



American Judicature Society

Newsletter January 2021



Welcome

The American Judicature Society ("AJS") is an independent, non-partisan membership organization working nationally to protect the integrity of the American justice system. Its mission is to secure and promote an independent and qualified judiciary and a fair system of justice.

The AJS has a diverse and broadly based membership, which includes judges, lawyers, and members of the public, and continues its work primarily on judicial diversity, judicial ethics, judicial selection, access to justice, criminal justice reform, and the jury system.

SAVE THE DATE: AJS NATIONAL CONFERENCE

The AJS National Conference, "Judicial Independence in the Age of Political Polarization" is scheduled for November 21 to 24, 2021, at the Sheraton Waikiki, Honolulu, Hawaii. Exciting sessions are being planned. Please calendar the event and attend for stimulating and engaging presentations and discussion.

Covid 19 Chaos

by Landon M. M. Murata

The Criminal Justice Committee of AJS prepared a "Report on the Impact of Virtual Court Proceedings in the Circuit Court," which has been posted at the AJS website. This report discusses the impacts of the COVID-19 pandemic and the implementation of virtual court proceedings on the administration of justice in criminal cases in the circuit courts of the State of Hawai'i.

The report first lays out some background on the COVID-19 pandemic and the efforts of the Hawaii State Judiciary ("Judiciary") to continue operating while doing its part to protect the health and safety of litigants and the legal community. The report also discusses the technological and logistical challenges and experiences many have had during the Judiciary's implementation of virtual court proceedings - the good, the bad, and the ugly. Finally, the report discusses the legal authority and context for virtual court proceedings as well as the constitutional and other legal impediments to its widespread use - the Confrontation Clause, the right to confer with counsel, and the qualified right of public access to the courts.

The report concludes that, despite its various technological and legal challenges, virtual court proceedings in the State of Hawai'i are likely here to stay and that, on balance, that's probably a good thing.

Members of the Criminal Justice Committee in 2020 were Judge Shirley Kawamura, Co-Chair, Judge John Tonaki, Co-Chair, Landon M. M. Murata, James Tabe, Steven Alm, Nancy Kriedman, Avery Matro, and Arkie Kohl. Read the full report on page 17.



Supreme Court Rule 23



Adoption of Rule 23 of the Rules of the Hawai'i Supreme Court

by Judge Lisa M. Ginoza and Ted N. Pettit

The Committee for Judicial Administration ("Committee") is one of several standing committees for the Hawai'i chapter of the American Judicature Society ("AJS"). The Committee is pleased to announce that on January 7, 2021, the Order Adopting Rule 23 of the Rules of the Supreme Court of the State of Hawai'i was filed. The Order was effective immediately and establishes a Commission to Promote and Advance Civic Education (the "PACE Commission"), as proposed by the Committee. This article describes the history of the development and enactment of Rule 23 and the importance of the new PACE Commission in these unprecedented times that cry out for more civic education as a means of protecting justice and our democracy.

From a current historical perspective, the need for the PACE Commission could never be stronger. In the midst of a COVID-19 pandemic, the day after the insurrection and attack on the United States Capitol, the Hawai'i Supreme Court created the PACE Commission to promote civic education. Rule 23 is the result of the efforts of the AJS and its leadership over the past decade to enhance civic education in schools and the community. One of the fundamental goals of the AJS is to create understanding and respect for the rule of law, the judicial system, and the public's participation in the democratic process. The PACE Commission will support this important endeavor.

Background

In 2018, one of the original goals for the Committee set out by the Board of Directors of the AJS was to revisit a report by an AJS Special Committee On Public Knowledge, Understanding and Confidence In The Courts ("AJS Special Committee"), issued over ten years ago, that addressed civic education in Hawai'i. The AJS Special Committee was created after a speech in 2006 by former Chief Justice Ronald T.Y. Moon, in which he addressed the need for civic education in our community. He emphasized the legal community's responsibility to improve the public's knowledge and understanding of how government works, including the justice system, and to encourage the public's participation. One of the key recommendations in the AJS Special Committee's report was to create a Hawai'i Institute for Civic Education ("HICE") and to establish funding to hire a director of the HICE. Unfortunately, there were funding challenges, and the HICE was not created. As a side note, the report generated sufficient interest to create the Civic Education Committee of the Hawai'i State Bar Association ("HSBA"). The Civic Education Committee continues to be an important part of the bar's multiple organizations and activities promoting the rights, roles and responsibilities of citizens in a democracy, although funding continues to be problematic.

Given this history and in view of the potential lack of funding, the Committee proposed that the PACE Commission be created by Hawai'i Supreme Court rule.



Supreme Court Rule 23



CREATION OF THE PACE COMMISSION

In the past two years, as the Committee took up the issue of civic education, the Committee members recognized that 2020 would be a year of important national, state and local political campaigns and elections. No one could have predicted that 2020 would be a year of extraordinary events and that on January 6, 2021, we'd see the storming of the United States Capitol, the building that represents the heart of the nation's democracy. Even more now, it is evident that attention must be devoted to the benefits of civic education.

The Committee focused on the importance of promoting civic education in our various communities, organizations and groups.

Members of the Committee met with individuals and groups already involved with civic education projects in Hawai'i, such as the Judiciary History Center, the HSBA's Civic Education Committee, and individuals at the Department of Education and at independent, private schools. The Committee also reviewed how other states were creating civic education advisory boards or committees. The Committee concluded that the best option for creating a long-lasting civic education structure, coordinating the efforts of those already engaged in civic education in Hawai'i, and building an even broader and more focused statewide effort, was to create a PACE Commission by way of a new Hawaii Supreme Court rule. The success of the Supreme Court's Access to Justice Commission, and Rule 21 creating that commission, served as an inspiration and template for a new rule to create the Commission to Promote and Advance Civic Education.

Supreme Court Rule 23



By letter dated June 15, 2020, the proposed rule was submitted by the Committee to Chief Justice Mark Recktenwald for consideration by the Hawai'i Supreme Court. Rule 23 adopted by the Hawaii Supreme Court essentially tracks the Committee's proposal, including the following:

- (a) The creation of the PACE Commission.
- (b) The purpose of the PACE Commission is to promote and advance civic education for students and citizens of Hawai'i by:
 - providing leadership, oversight and initiatives in the community and in the schools;
 - providing educational resources for the public through collaboration with the media, statewide conferences, recognition awards and other means;
 - maximizing the efficient use of available resources for civic education;
 - encouraging attorneys, judges, government officials and others to take leadership roles in expanding civic education in Hawai'i;
 - reducing barriers to civic education by developing resources to overcome language, cultural and other barriers; and
 - increasing pro bono contributions by Hawai'i attorneys to civic education.

(c) The PACE Commission will consist of no more than 14 members. In general, the members of the Commission are to be appointed by authorities that appoint individuals to serve on the Commission for 3-year terms, with no more than 3 consecutive terms. The proposed rule calls for community-wide representation and members who are residents of different islands in Hawai'i and who reflect the diverse ethnic, ancestral, economic, urban and rural communities in the Hawaiian Islands.

Under Rule 23, twelve members will be appointed by the following appointing authorities: the Chief Justice, the Governor, the Senate President, the Speaker of the House, the Office of Hawaiian Affairs, the Superintendent of the Department of Education, the Chief Judge of the U.S. District Court for the District of Hawai'i, the President of the University of Hawai'i, the Dean of the William S. Richardson School of Law, the HSBA, and the Hawai'i Association of Independent Schools. Two additional members can be appointed by those members of the Commission already appointed by the appointing authorities.

Supreme Court Rule 23



(d) The Chief Justice of the Supreme Court will designate from the members of the PACE Commission a chair and vice chair as officers of the Commission.

Rule 23 also provides for administrative procedures to implement the work of the PACE Commission.

While it is anticipated that the Commission will be staffed primarily with volunteers, the Rule provides for opportunities to fund the work of the Commission with a “combination of private and public sources of financial and in-kind support.” Rule 23(h).

Prior to submission of the proposed rule to the Hawai‘i Supreme Court, the co-chairs and other members of the Committee either met in person or had telephone conversations with the proposed appointing authorities at that time or with their respective representative(s). The proposed rule was discussed with them, and the Committee sought their input and requested their participation in a new PACE Commission, if it was created. These initial meetings resulted in consistently favorable, and often enthusiastic, responses from all of the proposed appointing authorities or their representatives. The Committee believes Rule 23 will have the full support of the appointing authorities.





Supreme Court Rule 23



THE COMMITTEE’S PROPOSAL TO THE HAWAI’I SUPREME COURT

Under Rule 23, the following are the current appointing authorities or their representatives.

Appointing Authority

CHIEF JUSTICE OF THE
HAWAI’I SUPREME COURT

GOVERNOR OF THE STATE OF HAWAI’I

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE

OFFICE OF HAWAIIAN AFFAIRS

SUPERINTENDENT,
DEPARTMENT OF EDUCATION

CHIEF JUDGE, UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF HAWAI’I

PRESIDENT OF THE
UNIVERSITY OF HAWAI’I

DEAN OF THE WILLIAM S.
RICHARDSON SCHOOL OF LAW

HAWAI’I STATE
BAR ASSOCIATION

HAWAI’I ASSOCIATION OF
INDEPENDENT SCHOOLS

Current Representative

The Honorable Chief Justice Mark E. Recktenwald

The Honorable David Ige

The Honorable Ronald D. Kouchi

The Honorable Scott K. Saiki

Sylvia Hussey, Chief Executive
Officer (Ka Pouhana)

Dr. Christina M. Kishimoto

The Honorable Chief Judge J.
Michael Seabright

Dr. David Lassner

Dean Camille Nelson

Patricia Mau-Shimizu, Executive Director
Levi Hookano – Current President

Philip J. Bossert, Ph.D., Executive Director

Prior to adoption, the Hawai'i Supreme Court sent the proposed rule out for public comment. The public comment period closed on November 7, 2020.

The Committee looks forward to the future success of the PACE Commission, with strong support from the Hawai'i Judiciary, the AJS, the HSBA, the appointing authorities for the Commission, and the general public. The PACE Commission will be an important step in keeping citizens of Hawai'i involved in their own governance and to further educate about the importance of our democracy.

The Committee members are Lisa M. Ginoza and Ted N. Pettit (co-chairs), Troy Andrade, David Louie, Kenneth Mansfield, Randy Perreira, Pat Mau-Shimizu, and Steven Uejio. Previous committee members who also contributed their time in recent years are Rodney Maile, Anton Krucky, Duane Fisher, and Meredith Burns.

For more information on the Hawai'i Chapter of the AJS and its mission see <http://americanjudicaturesociety.org/>



Supreme Court Rule 23



AJS ANNUAL MEETING

ANNUAL MEETING OF THE AMERICAN JUDICATURE SOCIETY

At the annual meeting of the American Judicature Society (“AJS”) on Thursday, December 3, 2020, Lawrence Okinaga, Chair, presented an update of the organization, beginning with the officers and directors. The officers for 2021 are: Lawrence Okinaga, chair; Ivan Lui-Kwan, vice chair; Sylvia Yuen, secretary; Daniel Padilla, assistant secretary; Russell Lau, treasurer; Colleen Hirai, assistant treasurer.

The directors who will be serving two-terms that will expire in 2022 are: Lisa Bail, Jan Boivin, Judge Richard Clifton, Judge Virginia Crandall (ret.), William Harstad, Colin Miwa, Randy Perreira, Mark Rossi, Gerald Sekiya, Aviam Soifer, Judge John Tonaki, Robert Toyofuku; new directors: Jodi Yi and Carol K. Muranaka.

The directors whose terms are expiring at the end of 2021 are William Atwater, Judge Mark Bennett, Momi Cazimero, Douglas Chin, Calvert Chipchase, Clare Connors, Chief Judge Lisa Ginoza, Timothy Johns, Judge Walter Kirimitsu (ret.), Albert Koehl, David Louie, U.S. Magistrate Judge Kenneth Mansfield, Judge Victoria Marks (ret.), Associate Justice Paula Nakayama, Judge Barbara Richardson (ret.), Judge J. Michael Sebright, Barbara Tanabe. Ex officio members are William Johnston, Robert Kaufman, and Judge Margaret McKeown.

The convention with the theme, “Judicial Independence in the Age of Political Polarization,” will be conducted either using the Zoom platform or a combination of Zoom and in-person presence. Mr. Okinaga noted the federal and state judges in current cases discussed in the news are consistently basing their decisions on the facts and the law. “This is a measure of judicial independence that we need to support,” he said.



Chief Justice Mark Recktenwald of the Hawai‘i Supreme Court, the guest speaker at the annual meeting, echoed those sentiments about judicial independence. He acknowledged that AJS’s mission to promote an independent, qualified, impartial judiciary and a fair administration of justice is more important now when the community is under - stress because of the pandemic.

Chief Justice Recktenwald chronicled the response of the Judiciary. He said, “I will not forget entering the orders that essentially shut down most of our operations in March, nor will I forget every call and message telling me that a judiciary employee had tested positive. Each one was like a punch in the gut.”

An effect of the pandemic was exhibited in the rise in domestic violence cases. Chief Justice Recktenwald reported that the Domestic Violence Action Center showed a 642 percent increase in client contacts in the six-month period from April to September 2020, compared to 2019. Additionally, the domestic violence criminal division in Honolulu has an estimated 800 pending jury trials, which if each of the two judges assigned to that division handled a trial a week, would take eight years to try these cases.

AJS ANNUAL MEETING

In response to the pandemic, Chief Justice Recktenwald created a Committee on Operational Solutions, co-chaired by himself and Judge Paul Wong, which included judges and judicial staff across the state. The Committee realized that many of the in-court proceedings would need to be moved to remote platforms such as Zoom or WebEx so that the number of people physically entering the courthouses would be minimized. The use of Zoom or WebEx in March went from almost nil to over 31,000 cases on those platforms in October.

One of the positive aspects of the pandemic that Chief Justice Recktenwald mentioned was that appearance rates increased in the online traffic infraction hearings and the public and bar welcomed the convenience of appearing remotely. "Courts of the future" are being created, he remarked, by being more efficient and responsive to the needs of the community.

Remote jury trials, however, have proven to be more challenging. In the First Circuit, there is a backlog of 2,200 criminal jury trial cases which may be a cause for concern in light of the Speedy Trial Act.

The Judiciary met this challenging task with meticulous work on measuring the courtrooms with tape measures to meet the social distancing requirement, acquiring clear face masks, placing clear barriers in the courtrooms, and conducting walk-throughs with the representatives from the Department of Health and stakeholders for mock trial proceedings. Thorough and careful efforts to protect the health and safety of the groups involved in criminal jury trials such as the 12 jurors, two alternates, parties, witnesses, attorneys, judges, and staff, culminated in restarting jury trials in December.

Another focus of the Committee on Operational Solutions has been providing innovative solutions for the self-represented litigants who might not have access to internet access or other tools to participate remotely. For example, the Hawai'i Supreme Court Law Library has set up kiosks for remote access.

The Community Outreach Court, which provides those charged with low-level crimes the opportunity to perform community service in lieu of paying fines and fees that can add up and make it nearly impossible to pay, expanded to the Villages of Maili. The Outreach Court also connects these "voluntary participants" (they are not identified as "defendants") with service providers who can provide information about employment, substance abuse treatment, housing, and other needs. Prior to the pandemic, between January 17 to March 2020, 215 graduated and almost 3,000 cases cleared with more than 4,000 hours of community service performed. In addition, 64 people found permanent housing.

Another bright point is the work of the legal service providers and attorneys who helped and have helped with the self-help centers remotely.



AJS ANNUAL MEETING



Chief Justice Recktenwald noted that other challenges unfolded as the pandemic witnessed COVID-19 spreading in the overcrowded jails. He was appreciative of the trial judges who reviewed hundreds of cases involving non-violent defendants to determine whether a defendant could be safely released to reduce the crowding. During the past year, 60,000 criminal citations charging misdemeanors for violating the community emergency orders arose while in 2019, only 20,000 criminal citations were issued in the First Circuit district court.

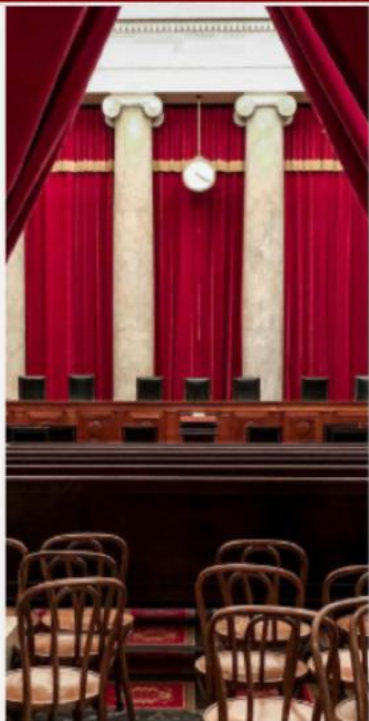
Chief Justice Recktenwald noted the challenges that the Judiciary faces with significantly reduced resources. There are four vacant judicial positions in the Criminal Division of the First Circuit, and the fact that funding was slashed by \$3 million statewide impacts the vulnerable members of the community such as victims of domestic violence and guardians ad litem.



A significant outgrowth of the Judiciary's pretrial reform efforts was a formation of a criminal justice research institute, which will provide critical data on the inequality with the criminal justice system. Moreover, the Court's Committee on Equality and Access to the Courts commenced discussions with community partners about issues of racial justice.

Chief Justice Recktenwald described the economic outlook predictions for the state as "grim." Although no new funding will be requested by the Judiciary, a budget will be submitted requesting no further cuts. He remarked that with the 8.6 percent cut the Judiciary took this fiscal year, the Judiciary accounts for less than 2 percent of the overall state budget and notably over the years, it has decreased significantly from 2.56 percent in fiscal year 2011 to 1.91 percent this year.

Chief Justice Recktenwald observed that the Judiciary was lean before the pandemic and is even more so now, but the Judiciary will continue to provide essential services and will continue to address the issues that arise with innovation and determination.



AJS Annual Program



AJS Annual Program

With nearly 300 attendees viewing by Zoom, the annual program of the American Judicature Society ("AJS") was held on Thursday, December 10, 2020, featuring Neal Katyal, partner at Hogan Lovells, Washington D.C. office, Paul and Patricia Saunders Professor of National Security Law at Georgetown University Law Center, and former Acting Solicitor General of the United States under President Barack Obama. The theme of the presentation was "Civil Liberties, Judicial Administration, and COVID-19."

Following Professor Katyal's presentation, Hawai'i Supreme Court Chief Justice Mark Recktenwald and University of Hawai'i William S. Richardson School of Law Dean Camille Nelson delivered comments, with United States Court of Appeals for the Ninth Circuit Judge Mark Bennett moderating .

Professor Katyal described cases recently decided by the U.S. Supreme Court, involving COVID-19 and the role of government, including one he argued before the Court in November that he believes sets a framework for the COVID cases.

The City of Philadelphia contracts with 28 foster care agencies and the City discovered that two of them discriminated against LGBT parents by not allowing them to be screened as potential foster parents. The City explained that it would not renew its contracts with these two agencies because of the City's general policy against discrimination on the basis of sexual orientation. The two agencies sued the City saying that it is their constitutional right to have the contract.

Professor Katyal explained the case mirrors *Employment Division v. Smith* where the State of Oregon had prohibited the use of peyote and Native Americans contended that peyote was a sacrament. In an opinion by Justice Scalia, it was decided that if the law is generally applicable, is neutral, is not targeted at religion, and there is no special animus, then the law is constitutional.



The Court's 5-to-4 split continued in July in *Calvary Chapel*, a Nevada case where churches were subject to a number of restrictions, but casinos were not. In a one-sentence order, the majority upheld the Nevada restrictions. The same four justices that had dissented in *South Bay*, Justices Thomas, Alito, Gorsuch, and Kavanaugh, also dissented in *Calvary Chapel*, concluding that the government did not have good reason for treating houses of worship differently. Professor Katyal pointed out Justice Alito's statement:

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to pay craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities.

Professor Katyal commented that the composition of the Supreme Court markedly changed following these decisions. On November 25, the Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo*, where Governor Cuomo had issued an executive order that identified clusters of COVID cases and restricted the area surrounding these clusters. The area immediately around a cluster was classified as a red zone and if a worship service was happening, attendance was limited to ten people; the orange zone was limited to 25 people, and the yellow zone was restricted to 50% of the building's usual capacity. At the same time, certain businesses were identified as essential and permitted to remain open in those zones.

AJS Annual Program



In May, the first COVID case to come to the Supreme Court was *South Bay Pentecostal Church v. Newsom* where certain churches challenged California's stay-at-home orders by arguing that the reopening plans discriminated against churches because they were closed but not retail stores, offices, restaurants, and schools. In a 5 to 4 opinion, Chief Justice Roberts, joined by Justices Sotomayor, Breyer, Ginsburg, and Kagan, upheld California's temporary restrictions. The restrictions addressed an "extraordinary health emergency" and was found to be consistent with the free exercise clause.

AJS Annual Program



The Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues brought a lawsuit to block enforcement of the executive order. Another 5 to 4 split decision ensued but with Justice Barrett casting the deciding vote in favor of a conservative majority.

Although there were six separate opinions in the case, said Professor Katyal, the Court concluded that the executive order violated the requirements of neutrality, targeted the ultra-orthodox Jewish organizations and religious organizations more generally, and therefore was not permissible.

Professor Katyal quoted from Justice Gorsuch's concurring opinion:

The Constitution guarantees the free Government is not free to disregard the First Amendment in times of crisis According to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike Who knew public health would so perfectly align with secular convenience?

Professor Katyal noted that the Supreme Court Justices were tense and terse with one another in the decision. He believes that there are at least five justices on the Court that will make it difficult for the government to apply COVID-related restrictions to religious services.



He noted that the Court seems to have come around full circle from the case of *Jacobson v. Massachusetts*, decided in 1905 after a major outbreak of smallpox in Boston. There, the Supreme Court upheld a Massachusetts statute requiring a vaccination when necessary for public health or safety and that if a person did not take the vaccine, that person was required to pay \$5.00 (about \$100 today). The Supreme Court had no problem in upholding that statute.

Nearly 115 years later, Justice Gorsuch in *Cuomo* argued that the restrictions that New York was imposing in the age of COVID were very different from those at issue in *Jacobson* because in *Jacobson*, an individual could pay a fine or ask for an exemption whereas in *South Bay* or *Cuomo*, the restrictions were mandatory and did not have exemptions. Justice Gorsuch observed that the more recent restrictions targeted religious institutions in a way that the *Jacobson* law did not.

The Court concluded that *Jacobson* should not be a blank check for governments to do anything they want in the name of public health. Interpreting the Court's current approach, Professor Katyal noted that "There should be some scrutiny behind what the government says and does. The question is just how much, and I just want that scrutiny to be done on an even-handed basis that the Court celebrates."

AJS Annual Program



Another case discussed was *Williams v. Wilson*, where a group of prisoners in a low-security prison claimed that they faced a substantial risk of contracting COVID because of prison conditions. The Bureau of Prisons was ordered by the district court to evaluate whether the elderly in high-risk prisons should be transferred for early release. In response, however, the Bureau of Prisons did nothing. The district court then ordered the government to make use of its home confinement authority and to reconsider early release. The government appealed to the Supreme Court contending that such an order would jeopardize public safety, interfere with the management of prisons, and there was no likelihood of success that the Eighth Amendment would be violated. The Supreme Court upheld the district court order.

Another recent case, *Valentine v. Collier*, involved two inmates in a Texas geriatric prison who had sued over their living conditions. Forty percent of the prison population had tested positive for COVID and of the 500 who tested positive, 20 had died. The district court held an 18-day trial, agreed that the prison failed to take obvious health measures, and granted an injunction requiring the prison to implement the measures. The Fifth Circuit stayed the injunction pending the appeal, and the prisoners contended at the Supreme Court that the stay should be vacated. The prisoners lost in a 7 to 2 decision. Justice Sotomayor wrote the dissent, joined by Justice Kagan, arguing that there had already been detailed fact-finding by the district court and that serious and irreparable harm existed for the inmates.

Professor Katyal raised an issue, which he does not believe will reach the Supreme Court, but is interesting: where do prisoners fall in the hierarchy of vaccine priority? He remarked that this will be a difficult public policy question with strong public health considerations on one hand and on the other hand, the perception that prisoners who have violated laws may yet be able to jump ahead of others.



Another anticipated hot topic is whether employers can require their employees to be vaccinated. OSHA indicates that it is permissible for an employer to do so, he said. Coronavirus liability may also become an issue for the Court to address. Businesses, schools, trade groups, and hospitals have been pushing hard for legislation protecting them from liability.

Excellent presentations by Chief Justice Recktenwald and Dean Nelson followed Katyal's remarks. Chief Justice Recktenwald summarized the Judiciary's response to the pandemic and the challenges going forward. He commented that the courtrooms were shut down at the beginning of the pandemic, as the courts explored the available technology, including Zoom and WebEx. Within six months, the Judiciary went from zero to 31,000 hearings using Zoom or WebEx. The use of technology for remote hearings will continue.

AJS Annual Program



Jury trials were suspended in March of 2020 but were restarted on the neighbor islands in November and, on Oahu island, in December, after it was safe to have in-person proceedings with social distancing, face masks, erected barriers in the courtroom, and enhanced cleaning. There are currently 2,200 criminal case jury trials still pending.

Dean Nelson observed that the law school pivoted its entire operation to online. The law school has shifted to focus on ensuring educational opportunities through digital tech and ed tech. She said that in this climate, the law school's strategy revolves around maintaining the academic integrity and excellence with these new modalities.

Judge Bennett moderated the question-and-answer session. In responding to an inquiry as to how to approach oral argument if doing it by Zoom, Chief Justice Recktenwald emphasized that all technical issues should be addressed prior to the hearing, having the best possible equipment and the right kind of internet access, and making sure that one is able to communicate with the court in the event the Zoom connection is interrupted.

In response to a question as to whether grades have returned to the law school or whether the pass-fail system was still in place, Dean Nelson reported that grades have returned in view of accreditation concerns, and professional and job hiring considerations

Larry Okinaga closed the program with expressions of gratitude to the speakers and to those not on-line, including Sylvia Yuen, chair of the Program Committee (and other members of her committee), Susan Asato, AJS staff person, and Daniel Padilla, AJS director.



Lawrence S. Okinaga

Chairman, American Judicature Society

Lawrence Okinaga



EQUAL JUSTICE UNDER LAW



JOIN AJS



The AJS Membership Committee encourages you to become a member of AJS. The AJS is a not-for-profit entity and relies heavily on the dues and donations.

The annual membership fee of \$50 may be paid via the AJS website or by mail to

AJS, Finance Factors Center, Suite 618, 1164 Bishop Street,
Honolulu, HI 96813.

AJS is committed to securing and promoting an independent and qualified judiciary and a fair system of justice. AJS works tirelessly to ensure that the American justice system continues to be the standard by which others in the world are measured. You will enjoy the following benefits as an AJS member:

- Serve on and promote judicial reform by participating on an AJS committee
- Enhance judicial reform and administration by participating in national and state efforts to support and better the judiciaries
- Receive email notifications of upcoming AJS events
- Enjoy networking opportunities with AJS members and other organizations.



COVID * 19

COVID-19 CHAOS



The American Judicature Society Newsletter is an official publication of the American Judicature Society. The nascent newsletter committee include Marla Greenstein, Barbara Tanabe, Judge Colleen Hirai (ret.), Daniel J. Padilla, Avery C. Matro, Rebecca Neff, Colin Miwa, Sylvia Yuen, and Carol K. Muranaka.

COVID-19 CHAOS

A Report On The Impact Of Virtual Court Proceedings In The Circuit Court

I. Introduction

Coronavirus disease 19 ("COVID-19") is an infectious disease that was first identified in December 2019. Worldwide, COVID-19 has resulted in over 29 million reported cases and over 942,000 deaths, as of September 17, 2020. See "COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)," <https://coronavirus.jhu.edu/map.html>, last viewed September 17, 2020. In that time, there have been over 10,000 reported cases and 102 deaths in the State of Hawai'i. See "Hawai'i COVID-19 Daily News Digest September 9, 2020," <https://hawaiicovid19.com/hawaii-covid-19-daily-news-digest-september-16-2020/>, last viewed September 17, 2020. Declared a pandemic on March 11, 2020, COVID-19 has had a profound impact on how we live our lives and conduct business the world over, including in the State of Hawai'i.

COVID-19 CHAOS



I. Introduction

The conduct of proceedings in the Circuit Courts of the State of Hawai'i have been no exception. Since March of this year, the Hawai'i State Judiciary ("Judiciary") has taken various steps to do its part to help protect the community from this unprecedented public health crisis. Access to courthouses across the state has been restricted. Trials and hearings have been repeatedly postponed. Grand jury proceedings have been cancelled, preliminary hearings delayed, and related procedural rules have been suspended. As a direct result of these drastic, albeit necessary, measures, there is an ever-growing backlog of trials, hearings, cases, and charges in the State of Hawai'i. It is a backlog that will not simply go away once the aforementioned restrictions have been lifted. It is a backlog that may take, not weeks or months, but years for the Judiciary and the interested parties to wade through.

II. Enter The Virtual Court Proceeding

On April 17, 2020, Chief Justice Mark E. Recktenwald ("Chief Justice") issued an order establishing a Committee on Operational Solutions to "examine and accelerate the Judiciary's capacity to conduct matters remotely as appropriate and to plan for the safe and timely return to normal operations." *In the Matter of the Judiciary's Response to the COVID-19 Outbreak*, Order Regarding the Committee on Operational Solutions, SCMF-20-0000152, *1 (S.Ct. Hawai'i April 17, 2020). Subsequent orders required oral arguments in the Intermediate Court of Appeals and the Supreme Court be heard using video conference or telephonic conference. Proceedings in both civil and criminal matters in circuit court were to be heard using video conference or telephonic conference to the extent feasible or as otherwise ordered by the chief judge of each judicial circuit.

Fast forward to the Chief Justice's most recent, August 28, 2020 order, and not much has really changed, at least on paper. *See In the Matter of the Judiciary's Response to the COVID-19 Outbreak*, Order Regarding Judiciary Operations, SCMF-20-0000152 (S.Ct. Hawai'i August 28, 2020). Oral arguments in the Intermediate Court of Appeals and the Supreme Court continue to be heard using video conference or telephonic conference. The chief judge of each judicial circuit has the authority to designate matters to be heard using video conference or telephonic conference, as do the presiding judges, on a case-by-case basis. In the First Circuit, for example, all jury and non-jury trials are required to be postponed to a date after October 2, 2020. *See In the Matter of the Circuit Court of the First Circuit's Response to the COVID-19 Outbreak*, Eighth Amended Emergency Order #2 Regarding Circuit Court of the First Circuit, Criminal Matters, 1CSP-20-0000082, *2 (August 28, 2020). Face-to-face conferences, hearings, and motions were, for the most part, ordered to be continued to a date after September 30, 2020. *Id.* Arraignments, extradition hearings, initial appearances in felony cases, preliminary hearings, bail hearings, and "essential hearings" were ordered to proceed as scheduled. *Id.*

COVID-19 CHAOS



Throughout all of the various orders discussed above, the Judiciary as well the individual presiding judges have been implementing or attempting to implement virtual court proceedings for those matters that are not required to be or could not be postponed to a later date. Using the web-based video communication platforms Cisco Webex and ZOOM, courts have been experimenting with holding various conferences and non-evidentiary hearings remotely. The results of these experiments, although not devoid of some unique and occasionally humorous difficulties further discussed below, have been largely positive. The challenges, it seems, can generally be divided into two rough categories: the first having to do with the technology itself, the court's ability to accommodate its use, its general availability, and the ability of the courts and the various parties to operate it; and the second having to do with the legal environment and context within which the virtual court proceedings must operate.

III. Technological and Logistical Challenges

The idea of using video conference technology to conduct business, even court business, is not new or novel. Rule 43 of the Hawaii Rules of Penal Procedure ("HRPP") was amended in 2008 to allow for the courts to conduct certain proceedings by video conference. The software platforms currently being used by the Judiciary, Cisco Webex and ZOOM, have both been around for quite some time. However, it is only now, with the widespread effects of the COVID-19 pandemic, that the courts in the State of Hawai'i have been forced to make greater efforts to employ this technology to conduct virtual court proceedings. Not unexpectedly, along with the convenience and increased safety of virtual court proceedings, has come a number of technological and logistical challenges.

A. The Good

For "run of the mill" court appearances - e.g. status conferences, trial calls, and simple, non-evidentiary hearings - the ability to appear remotely during the COVID-19 pandemic has been a definite improvement. Attorneys and defendants working from home or from the office, can simply log in to the waiting room for whatever court they are appearing in and wait for their turn to be let into the "virtual courtroom". There's no need to worry about face masks, face shields, or keeping six feet between you and the nearest person when one is sitting alone in front of a computer or other device.

Gone are the days of having a gallery full of attorneys, defendants, and the public, waiting for their turn to have their matter heard by the court. The software platforms can not only be accessed from personal computers but also from tablets, cell phones, and other mobile devices. There is no longer any need for the parties to make sure they have enough time to walk, drive, or otherwise commute to the courthouse and get through security in time for their scheduled appearance. Attorneys can continue to perform other tasks while they wait without having to balance a computer on their lap, hoping that no one looks over their shoulders at any potentially confidential materials they may have on the screen.

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B. The Bad

This is not to say, of course, that the transition to virtual court proceedings has been all sunshine and daisies. Despite the relative convenience of the software platforms the Judiciary has chosen to employ, hardware, or the lack thereof, did pose a significant roadblock, especially early on. Most courtrooms had computers and internet access but not all of them were set up to conduct virtual court proceedings. Not all of the attorneys had the equipment or technical knowledge to appear in virtual court proceedings. Add to that the complication of some defendants being in custody where the Department of Public Safety was responsible for ensuring their appearance in court, some defendants being out on bail, bond, or release where they were responsible for ensuring their own appearance in court, and the general unfamiliarity of both the parties and the courts with this new method of conducting court business, and what we ended up with was a fair amount of uncertainty.

With respect specifically to defendants who were out on bail, bond, or release, many of these defendants were indigent, requiring the services of the Office of the Public Defender or other court appointed counsel. No one knows how many of these indigent defendants may have access to personal computers, tablets, cell phones, or other mobile devices. Even if they have the hardware, there's no guarantee they have consistent and reliable access to the internet. The Office of the Public Defender maintains that many indigent defendants simply cannot afford to connect to the internet to participate in virtual court proceedings. Such proceedings are time-consuming. Parties often spend substantial time waiting in the court's virtual waiting room prior to the scheduled proceeding.

Over time, the Judiciary and the parties picked up on what worked, what didn't work, and what changes needed to be made to how the courts scheduled matters, not only in the individual courtrooms but amongst the various courtrooms working together. In the beginning, many attorneys found themselves trying to juggle between hearings where their physical presence was still required and matters that were being heard virtually. There was also the problem of attorneys having multiple hearings or other matters scheduled at the same time in different courtrooms. Once an attorney logs into a court's virtual waiting room, there's usually no warning before the attorney is placed into a virtual courtroom and on the record. If an attorney's schedule required the attorney to be in two courtrooms at once, the attorney making an appearance in one virtual courtroom ran the risk of being yanked into a second courtroom while still on the record in the first. Staggered court schedules have somewhat alleviated this problem, but it still comes up, from time to time.

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It also appears that there are limits to what court business can be conducted virtually. Jury trials and grand jury proceedings are still suspended. All indications are that there are no serious discussions going on about trying to use the current software platforms to conduct these types of proceedings. Although HRPP Rule 43(e)(2)(b) allows for the court to conduct “a pre-trial evidentiary . . . proceeding,” with the consent of the defendant, it does not appear that any such proceedings are being conducted. Whether that is because the courts have been disinclined to hold such hearings or because defendants have not been consenting to do so is not known. Regardless, it appears that, at this time, jury trials, grand jury proceedings, and evidentiary hearings are not benefitting from the Judiciary’s decision to encourage the use of virtual court proceedings and it is uncertain whether they ever will.

C. The Ugly (Or Comical, Depending On How You Look At It)

No matter how good a system is, including systems such as Cisco Webex or ZOOM, such systems are always susceptible to glitches, bugs, and user error. Anecdotal evidence abounds regarding parties to a virtual court proceeding being unable to hear one another, or one party being too loud while another party is too soft. There are even stories of audio so distorted that a party sounds like Mickey Mouse, or as if they had taken a drag from a helium balloon. User error in this area is often the result of an individual forgetting to unmute themselves before speaking. Video and connection problems are also known to have occurred. To the extent that stories of video problems have been collected, many of them seem to be attributed to user error - cameras facing the wrong way or not being turned on. A few instances of glitches have been observed with the video feed from a party being upside down or the contrast being either too high or too low. Although connection problems can often be attributed to the various internet service providers being used, it is also possible the software systems themselves are to blame. There doesn’t seem to be any information to indicate which situation is more prevalent, but such connection problems have been observed to cause lag in the audio and video, thus disrupting the virtual court proceeding.

Another issue with the virtual court proceedings has to do with the slightly less formal environment that seems to have developed. Virtual court proceedings sometimes appear to be more chaotic than face-to-face proceedings, with parties often speaking over one another or, even worse, speaking over the presiding judge. Even defendants seem more apt to interject their voice into the proceedings, sometimes over repeated instructions from their attorney and the court to remain silent. Finally, and perhaps the most telling, is that it is not uncommon or unheard of to see an attorney dressed in less formal business attire rather than proper court attire. For good or for ill, the unwritten rules of etiquette and decorum that have historically governed the behavior of litigants in a physical courtroom seem to be somewhat relaxed in this new virtual environment. Most likely for ill.

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IV. Legal Context and Concerns

A. The Legal Context For Virtual Court Proceedings

As previously mentioned, on January 1, 2008, HRPP Rule 43 was amended to include a new subsection (e) which provides for the conduct of certain court proceedings by video conference and states:

(e) Presence may be by video conference.

(1) The court may conduct by video conference, without the consent of the defendant, an arraignment wherein it accepts a plea of not guilty;

(2) The court may conduct by video conference, with the oral or written consent of the defendant,

(A) an arraignment wherein it accepts, or takes under advisement, a plea of guilty or no contest,

(B) a pre-trial evidentiary or non-evidentiary proceeding, or

(C) a post-conviction evidentiary or non-evidentiary proceeding, other than a sentencing hearing.

(3) The court may conduct a sentencing hearing and impose sentence by video conference with the oral or written consent of both the prosecution and the defendant.

HRPP Rule 43. The rule thus creates three categories of court proceedings which may be conducted via video conference: (1) arraignments where a defendant pleads not guilty; (2) arraignments where a guilty or no contest plea is taken and pre-trial and post-conviction proceedings; and (3) sentencing hearings. The first category does not require the consent of any party. The second category requires the consent of the defendant. The third category requires the consent of both the defendant and the State. Significantly, proceedings other than arraignments where the court may take a guilty or no contest plea, preliminary hearings, and jury and non-jury trials, are not included amongst any of the three categories. There is likewise no authority to conduct grand jury proceedings by video conference.

That being said, even with respect to the categories of proceedings for which authority exists to conduct proceedings by video conference, there are still legal concerns which may hinder the Judiciary's ability to do so. The Confrontation Clause is likely to be raised by defendants to argue against witnesses being allowed to testify via video conference in any evidentiary hearings. The right to confer with counsel is somewhat hampered under both software platforms currently in use. Finally, it is the courts responsibility to ensure that throughout the implementation of the virtual courtroom proceedings, the qualified right of public access to the courts is protected.

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B. The Confrontation Clause

“There is no question that a defendant in a criminal case has a fundamental or constitutional right to be confronted with and to cross-examine witnesses against him.” *State v. Faafiti*, 54 Haw. 637, 639, 513 P.2d 697, 700 (1973). In *State v. Apilando*, 79 Haw. 128, 136, 900 P.2d 135, 143 (1995), as amended (Aug. 31, 1995), the Supreme Court of Hawai‘i (“Hawai‘i Supreme Court”) held that the right of confrontation “includes an accused’s right to a literal face-to-face confrontation with the witnesses who testify against him or her”. *Id.* at 136, 900 P.2d at 143. However, the *Apilando* court went on to state:

[W]e also recognize that exceptions do exist, such as that provided by the present version of HRE 616(b), discussed *infra*. We agree with Justice O’Connor, who stated in her concurring opinion in *Coy*:

I would permit use of a particular trial procedure that called for something other than face-to-face confrontation *if that procedure was necessary to further an important public policy*. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court’s opinion conflicts with this approach and this conclusion, I join it.

Apilando, *supra*, 79 Haw. at 136, 900 P.2d at 143 (1995) (emphasis added). Thus, while there is an argument that conducting an evidentiary hearing by video conference may run afoul of the Confrontation Clause, there is also an argument that allowing witnesses to testify by video may be necessary to further an important public policy such as limiting face-to-face proceedings during an unprecedented public health crisis such as the COVID-19 pandemic.

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Of course, once the COVID-19 pandemic is over, or once it is deemed safe to resume having face-to face courtroom proceedings, the necessity argument may be less compelling. However, there may also be room to argue that face-to-face confrontation can be substantially replicated by the video conferencing technology being implemented today. Juries are routinely instructed that they may consider:

the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence; the witness's candor or frankness, or lack thereof; the witness's interest, if any, in the result of this case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witness has made contradictory statements, whether in trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.

See Hawai'i Standard Criminal Jury Instructions No. 3.09. With respect to the visual or physical categories of what the jurors may consider, there is an argument that those aspects of a witness testimony can be more than adequately observed utilizing the software platforms of today; the difference between face-to-face and video conference testimony having been reduced to the difference between two and three dimensional viewing.

C. Right To Confer With Counsel

In *State v. De La Garza*, 129 Hawai'i 429, 302 P.3d 697 (2013), Hawai'i Supreme Court stated:

[T]he right to counsel includes the defendant's right to confer with counsel. *State v. Mondon*, 121 Hawai'i 339, 367, 219 P.3d 1126, 1154 (2009). In *Mondon*, the court held that "a criminal defendant has a constitutional right to confer with counsel at all stages of his case, including recesses taken during his testimony." *Id.* Accordingly, "preventing a defendant from conferring with his counsel during a recess of any length would . . . deny his right to assistance of counsel[.]" *Id.* *See also State v. Ulestad*, 127 Wn. App. 209, 111 P.3d 276, 278-79 (Wash. Ct. App. 2005) ("defendant's right to continuously consult with his counsel during trial" was violated, where counsel was in adjoining room with child witness and defendant was not provided with method of constant communication with counsel).

Although not impossible to overcome, defendants being remotely separated from their attorneys during virtual court proceedings does pose some challenges. In this context, anytime the attorney needs to consult with the defendant (or vice versa), the court would likely need to take a recess or at a minimum mute the defendant and the defense counsel while they switch to another form of communication to confer; most likely a telephone. This could also be problematic if either the defendant or the defense counsel is already using their cell phone to participate in the virtual court proceeding.

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D. Qualified Right Of Public Access

In *Oahu Publications Inc. v. Ahn*, 133 Haw. 482, 331 P.3d 460 (2014), as corrected (Aug. 5, 2014), the Hawai'i Supreme Court held that "article 1, section 4 of the Hawai'i Constitution provides the public with a qualified right of access to observe court proceedings in criminal trials." *Id.* 133 Haw. at 496, 331 P.3d at 474. Additionally, "the qualified right of public access . . . can be overcome 'only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.*

When the implementation of virtual court proceedings first began, the Judiciary announced that virtual court proceedings would be live streamed on YouTube. Precautions were going to be taken to ensure that viewers would not be able to directly record the proceedings. Nothing could be done, however, to prevent viewers from recording the live stream of the proceedings using a separate video recording device, be it a camera, camcorder, tablet, cell phone, or any other device. As of this writing, it is unclear to what extent the Judiciary has been able to meet its goal of live streaming all virtual court proceedings.

V. Conclusion

There is no question that the COVID-19 pandemic has forced the Judiciary to explore using video conferencing technologies to an extent never before contemplated. It is equally clear that while there are many benefits of conducting court business in this manner, there are also some significant deficiencies and legal challenges that prevent us from using this technology for all or even most court proceedings. Nevertheless, it seems highly likely that the implementation of virtual court proceedings is a bell that cannot be unrung. We will continue to have technological and legal challenges to using this system but in all likelihood, we will get through it. At some point we will reach an equilibrium between proceedings that still must be conducted face-to-face and proceedings that can routinely be handled virtually. When that day comes, it may very well be one of the few silver linings that we can identify as coming out of this seemingly never-ending pandemic we are currently experiencing.

Thank You For Reading!