

RE:           Rule 12.2 of the Rules of the Circuit Courts  
              Rule 2.1 of the Hawai'i Probate Rules  
              Rule 53.1 of the Rules of the Family Courts  
              Rule 12.2 of the Rules of the District Courts  
              Rule 14 of the Rules of the Small Claims Division of the District Courts

The Supreme Court of Hawai'i seeks public comment regarding proposals to add and amend Alternative Dispute Resolution rules to the various rules of court listed above. The proposals are attached hereto.

Comments about the proposed rules should be submitted in writing, **no later than Monday, August, 30, 2010**, to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website at [www.courts.state.hi.us](http://www.courts.state.hi.us).

Attachment

**Rules of the Circuit Courts, Rule 12.2. Alternative Dispute Resolution.** After first attempting to resolve the case in a settlement conference held pursuant to Rule 12.1 of the Rules of the Circuit Courts, t[T]he court, sua sponte, or upon motion by a party, may, in exercise of its discretion [or upon motion by a party, may] order the parties to participate in a[n] non-binding [a]Alternative [d]Dispute [r]Resolution process (ADR or ADR process) subject to terms and conditions imposed by the court[.], with costs to be borne by the parties. ADR may include, without limitation, mediation, non-binding arbitration, presentation of evidence and/or argument to a focus group or mock jury, or such other process as the court may determine may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter. These rules do not apply to the Court Annexed Arbitration Program.

- (a) **Referral to ADR.** Before referring a case to ADR, the court shall consider a number of factors, including but not limited to, the current status of the case, whether the parties would be better served by another settlement conference held by a court or by a referral to ADR, 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 referral to ADR would result in an unfair or unreasonable economic burden to any party.
- (b) **Selection of the neutral.** If the ADR process ordered by the court involves the selection of a neutral or neutrals, the parties shall first attempt to select a neutral(s) by mutual agreement. If the parties cannot agree on the selection of a neutral(s), then each party shall submit three names of prospective neutrals to the court by the date determined by the court. The court shall combine all the names submitted by the parties and allow each party to rank the party's preferences for all prospective neutrals. 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 use an objective tie-breaking process to decide which person shall serve as the neutral.
- (c) **Disclosure of conflicts by the neutral.** Before accepting the assignment to the ADR process, a person who is asked to serve as a neutral shall make a reasonable inquiry regarding the identity of the parties, and, if applicable, expected witnesses or other participants in the ADR process. The prospective neutral shall disclose any known facts or relationships that a reasonable individual would consider likely to affect his or her impartiality. If a neutral learns any fact or relationship after accepting an ADR process the neutral shall make a supplementary disclosure of such fact or relationship as soon as practicable.
- (d) **Physical presence of counsel and parties required.** Counsel and parties with settlement authority shall attend the ADR process unless otherwise excused by the neutral or the court.
- (e) **Communication by parties, neutral, and the court.** Unless the parties otherwise agree in writing, if a matter is assigned to an ADR process, neither the neutral, counsel or the parties shall communicate with the court regarding the matters discussed or presented in ADR, nor shall the court request such information. However, the neutral may disclose to the 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.

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- (f) **Costs of ADR.** All ADR costs shall be borne equally by the parties unless otherwise agreed to by the parties or provided by law.

**Hawaii Probate Rules, Rule 2.1. [~~Mediation Rules.~~] Alternative Dispute Resolution.** [The Probate Court may direct parties to participate in mediation pursuant to the Mediation Rules for Probate, Trust, Conservatorship, and Guardianship (Mediation Rules), attached to these rules as Exhibit A and effective October 1, 1996, and as subsequently amended.] The court, sua sponte, or upon motion by a party, may, in 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, with costs to be borne by the parties. ADR may include, without limitation, mediation, non-binding arbitration, presentation of evidence and/or argument to a focus group or mock jury, or such other process as the court may determine may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter.

- (a) **Referral to ADR.** Before referring a case to ADR, the court shall consider a number of 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 or by a referral to ADR, 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 referral to ADR would result in an unfair or unreasonable economic burden to any party.
- (b) **Selection of the neutral.** If the ADR process ordered by the court involves the selection of a neutral or neutrals, the parties shall first attempt to select a neutral(s) by mutual agreement. If the parties cannot agree on the selection of a neutral(s), then each party shall submit three names of prospective neutrals to the court by the date determined by the court. The court shall combine all the names submitted by the parties and allow each party to rank the party's preferences for all prospective neutrals. 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 use an objective tie-breaking process to decide which person shall serve as the neutral.
- (c) **Disclosure of conflicts by the neutral.** Before accepting the assignment to the ADR process, a person who is asked to serve as a neutral shall make a reasonable inquiry regarding the identity of the parties, and, if applicable, expected witnesses or other participants in the ADR process. The prospective neutral shall disclose any known facts or relationships that a reasonable individual would consider likely to affect his or her impartiality. If a neutral learns any fact or relationship after accepting an ADR process the neutral shall make a supplementary disclosure of such fact or relationship as soon as practicable.
- (d) **Physical presence of counsel and parties required.** Counsel and parties with settlement authority shall attend the ADR process unless otherwise excused by the neutral or the court.
- (e) **Communication by parties, neutral, and the court.** Unless the parties otherwise agree in writing, if a matter is assigned to an ADR process neither the neutral, counsel or the parties shall communicate with the court regarding the matters discussed or presented in ADR, nor shall the court request such information. However, the neutral may disclose to the 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.

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(f) **Costs of ADR.** All ADR costs shall be borne equally by the parties unless otherwise agreed to by the parties or provided by law.

(Note: This rule would be substituted for the Mediation Rules for Probate, Trust, Conservatorship, and Guardianship rules.)

**Rules of the Family Courts, Rule 53.1. Alternative Dispute Resolution.** The court, sua sponte, or upon motion by a party, may, in exercise of its discretion [or upon motion by a party, may] order the parties to participate in a[n] non-binding [a]Alternative [d]Dispute [r]Resolution process (ADR or ADR process) subject to terms and conditions imposed by the court[.], with costs to be borne by the parties. ADR may include, without limitation, mediation, non-binding arbitration, presentation of evidence and/or argument to a focus group or mock jury, or such other process as the court may determine may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter.

- (a) **Referral to ADR.** Before referring a case to ADR, the court shall consider a number of 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 or by a referral to ADR, 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 referral to ADR would result in an unfair or unreasonable economic burden to any party.
- (b) **Selection of the neutral.** If the ADR process ordered by the court involves the selection of a neutral or neutrals, the parties shall first attempt to select a neutral(s) by mutual agreement. If the parties cannot agree on the selection of a neutral(s), then each party shall submit three names of prospective neutrals to the court by the date determined by the court. The court shall combine all the names submitted by the parties and allow each party to rank the party's preferences for all prospective neutrals. 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 use an objective tie-breaking process to decide which person shall serve as the neutral. This provision does not apply to the Volunteer Settlement Master Process or the Oahu Child Welfare Mediation Program.
- (c) **Disclosure of conflicts by the neutral.** Before accepting the assignment to the ADR process, a person who is asked to serve as a neutral shall make a reasonable inquiry regarding the identity of the parties, and, if applicable, expected witnesses or other participants in the ADR process. The prospective neutral shall disclose any known facts or relationships that a reasonable individual would consider likely to affect his or her impartiality. If a neutral learns any fact or relationship after accepting an ADR process the neutral shall make a supplementary disclosure of such fact or relationship as soon as practicable.
- (d) **Physical presence of counsel and parties required.** Counsel and parties with settlement authority shall attend the ADR process unless otherwise excused by the neutral or the court.
- (e) **Communication by parties, neutral, and the court.** Unless the parties otherwise agree in writing, if a matter is assigned to an ADR process, neither the neutral, counsel or the parties shall communicate with the court regarding the matters discussed or presented in ADR, nor shall the court request such information. However, the neutral may disclose to the 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.
- (f) **Costs of ADR.** All ADR costs shall be borne equally by the parties unless otherwise agreed to by the parties or provided by law.

**Rules of the District Courts, Rule 12.2. Alternative Dispute Resolution.** The court, sua sponte, or upon motion by a party, may, in exercise of its discretion [or upon motion by a party, may] order the parties to participate in a[n] non-binding [a]Alternative [d]Dispute [r]Resolution process (ADR or ADR process) subject to terms and conditions imposed by the court[.], with costs to be borne by the parties. ADR may include, without limitation, mediation, non-binding arbitration, presentation of evidence and/or argument to a focus group or mock jury, or such other process as the court may determine may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter.

- (a) **Referral to ADR.** Before referring a case to ADR, the court shall consider a number of factors, including but not limited to, the current status of the case, whether the parties would be better served by another settlement conference held by a court or by a referral to ADR, 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 referral to ADR would result in an unfair or unreasonable economic burden to any party.
- (b) **Selection of the neutral.** If the ADR process ordered by the court involves the selection of a neutral or neutrals, the parties shall first attempt to select a neutral(s) by mutual agreement. If the parties cannot agree on the selection of a neutral(s), then each party shall submit three names of prospective neutrals to the court by the date determined by the court. The court shall combine all the names submitted by the parties and allow each party to rank the party's preferences for all prospective neutrals. 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 use an objective tie-breaking process to decide which person shall serve as the neutral. This provision does not apply to cases referred by the court to the Mediation Centers of Hawaii, Inc. or its subcontractors, or to court programs which provide services at the courthouse.
- (c) **Disclosure of conflicts by the neutral.** Before accepting the assignment to the ADR process, a person who is asked to serve as a neutral shall make a reasonable inquiry regarding the identity of the parties, and, if applicable, expected witnesses or other participants in the ADR process. The prospective neutral shall disclose any known facts or relationships that a reasonable individual would consider likely to affect his or her impartiality. If a neutral learns any fact or relationship after accepting an ADR process the neutral shall make a supplementary disclosure of such fact or relationship as soon as practicable.
- (d) **Physical presence of counsel and parties required.** Counsel and parties with settlement authority shall attend the ADR process unless otherwise excused by the neutral or the court.
- (e) **Communication by parties and neutral to the court.** Unless the parties otherwise agree in writing, if a matter is assigned to an ADR process, neither the neutral, counsel or the parties shall communicate with the court regarding the matters discussed or presented in ADR, nor shall the court request such information. However, the neutral may disclose to the 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.

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- (f) **Costs of ADR.** All ADR costs shall be borne equally by the parties unless otherwise agreed to by the parties or provided by law.

**Rules of the Small Claims Division of the District Courts, Rule 14.**

**Alternative Dispute Resolution.** The court may, in 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 may include mediation or such other process as the court may determine may be helpful in encouraging an economic and fair resolution of all or any part of the disputes presented in the matter.

- (a) **Disclosure of conflicts by the neutral.** Before accepting the assignment to the ADR process, a person who is asked to serve as a neutral shall make a reasonable inquiry regarding the identity of the parties, and, if applicable, expected witnesses or other participants in the ADR process. The prospective neutral shall disclose any known facts or relationships that a reasonable individual would consider likely to affect his or her impartiality. If a neutral learns any fact or relationship after accepting an ADR process the neutral shall make a supplementary disclosure of such fact or relationship as soon as practicable.
- (b) **Physical presence of counsel and parties required.** Counsel and parties with settlement authority shall attend the ADR process unless otherwise excused by the neutral or the court.
- (c) **Communication by parties, neutral, and the court.** Unless the parties otherwise agree in writing, if a matter is assigned to an ADR process, neither the neutral, counsel or the parties shall communicate with the court regarding the matters discussed or presented in ADR, nor shall the court request such information. However, the neutral may disclose to the 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
- (d) **Costs of ADR.** If there is a cost for the ADR, all ADR costs shall be borne equally by the parties unless otherwise agreed to by the parties or provided by law.