the bench to check either with eBench warrant or vinelink.com, to do an immediate check, prior to issuing a bench warrant, on the status of the defendant as to whether he/she is in custody or not.

## **8. Penal Responsibility Issues**

In Haw. Rev. Stat. §§ 704 et al. penal responsibility (“PR”) cases, the City and County of Honolulu has a policy of refusing to stipulate to the PR finding of doctors, which is of course its right. However, it does this even when all panel doctors are in agreement that client is not responsible and the State has no rebuttal doctors. This exacts unnecessary costs on the defense and the courts. Perhaps the prosecutors should submit on the reports when there is no contrary opinion.

- Should the State reconsider its blanket opposition to stipulating to penal responsibility reports of panel doctors?

### **Discussion:**

The issue is that in Honolulu, when there is a finding that the client is not responsible by all panel doctors, the prosecutors still refuse to stipulate that defendant is not responsible, requiring unnecessary costs to the defense and the courts.

Judge Perkins indicated that in his experience, he has been told that deputy prosecutors have indicated that they need to get approval from within their office and sometimes deputies feel that the doctors are wrong and it is their right to refuse to stipulate.

The response from the prosecutors is that they are not aware of an office policy requiring them to oppose a stipulation when all the doctors’ reports are in agreement. The prosecutors indicated they will look into the issue and determine whether this is indeed the situation. As far as they know, decisions are made on a case by case basis.

## **9. Single Motion Hearings Days**

Some circuit courts schedule all their non-trial hearings on a single day each week (i.e. 20 hearings set at 8:30 a.m.). This regularly results in a number of cases being heard at the same time, with attorneys waiting hours for their specific matters to be heard. This has become the norm.

- Should the courts consider modifying their weekly calendars to accommodate a true motions hearing date and time?

### **Discussion:**

The issue arises because some circuit court judges schedule all their non-trial hearings on a single day. This regularly results in a number of cases being scheduled at the same time which results in attorneys waiting hours for their specific matters to be heard.

On the neighbor islands, the motions calendar management is handled without undue waiting times for the attorneys. On Oahu, it seems that if the motions are substantive, they are normally set later in the day and that helps. However, the problem could be compounded by several circumstances: attorneys being held up in another courtroom for their 8:30 a.m. motion and then having the 9:30 a.m. motions starting to back up; clients who are in custody who are not timely transported and the limited time left for the attorneys to confer with them; courtroom staff who are not aware or cognizant that things go smoother and faster for everyone if, for example, a change of plea is handled after a series of motions to continue.

The consensus seems that scheduling all motions on one day just does not work well. Somehow, there needs to be a case management adjustment so that attorneys are not waiting in court all morning for a simple 5-10 minute hearing.

Judge Perkins indicated that he will raise this matter at the next judges' meeting.

## **10. Amendment to Lesser Charges Without Corresponding Reduction in Bail**

This issue occurs when a defendant is charged with a more serious offense and bail is initially set. Later the charge is amended to a lesser offense; however, the bail is not adjusted to correspond to bail amounts for the less serious charge.

## **Discussion:**

The discussion started with the question of how bail is set? Judge Perkins indicated that there is no “bail schedule.” The bail requested should be reviewed by the judge, however, the popular sentiment amongst defense attorneys is that judges routinely agree with whatever bail is requested by the State. It was also discovered that “customary bail amounts” varies from circuit to circuit, for example, a Class C Felony on the Big Island is generally \$2,000 whereas the same offense on Oahu would amount to a customary bail amount of \$11,000.

The concerns raised by the defense attorneys are that they should be given information as to what bail amount was requested by the State and whether it was reviewed and adjusted by the judge. Secondly, the concern is a belief that there is no genuine review of the initial bail requested.

Judge Perkins indicated that with grand jury indictments there are no defense counsel, all that is known is what is presented and it is difficult to have some set of standards, without any information which defense counsel expects the judge to consider.

The defense bar feels that there needs to be a discussion on why there is a “customary bail amount.” Where do the amounts come from? The argument is that in reality, there is a “bail schedule” and the reality is that it seems to differ between circuits.

Judge Perkins suggested that bail should be reasonable, so there should be discussion between the State and the defense bar to try and establish a starting point for bail amounts.

One comment was that in New York, the local bar with the help of law students assisted in obtaining information and if that were done here, it would enhance the ability of Intake Service Center in completing bail studies more quickly and hopefully lead to more timely bail hearings.

The consensus is to create a bail task force to review bail issues and concerns.

## **C. DISTRICT COURT CIVIL GROUP**

### **1. Motions to Set Aside Defaults**

In Honolulu District Court, if a motion to set aside an entry of default is filed and if no defense is set forth, it is automatically denied without a hearing. If the motion is granted, it is automatically set for a pretrial the next Monday. In rural courts, there is no such procedure. Can this Honolulu procedure be implemented in rural courts?

#### **Discussion:**

According to one of the judges, the practice in rural courts is that, if a motion to stay enforcement of the writ is denied, the motion to set aside default will be set for hearing. In the meantime, the writ should issue, but the writ sometimes becomes tied up. One of the problems is that pro se parties do not provide notice if the case is set for trial, and Ho'ohiki can sometimes be very slow. The end result is the attorney cannot find out in time. Suggestions included (i) setting trials farther out, but imposing a rent trust fund obligation; (ii) setting the case for a status conference on the following Wednesday, and for trial two weeks after the motion to set aside is granted or set the case for a return hearing date, or (iii) place a notice in the attorney's court jacket.

Consensus: Attendees agreed that this was a problem and identified a group of people (including Judge Kibe and attorneys Russ Awakuni, Sheila Lippolt, and Ken Lau) who could work together to implement the Honolulu procedure in rural courts.

### **2. Summary Possession Return Hearings**

The issue is whether the plaintiff's attorney needs to be present at a summary possession return date.

#### **Discussion:**

On Maui, the plaintiff must appear at a summary possession return hearing. In Oahu rural courts, it would not work for plaintiffs' attorneys not to appear because mediation occurs on the same day as the return hearing date. In the Honolulu division, an attorney need not appear. Some attorneys wish to appear on the return date to be able to have a discussion with the defendant about the case.

Consensus: In rural courts, it is a good idea for plaintiffs' attorneys to appear at summary possession return hearings because mediation occurs on the same day as the

return hearing. In Honolulu District Court, attendance is optional, but it provides an opportunity for a discussion with the defendant.

### **3. Signatures on Orders**

- Is it really necessary to obtain signatures as to approval as to form or can it be waived?

#### **Discussion:**

There is no requirement for the opposing party to sign orders. District Court Rule 23 provides the procedure for attempting to obtain the opposing party's approval and then submitting the order to the court. Some participants suggested that it should be an opposing party's option to waive signature. However, some want to review the orders before the orders are submitted. Perhaps the court should generate the order or the party who brought the motion could bring the order to court for immediate review and signature. Another suggestion was the court could create a form for orders. Currently, the court does prepare a form of order for the prevailing pro se parties.

Consensus: The current process for preparing orders works as is.

### **4. Pretrial Briefs**

Are pretrial briefs helpful and beneficial to the judges?

#### **Discussion:**

In a recent experience a party submitted a pretrial brief before starting a trial that lasted 3 hours and 45 minutes. The other party objected to the lack of notice. It was suggested that the deadline for pretrial briefs should be discussed at the pretrial conference. However, providing a deadline may not be wise because it suggests that a brief should be submitted even on issues that are simple. Pretrial briefs should only be submitted on unusual issues. The judges suggested that pretrial briefs on novel issues should be filed a week before the trial.

Consensus: Pretrial briefs should be addressed before trial. If parties plan to file a brief on a novel issue, the brief should be filed by the deadline stated in the pretrial order (in Honolulu District Court) or in the court minutes (in rural courts).

## 5. Appellate Authority for Civil District Court Cases

Haw. Rev. Stat. § 641-1(a) authorizes appeals to the Intermediate Court of Appeals from “final judgments, orders, or decrees of . . . district courts [.]” Rule 58 of the District Court Rules of Civil Procedure does not require that a judgment be set forth in a separate document. On the other hand, Rule 58 of the Hawai‘i Rules of Civil Procedure, which is applicable to all circuit court cases of a civil nature, requires as follows: “Every judgment shall be set forth on a separate document.” See *Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115 (1994). An order is not appealable in circuit court cases even if it resolves all claims against the parties. It must be reduced to a separate judgment.

- Should the separate judgment document rule for civil circuit court cases be the same for the civil district court cases?

### Discussion:

There is a high volume of cases in district court, and it would be too time-consuming to generate a final order for each case. Also, there does not seem to be any problem determining when an order is appealable. Generally the participants did not see this as a major issue.

Consensus: It is not practical or necessary to require that a final order be generated in every case.

## 6. Issues with Pink/Yellow Correction and/or Bounce Slips

- Are there any potential improvements that can be considered on correction slips?

### Discussion:

It would be more efficient for slips to list all errors with a document at once. Some items on the slips are tantamount to ex parte communications (e.g., notices that no documents were submitted to support a request for fees).

Consensus: There was no consensus on this issue.

## 7. Court Calendars

- Can the court calendars be placed online?

**Discussion:**

The information for the court calendar is derived from Ho'ohiki. There currently is no way to generate an accurate calendar in time to be placed online, because changes are made at the last minute. It is a good idea to check court minutes to make sure cases are on the calendar.

Consensus: It is a good idea to place court calendars online, but there are practical difficulties with generating and relying on calendars prepared in advance.

## **D. DISTRICT COURT CRIMINAL GROUP**

### **1. JIMS and JEFS Issues**

#### **a. Timely Judgments**

Attorneys are concerned that once an order is generated, the clerks are not able to go back into the system to amend or correct the order. The other concern is how long it takes to generate an order.

- Should the JIMS system be improved/modified to provide for timely in court access, modification and review?

#### **Discussion:**

As the court transitions to in-court processing (ICP") of judgments, a concern was raised that the court clerks take too long to generate ICP judgments, and parties sometimes do not wait to receive their written judgments before leaving court. It was agreed that the judges will advise court clerks of the concerns raised concerning long delays in issuing ICP documents, and that judges will inform defendants to wait until they receive ICP documents so that the judge can discuss the terms of judgments on the record with the defendants when necessary (such as when probation is ordered or when a deferred acceptance of a no contest plea is granted).

#### **b. Inconsistencies in Paperwork**

A defense attorney does not receive paperwork memorializing the next court date. This has created problems. For example, a wrong date was inputted by a clerk in JIMS for June when the case was set in July. When the case was called in June, a bench warrant issued. Subsequently, it was shown that the information in JIMS was incorrect since the attorney had the disposition form as proof of the correct date.

- Should the JIMS court provide disposition forms for attorneys as well as clients?

#### **Discussion:**

A concern was raised that the ICP judgments sometimes are incorrect or inconsistent with the handwritten disposition sheets. With respect to such errors and inconsistencies, attorneys are encouraged to review the disposition slips and



ICP documents and advise the court clerk of issues so that they can be addressed promptly, before the court session is concluded.

**c. Probation Terms and Conditions**

When defendants are placed on probation in district court, the probation form includes felony conditions, such as random drug testing that is not required for misdemeanors or petty misdemeanors.

- Should the district court probation form include the same standard terms and conditions of probation as the felony form?

**Discussion:**

All participants agreed that yes, the district court form should contain the same standard terms and conditions as the felony form. In addition, the court can impose special conditions, as appropriate.

**d. Hyperlinks to JEFs Filings**

When the parties receive an email notification of a filing in JEFs, it would be helpful to have a hyperlink in the email so the order/document can be viewed immediately.

- Should the JEFs system provide hyperlinks to email notifications when documents are filed?

**Discussion:**

All participants agreed that hyperlinks would be very useful. Currently, the system cannot achieve this without a security upgrade. The court will seek to obtain funding for an upgrade.

**e. Electronic Filing for Rural Courts**

Motions to recall bench warrants in rural courts take longer to be processed. Also, there is no notification as to when the motion is processed or calendared, which requires the attorney to phone the court clerk to check on the status of the motion.

- Should procedures for electronic filing for rural courts be modified so as to expedite filings?

**Discussion:**

Discussion regarding expedited filings turned to concerns raised when defendants file motions to advance their trial dates. Sometimes the court will rule on the motion before the Prosecutor's Office has time to file a written response. If the motion is granted, it can be difficult for the prosecutor to re-subpoena witnesses in time for the advanced trial date. In response, some judges will grant the motion to advance, but set the advanced court date for "status/change of plea." Should the court grant motions to advance trial and, if so, should it set the next court date for trial, or for "status/change of plea"?

All participants agreed that the court should not advance the court date and change the setting from trial to "status/change of plea." If the court believes the requested advancement of a trial date will not give the prosecutor sufficient time to be ready for trial, the court should deny the motion to advance.

**2. Restitution Hearings and Orders**

**a. Verification of Restitution**

On the neighbor islands, the State will offer a deal (i.e., drop a Reckless, amend an Inattention to a Violation, and COP to a Lack of Due Care if the defendant waives the right to a contested restitution hearing. The restitution amount is very high, sometimes \$20,000 or \$30,000, because the "Special Services" division does not verify the amount requested by the complainant ("CW"). The courts are therefore ordering, for example, \$20,000 in restitution for a violation of Lack of Due Care. In theft cases, the restitution requested will be triple the amount that was stolen. For example in a Theft 3rd, the restitution may be set as \$1,200, because the CW will allege other "stuff" went missing.

- Should Adult Client Services Branch ("ACSB") or Special Services be responsible for screening restitution requests? (On Oahu, ACSB screens and denies some requested restitution if it is not verifiable.)

**Discussion:**

The consensus was that ACSB should investigate the reasonableness of restitution requests. For example, if the defendant's insurer makes payment to a

complaining witness, any restitution award should be reduced commensurate with the amount of applicable insurance proceeds paid to the complaining witness, and ACSB should avoid allowing the complaining witness to “double dip.” On Oahu, the only concern expressed is that sometimes ACSB does not allow the complaining witness sufficient time to request restitution before a restitution hearing is held, but when that happens, the prosecutor can ask for a continuance to ensure that the complaining witness has sufficient time to request restitution. There were no suggestions regarding how to address this issue.

#### **b. Delayed Sentencing Upon Restitution Request**

In cases involving orders of restitution there is a significant delay between the conclusion of trial or change of plea until the starting date of a sentence due to the necessity of a separate restitution hearing.

- Should restitution hearings be timely scheduled and coordinated with the sentencing hearing so that the start of a defendant’s sentence not be delayed?

#### **Discussion:**

This is an issue only in the First Circuit. It was agreed that, when restitution will be a term of probation or deferral, the court should enter judgment when the defendant changes his or her plea, so that the probation or deferral period can begin immediately. If an amount of restitution is later determined, the court can then amend its judgment to include the restitution as a term of probation or deferral, while the probation or deferral period continues pursuant to the original judgment.

### **3. Infractions and Underlying Criminal Charges**

Many times defendants are charged with criminal traffic charges, such as DWOL, DUI, reckless, etc., which are initiated by infractions such as speeding or unsafe lane change. Many times, the infractions are not set with the criminal charge, and if a motion to consolidate is filed it is often rejected because infractions are set in a different courtroom.

- Is there a more efficient way to consolidate infractions and criminal charges when they stem from the same incident?
- Should non-criminal traffic infractions arising out of a criminal case be combined with the criminal charges for court?

### **Discussion:**

In Honolulu District Court, traffic crimes (particularly OVUII charges) often arise in connection with civil traffic infractions. The criminal charges are arraigned separately from the underlying traffic infractions, and the charges are scheduled for trial on different days in different courtrooms. When defense counsel file a motion to move the trial of the traffic infraction to the same date and courtroom as the criminal charge, the motion is routinely denied, so defense counsel must then appear in court (in Courtroom 4A) to orally request of the trial judge that the cases be consolidated.

The court will look into this situation to determine if a written order can be issued to consolidate criminal traffic charges with underlying civil infractions without requiring defense counsel to appear in Courtroom 4A.

### **4. Serving Subpoenas Via Email**

Rule 17, Subpoena, of the Hawaii Rules of Penal Procedure permits service by facsimile transmission. Rule 17(d) provides as follows:

(d) Service by facsimile transmission. Service of a subpoena may be made by facsimile transmission. The return of service shall declare that service was accomplished by facsimile transmission to a specific phone number, on a specified date and time, and shall state that the sender obtained confirmation from the person subpoenaed that the person received the subpoena. The printed confirmation from the sender's facsimile machine shall be attached to the return of service.

Fax machines are becoming obsolete. Land lines are slowly being eliminated and a fax transmission is less confidential. A proposed amendment to the rule could read: "If the party receiving subpoenas verbally agrees to receive a subpoena by email and has provided his/her email address . . . ." The attorney would file the subpoena with the witnesses' email confirmation attached. Both fax and email transmissions have ways to verify that the subpoena was received in the event the witness fails to appear.

- Should the court amend H.R.P.P. Rule 17(d) to allow for service of subpoenas via email for witnesses?

### **Discussion:**

All present unanimously agreed that Rule 17(d) should be amended to reflect this change.

## **5. Piecemeal Trials**

Some district court judges are penalizing defendants when they show up for trial without a lawyer, ruling that the State can proceed to trial piecemeal. In such a case the State can start an OVUII (Operating a Vehicle Under the Influence of An Intoxicant) trial if it only has, for example, the stopping officer and not the officer who conducted the FST or breathalyzer, effectively, allowing the State to “call ready” and begin a trial even if all its witnesses are not present or under subpoena. Frequently the delay is not attributable to a defendant, as there is a PD appointment backlog that prohibits an appointment until after the scheduled trial date.

- Should a district court trial be allowed to be conducted in a piecemeal manner?

### **Discussion:**

There was animated discussion and disagreement as to whether a trial can be started when less than all of the prosecutor’s witnesses are present. All present agreed that if a defendant asks for a continuance and also agrees to a “piecemeal” trial as a condition to obtaining the continuance, then a piecemeal trial is appropriate. There was no consensus as to the propriety of allowing or ordering a piecemeal trial in any other circumstances.

## **6. Designating Courtrooms As “Private” and “PD”**

Designating the courtrooms as “private” or “PD” creates unfair advantages for those who cannot afford private counsel. For example, for OVUII (Operating a Vehicle Under the Influence of An Intoxicant) cases in courtroom 10D, the court will dismiss the case after the second time the state is not ready to proceed. However, in 10C, (designated for PD clients), the judges will not consider dismissal until Rule 48 is nearly expired.

- Should the judiciary designate courtrooms as either “Private” or “PD”?

### **Discussion:**

One participant suggested that both Courtrooms 10C and 10D be used for PD clients in the morning, and used for private counsel clients in the afternoons. That suggestion was not addressed in any detail and the issue of the current division of 10C and 10D was not discussed in detail. Judge Richardson will entertain any suggestions regarding the division of the courtrooms.

## **7. Pleading No Contest v. Guilty**

At times, the State and defense will enter into a plea agreement wherein the defendant will agree to plead no contest. Some judges have a very difficult time accepting a no contest plea, even when both parties agree with it.

- What are the current difficulties in the courts accepting no contest pleas?

### **Discussion:**

The broad consensus was that, to the extent this may have once been an issue, it is no longer a concern. On the family court calendar, judges may have a concern about accepting no contest pleas, because it is more difficult for defendants to enter and complete domestic violence intervention classes if they have pled no contest instead of guilty.

## **8. Miscellaneous**

When a complaint is filed in a penal summons case, sometimes the penal summons is never served. Nevertheless, the unserved, unprosecuted case creates a license stopper for the named defendant.

### **Discussion:**

The court agreed to look into ways to remove the unserved penal summons cases as license stoppers.

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## 2015 BENCH-BAR CONFERENCE

### Conference Participants

#### THE COMMITTEE ON JUDICIAL ADMINISTRATION

Committee                   Honorable Simeon R. Acoba Jr.  
Co-Chairs:                 Associate Justice, Supreme Court of Hawaii (Ret.)  
                                  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  
                                  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  
                                  Hayley Y.C. Cheng  
                                  Dennis Chong Kee  
                                  Kahikino Noa Dettweiler  
                                  Vladimir Devens  
                                  Don Jeffrey Gelber  
                                  William A. Harrison  
                                  James Kawashima  
                                  Edward C. Kemper  
                                  Carol K. Muranaka  
                                  Lester D. Oshiro  
                                  Audrey L. E. Stanley

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## APPELLATE JUDGES AND ADMINISTRATION

Chief Justice Mark E. Recktenwald, Hawai'i Supreme Court  
Associate Justice Sabrina S. McKenna, Hawai'i Supreme Court  
Chief Judge, Craig H. Nakamura, Intermediate Court of Appeals  
Associate Judge Alexa Fujise, Intermediate Court of Appeals  
Associate Judge Katherine Leonard, Intermediate Court of Appeals  
Associate Judge Lawrence Reifurth, Intermediate Court of Appeals  
Rodney Maile, Administrative Director of the Courts  
Sherrie Seki, Special Assistant to the Administrative Director of the Courts

## CIRCUIT COURT – CIVIL LAW GROUPS

Participants:

### *Group 1*

Lead Judge: Judge Randal G.B. Valenciano  
Lead Attorney: Vladimir P. Devens  
Reporter: Steven J.T. Chow, Kyleigh F.K. Nakasone

|                                |                             |
|--------------------------------|-----------------------------|
| Judge Bert I. Ayabe            | Leslie R. Kop               |
| Judge Jeannette H. Castagnetti | Phillip A. Li               |
| Judge Gary W.B. Chang          | Kenneth J. Mansfield        |
| Judge Virginia L. Crandall     | Michael J. Matsukawa (Kona) |
| Nadine Y. Ando                 | William M. McKeon (Maui)    |
| Paul S. Aoki                   | J. Anderson L. Meyer        |
| Lisa A. Bail                   | Melvyn M. Miyagi            |
| Don J. Gelber                  | Duane R. Miyashiro          |
| Sue V. Hansen                  | Bert S. Sakuda              |
| C. Michael Heihre              | Jeffrey H.K. Sia            |
| Ronald I. Heller               | Stephanie E.W. Thompson     |
| Harvey E. Henderson Jr.        | Richard Turbin              |
| Archie T. Ikehara              | Mark G. Valencia            |
| Stuart M. Kodish               | Alan Van Etten              |
|                                | Jodi L.K. Yi                |

### *Group 2*

Lead Judge: Judge Karen T. Nakasone  
Lead Attorney: James Kawashima  
Reporter: Judge Joel E. August (ret.)



Associate Reporter: Karen H. Vance

|                                       |                          |
|---------------------------------------|--------------------------|
| Judge Greg K. Nakamura                | David M. Louie           |
| Judge Derrick H.M. Chan               | David J. Minkin          |
| Judge Rhonda A. Nishimura             | Traci Rei G. Morita      |
| Judge Peter T. Cahill                 | Brenda E. Morris         |
| Robert J. Borns (Kona)                | Mark M. Murakami         |
| Wesley H.H. Ching                     | Jeffrey S. Portnoy       |
| Gail Y. Cosgrove                      | Kenneth S. Robbins       |
| James S. Dixon                        | Woodruff K. Soldner      |
| Marie M. Gavigan                      | Jennifer R. Sugita       |
| Gary G. Grimmer                       | Molly A. Stebbins (Hilo) |
| Rhonda L. Griswold                    | Kevin P.H. Sumida        |
| Mauna Kea K. Higuera-Trask<br>(Kauai) | Brian W. Tilker          |
| Matson Kelley (Maui)                  | Patrick K. Wong (Maui)   |
| Derek R. Kobayashi                    | Calvin E. Young          |

#### **CIRCUIT COURT – CRIMINAL LAW GROUP**

Participants:

|                |                                  |
|----------------|----------------------------------|
| Lead Judge:    | Judge Ronald Ibarra              |
| Lead Attorney: | William A. Harrison              |
| Reporters:     | Lester D. Oshiro and Keani Alapa |

|                                |                          |
|--------------------------------|--------------------------|
| Judge Joseph E. Cardoza (Maui) | Andrew Kennedy (Kona)    |
| Judge Richard K. Perkins       | Robert D.S. Kim (Kona)   |
| Judge Christine E. Kuriyama    | Howard K. K. Luke        |
| Susan L. Arnett                | Clarissa Y. Malinao      |
| William C. Bagasol             | Stanton Oshiro (Hilo)    |
| Hayley Cheng                   | Thomas M. Otake          |
| L. Adrian K. S. Dhakhwa        | Renee Sonobe Hong        |
| Brook Hart                     | David A. Sereno (Maui)   |
| David Hayakawa                 | Richard W. Stacey        |
| Randy Hironaka                 | Kevin K. Takata          |
| Kauanoë Jackson (Kona)         | Carson F. Tani (Maui)    |
| Tracy Jones (Maui)             | Kimberly Taniyama (Kona) |
| Katherine P. Kealoha           |                          |

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**DISTRICT COURT – CIVIL LAW GROUP**

Participants:

Lead Judge: Judge Melanie Mito May  
Lead Attorney: Dennis W. Chong Kee  
Reporter: Edward C. Kemper

|                                |                        |
|--------------------------------|------------------------|
| Judge Harry P.N. Freitas       | Philip Miyoshi         |
| Judge Gerald H. Kibe           | Teri-Ann Nagata        |
| Judge Adrienne N. Heely (Maui) | Cheryl A. Nakamura     |
| Russ S. Awakuni                | Sheryl Nicholson       |
| David W. H. Chee               | Allan Y. Okubo         |
| Marvin Dang                    | Jason F. Oliver        |
| Renee M. Furuta                | Dan Oyasato            |
| Christopher Goodwin            | William J. Plum        |
| Arlette Harada                 | Matthew Pyun           |
| Keith Kiuchi                   | Yuriko Sugimura        |
| Kenneth K.S. Lau               | Robert Triantos (Kona) |
| Sheila P. Lippolt              | Reginald K. T. Yee     |

**DISTRICT COURT – CRIMINAL LAW GROUP**

Participants:

Lead Judge: Judge Shirley M. Kawamura  
Lead Attorney: Audrey Stanley  
Reporter: Judge James H. Ashford

|                               |                     |
|-------------------------------|---------------------|
| Judge Jeffrey P. Crabtree     | Jeen Hee Kwak       |
| Judge Melvin H. Fujino (Kona) | Michelle Laubach    |
| Judge Kelsey T. Kawano (Maui) | Darien Nagata       |
| Judge Barbara P. Richardson   | Trisha Nakamura     |
| Bronson Avila                 | Tiare Nakata        |
| Birney Bervar                 | Robert Olson        |
| Jonathan Burge                | Andrew Park         |
| Brian A. Costa                | George Parrott      |
| Wendy DeWeese                 | Clinton G. Piper    |
| Dakota Frenz                  | Brandon Segal       |
| Richard D. Gronna             | John M. Tonaki      |
| Spencer Jim On                | Sean Van Demark     |
| Alen Kaneshiro                | Jerry A. Villanueva |