Report of the
American Judicature Society
Hawai‘i Chapter
Special Committee
on Rules Governing Mediation in Civil Cases

October 25, 2010

Background and Introduction

For the past 25 years, ADR generally, and mediation specifically, have taken on increasing importance in court systems across the United States. Hawaii has been a leader in this ADR movement. A significant number of cases are mediated at all levels of the Hawaii judicial system each year. Lawyers, parties, and judges in Hawaii are generally very satisfied with the mediation process, despite few specific court rules regarding mediation.

A Special Committee on Rules Governing Mediation in Civil Cases was created by the Hawaii Chapter of the American Judicature Society to make recommendations on whether the Hawai‘i Supreme Court should consider adopting mediation rules for civil cases in the Circuit and District Courts. The committee consisted of: Co-Chairs Gary Chang and James Kawachika; reporter John Barkai; Hon. Colleen K. Hirai (retired); Hon. Victoria Marks (retired); Hon. Gerald Kibe; Hon. Kevin Chang; Hon. Riki May Amano (retired); Carol Eblen; David Fairbanks; Elizabeth Kent; Leslie Kop; Mark Bennett; Keith Hunter; Bruce McEwan; and Nate Smith. The Hon. James Burns (retired) and Duane Miyashiro served as ex-officio members of the committee.

Between the time of the committee's formation and its first meeting, the Hawaii Supreme Court issued a draft set of Alternative Dispute Resolution (ADR) rules for the Circuit, Probate, Family, District, and Small Claims Division of the District Courts, and asked for public comment. The committee then modified its focus from making recommendations for mediation rules to considering the Supreme Court’s proposed ADR rules. The committee also considered recommending additional rules if they seemed appropriate. Ultimately, the committee decided not to propose any additional ADR rules but it did recommend that other mediation issues be considered at a later time.

The Work of the Committee

The committee met nine times (July 20, 29, August 5, 26, September 9, 16, 22, October 5, and 14). Eight meetings were at the offices of Reinwald O’Connor & Playdon (hosted by co-Chair James Kawachika) and one meeting was at the office of the law firm of Goodsill Anderson Quinn & Stifel (hosted by attorney Carol Eblen).

The committee had some general discussions about mediation, the use of mediation in Hawaii and nationally, as well as specific discussions about the proposed rules. The committee took particular note of the current ADR rules of the Hawaii courts, the

mediation rules for the United States District Court for the District of Hawaii, Hawaii Supreme Court's Guidelines for Hawaii Mediators, and other resources such as the Uniform Mediation Act and mediation rules from other jurisdictions.

Although the proposed Supreme Court rule is titled "Alternative Dispute Resolution," most of the committee's discussions concerned, and the most likely application of the rules was assumed to be, the use of mediation. The committee largely focused its attention on the use of mediation in the Circuit Courts. In addition, most of the committee's expertise and experience with mediation was with mediation in the Circuit Courts, although one committee member was a former probate judge and another committee member is a current District Court judge. No one on the committee is currently either a Family Court judge or a family court practitioner, although both Judges Burns and Marks are former Family Court Judges.

The committee always met as a committee of the whole. The committee carefully reviewed each section of the proposed rules with particular focus on the definition of ADR, referral to ADR, selection of the neutral, disclosures, presence of the parties and counsel, communications with judges, and costs.

In its work, committee utilized the following definition of mediation: Mediation is an informal process in which the disputing parties use a third-party mediator to assist them in trying to reach a negotiated settlement. The committee recognized that although the most common styles of mediation are referred to as "facilitative" and "evaluative," most of the mediations taking place in Circuit Court cases use the evaluative style.

Various perceptions about mediation heard by the committee members

The committee members believe that the use and increase in mediation in the past few years has been beneficial to the parties and has had a very positive impact on the judicial system. Mediation appears to be working very well in Hawaii even without many court rules to govern mediation. However, things are not perfect, and sometimes concerns arise especially when judges order cases to mediation. There are wide-ranging and varying beliefs about the fairness and appropriateness of the mediator selection process for example. Most of the perceptions about mediation are very positive, but in a few instances it is negative. However, because there was almost no objective data about mediation available, the committee had no way of determining if any of the negative perceptions are very accurate or represent common practices. Some of the less positive perceptions and concerns that the committee members expressed or reported that they had heard about included:

- some judges frequently appointed the same mediator to many cases;
- some people believed that the costs of court-ordered mediation were too high for some parties;
- when mediations did not result in a settlement, mediators sometimes reported to the judges (and some judges asked the mediators for) a wide variety of information including who the mediator perceived was the "problem" in reaching a settlement and why they were a problem (Therefore, these mediations were not treated as confidential);

- sometimes it was difficult for lawyers to get a case to trial or to get some other decision on the merits.

Although the committee did not engage in fact-finding, none of the above concerns appeared to be corroborated by experiences of the committee members, other than the reports to judges by mediators and the general concerns about the cost of mediation.

The committee's suggested changes to the Supreme Court's proposed ADR rule for Circuit Court

The committee's suggested changes to the Supreme Court's proposed ADR rule for Circuit Court

- removes the requirement that a case first have a settlement conference before it could be ordered to ADR
- allows the court to order that the fees not be borne equally by the parties
- allows a party who claims inability to afford ADR to file a motion with the court to be excused from payment or pay at a reduced amount
- modifies the process for the selection of the neutral by allowing each party to nominate a larger number of prospective neutrals (5 instead of 3), allows the parties to object to proposed neutrals, allows the judge to decide which neutrals will serve if there is a tie in the voting for the neutrals, and specifies what to do when the selected neutral is unwilling or unable to serve as the neutral
- makes disclosure a mutual duty which is not placed solely on the neutral but which is also shared by the parties and their lawyers
- clarifies the disclosure process by providing a specific method for objections
- modifies the presence of counsel and parties requirement to include people with full settlement authority and specifically provides what this means when one of the parties is a governmental entity
- clarifies the provision about communication with the court to include that the mediator should not discuss issues with either the trial judge or the settlement judge.

The committee made no suggestions as to the ADR rules for Probate, Family, District, and Small Claims Division of the District Courts and would defer to the judges and practioners in those courts

The committee was generally of the opinion that in courts other than the Circuit Court, cases are not ordered to private ADR providers very frequently and that mediations are more often conducted by ADR providers mutually selected by the parties or through some nonprofits such as the Mediation Centers of Hawaii (MCH). In the District Court and Small Claims Division, MCH is believed to be the main provider of mediation services. There may well need to be a different way of handling disclosures when a MCH organization is appointed to provide the mediation services. Therefore the committee thought it best to allow those courts to work out their own procedures. In addition, the committee believed that sometimes the volunteer, lay mediators in these courts found it necessary to communicate with the court in order to help the parties draft a legally appropriate settlement document. Therefore, the committee thought it more appropriate to

defer to these courts and their practioners to offer appropriate comments and suggestions on the ADR rules for those courts.

The major limitation of the proposed ADR rules is that the rules would only apply to those few mediations that are court ordered

The committee recognized that the proposed ADR rules apply only to cases in which the judge orders a case to ADR. The committee further believed that in the vast majority of Circuit Court cases that use mediation, the parties select their own mediator and the parties voluntarily enter into mediation. Therefore, the rules as applied in Circuit Court will only apply to a very small minority of mediated cases: those cases in which the court requires the parties to go to mediation and the judge appoints a mediator. However, the committee hopes that some of the standards for court ordered mediation will be applied to other mediations, particularly those provisions related to disclosure, the presence of the counsel and parties, and communication with the court.

It is not clear how many court mediations will be covered by these proposed rules. Although the Judiciary has data available to it about mediations from its contract for mediation services from the Mediation Centers of Hawaii for cases usually in District Court and Small Claims Court cases, the committee did not have any objective data about the amount of mediation taking place in Hawaii's Circuit Courts. Some committee members estimated that each Circuit Court judge only orders mediation in 1-2 cases per year. Committee members estimated that up to half of the cases terminated each year in Circuit Court used mediators. Assuming that 3500 cases terminate each year in the Circuit Courts (in 2009-2010 the Circuit Courts terminated slightly over 3700 according to the Judiciary's Annual Report), that would mean perhaps 50 cases annually would be covered by these ADR rules state wide, and approximately 1700 mediated cases would not be covered by these rules. While First Circuit judges and former judges on our committee knew how many cases they individually ordered to mediation, apparently Circuit judges are not privy to any data regarding the number or frequency of court ordered mediations. Therefore, this committee recommends that the courts collect data about mediation.

Topics Discussed Without Recommending Adoption of Rules

Topics the committee discussed but did not recommend adoption of a rule for included:

- Confidentiality and privilege beyond communications with the trial and settlement judges as covered in subsection (e) of the proposed Circuit Court Rule and the general rule about communications that would apply to all courts;

- Immunity for mediators (noting the probate rules and the Federal District Court rules do have such immunity provisions);

- Qualifications, training, and certification of mediators (the committee believes that some other committee should take up this topic at a later time);

- Enactment of a statute such as the Uniform Mediation Act (UMA);

- A rule of Judicial Conduct that would prevent judges from receiving reports from mediators in cases that do not settle in mediation.

Confidentiality and privilege. - Although mediation is often described as a "confidential" process and mediators sometimes tell parties and counsel that "everything you tell me will be kept confidential," there are no statutory provisions that make such communications confidential other than the general protections of Hawaii Revised Statutes (HRE) 408. HRE 408 excludes evidence of what was said in a mediation from being admitted into evidence at trial of the case that is the subject of the mediation, that evidentiary rule does not cover all of the issues related to mediation communications. In particular, HRE 408 and other Hawaii law do not cover issues related to pretrial discovery or use of mediation communications in other lawsuits or by third parties. The Uniform Mediation Act (UMA) has several sections concerning mediation confidentiality and privilege. Because a court rule cannot "create" a privilege, this committee took no action on this issue. The committee recommends that another committee should undertake a study of this issue.

Immunity for Mediators. - The committee discussed immunity for mediators and notes that if the new ADR rules replace the current mediation rules for Probate Court, the new rules will eliminate the absolute immunity currently contained in Rule 9 of the Probate Mediation Rules. The committee also notes that the mediation rules for the U. S. District Court for Hawaii give mediators the same immunity that judges have. Although immunity for mediators may be of great interest to mediators, limited internet research shows no reported appellate cases about mediators being sued for malpractice in any state.

Qualifications, training, and certification of mediators. - The committee discussed whether there should be any specific qualifications, training requirements (including mandatory Continuing Legal Education (CLE), or certifications necessary for mediators. The committee believed that it was not necessary for the purpose of creating the ADR rules to have such requirements at this time, especially since the court is not creating a panel of mediators. However, the committee recommends that some other committee should look into qualifications, training, and certification for mediators at another time. At some later time, particularly if a Circuit Court panel of mediators is created, CLE and qualifications should be considered.

Enactment of a statute such as the Uniform Mediation Act (UMA). - The committee discussed whether there should be a comprehensive state code, such as a Hawaii version of the Uniform Mediation Act (UMA), covering many topics related to mediation, but took no position on this issue.

A rule of Judicial Conduct that would prevent judges from receiving reports from mediators in cases that did not settle in mediation. – The committee discussed recommending a rule of Judicial Conduct prohibiting judges from receiving reports from

mediators about why mediations had failed to reach a settlement, but ultimately decided against it.

Proposed Data Collection

Committee members had a great deal of experience, impressions, and feelings about the use of mediation in Hawaii, but one thing was clearly lacking - hard data about the use of mediation in Hawaii. Although many cases filed in Hawaii courts may be mediated, objective data about the number of cases mediated is very scarce. Hawaii is not alone in this situation. The committee was not aware of any states that keep information about the numbers of cases, particularly high-valued cases, where mediation is used. For these reasons, the committee recommends that the courts collect information about the use of mediation and settlement in civil cases If the Hawaii courts collected data about the use of mediation in court cases, such information would be very useful for lawyers, clients, the courts, and other policy makers when making decisions about mediation and would also set important benchmarks for other jurisdictions across the United States.

Conclusion

The committee believed that some new ADR rules with a focus on mediation would be helpful to ensure the perceptions of fairness, impartiality, and integrity of the mediation process in Hawaii courts. The committee paid particular attention to the topics of selection of the mediator, disclosures to ensure neutrality, physical presence of counsel and parties to enhance the effectiveness of mediation, and especially to the confidentiality of the communications between judges and the mediators. The committee concentrated its efforts on the Circuit Court Rule for ADR and made various modifications to the Supreme Court's set of proposed ADR rules. The committee did not believe it was necessary to draft a more detailed set of mediation rules at this time, particularly because the court was not establishing a panel of approved mediators. Finally, the committee believes that having the courts collect information about the use of mediation would ultimately lead to a better understanding of how mediation is used in the courts and provide new insights for any subsequent changes to these the ADR rules and procedures.

Suggestions from the AJS Special Committee on Rules Governing Mediation in Civil Cases

Suggested Circuit Court ADR Rule

Rules of the Circuit Courts, Rule 12.2. Alternative Dispute Resolution. The court, sua sponte or upon motion by a party, may, in the exercise of its discretion, order the parties to participate in a non-binding Alternative Dispute Resolution process (ADR or ADR process) subject to terms and conditions imposed by the court. ADR includes mediation, summary jury trial, neutral evaluation, non-binding arbitration, presentation to a focus group, or other such process the court determines may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter. Subsections (a) through (e) of this rule do not apply to arbitration under the Court Annexed Arbitration Program.

(a) **Order to ADR and Fees and Expenses of Neutral.**
(1) Before ordering a case to ADR, the court shall consider factors, including, but not limited to, the current status of the case, whether the parties would be better served by a settlement conference held by a court, whether the parties are willing to participate in ADR, and whether the parties have previously participated in ADR in the pending matter. In addition, the court shall consider whether ordering a case into ADR would result in an unfair or unreasonable economic burden to any party.
(2) All ADR fees and expenses of the neutral shall be borne equally by the parties unless otherwise agreed to by the parties, ordered by the court, or provided by law. A party who cannot afford to pay all or any portion of fees or expenses charged under this rule may file a motion with the court to be excused from payment or to pay at an appropriately reduced amount or rate.

(b) **Selection of the neutral**. If the ADR process ordered by the court involves the selection of a neutral, the parties shall first attempt to select a neutral by mutual agreement. If the parties cannot agree, then each party shall submit a list to the court nominating up to five (5) prospective neutrals by a date determined by the court. The court shall provide the parties with a combined list of all nominees and allow each party to rank all prospective neutrals. Before the ranking, each party shall have seven (7) days to object to any proposed neutral on the list of nominees, and the court shall decide whether there is sufficient reason to exclude the nominee from consideration. If any nominee is excluded, the party whose nominee was excluded may submit the name of another nominee who may be similarly challenged. The person receiving the highest rank on the combined list shall be selected as the neutral. In the event of a tie, the judge shall decide which person shall serve as the neutral. If at any time the neutral becomes unable or unwilling to serve, and the parties are unable to agree on the selection of another neutral, the judge will select the next highest ranking nominee available to serve or repeat any stage of the selection process that the judge determines to be appropriate.

(c) **Disclosure**. Unless waived by all parties, the parties, counsel, and neutral shall make a reasonable inquiry concerning and disclose to each other, the identity of the parties, potential witnesses who may be called at trial, and other participants who may be included in the ADR process. In addition, they shall disclose any other facts and information, such as past, present, or future relationships, that a reasonable person would consider likely to affect the impartiality of the neutral, including the neutral's past, present, and any future relationships with counsel. The parties shall have seven (7) days after the disclosure is made to file with the court any objection to the neutral, and the court will promptly decide whether the neutral will serve. The parties, counsel, and neutral shall have a continuing obligation to disclose any information they subsequently learn during the ADR process that a reasonable person would consider to likely affect impartiality of the neutral.

(d) **Physical presence of counsel and parties required**. (1) Lead trial counsel and clients, representatives, and third persons with full settlement authority shall attend, in person, all ADR conferences scheduled by the neutral, unless excused by the neutral. (2) A governmental entity satisfies the attendance requirement if its lead counsel is in attendance and has been delegated full settlement authority, or has reasonable access to the person who has full settlement authority (recognizing that any such authority may be subject to the appropriation process). In the event that the neutral determines it appropriate, the neutral shall have reasonable access to the person who has full settlement authority with appropriate accommodation given to the person's competing public duties.

(e) **Communication by parties, counsel, neutral, and the court**. Unless the parties otherwise agree in writing, the neutral, counsel, the parties, and other participants in any mediation, shall not communicate with the civil court adjudicating the merits of the mediated matter (including the settlement or the trial judge) about the substance of any position, offer, or other matter related to mediation without the consent of all parties, nor shall such court request or order disclosure of such information unless such disclosure is required to enforce a settlement agreement, adjudicate a dispute over mediator fees, or provide evidence in an attorney disciplinary proceeding, and then only to the extent required to accomplish such purpose. However, the neutral may disclose to a court whether the ADR process is scheduled, pending, or concluded; who attended; and, if applicable, whether a settlement or resolution was reached with regard to some or all issues presented.

Appendix A

AJS Hawai‘i Chapter Special Committee on Rules Governing Mediation in Civil Cases

The Rules of Civil Procedure provide Judges with discretion to order litigants to participate in the alternative dispute resolution process of mediation. For example, under Rule 12.2 of the Rules of the Circuit Courts of the State of Hawai‘i, a Judge can order the parties to participate in an alternative dispute resolution process subject to conditions imposed by the Court upon motion by any of the parties or sua sponte. *See also* Rule 12.2 of the Rules of the District Courts of the state of Hawai‘i. This is similar to the rules in other jurisdictions. In addition, the parties can submit disputes to mediation by agreement. However, unlike other jurisdictions, the Rules of Civil Procedure do not contain rules for the mediation process itself which the parties, the mediators and the Judges must follow. The Hawai‘i Supreme Court issued Guidelines for Hawai‘i Mediators on July 11, 2002 (attached), however, those Guidelines are aspirational and were not promulgated as binding rules. Moreover, although Exhibit A appended to the Hawai‘i Probate Rules (attached) provide mediation rules for probate, trust, conservatorship, and guardianship cases, those rules do not apply to other civil cases.

Some lawyers have reported problems in the mediation process, including the uncertainty of what to expect in mediation and inconsistency where Judges and mediators have imposed varying terms and conditions or rules on the parties. We believe that some helpful guidance may be obtained by examining similar rules in other jurisdiction, and by having the input and advice of an independent review panel.

Accordingly, the AJS Hawai‘i Chapter has agreed to form a Special Committee to review the mediation rules and to make recommendations on whether the Hawai‘i Supreme Court should consider adopting mediation rules for civil cases in the Circuit and District Courts. If the Committee concludes that mediation rules should be adopted, then the Committee will consider and draft rules it recommends for adoption by the Hawai‘i Supreme Court. The Committee will conduct its review and make recommendations to the Board, which will then decide whether to submit the Report to the Supreme Court.

Appendix B

Special Committee on Rules Governing Mediation in Civil Cases

Committee Roster

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