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SCRU-11-0000632

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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In the Matter of the  
RULES OF THE CIRCUIT COURTS OF THE STATE OF HAWAI‘I

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ORDER AMENDING RULE 12.2 OF THE RULES OF  
THE CIRCUIT COURTS OF THE STATE OF HAWAI‘I

(By: Recktenwald, C.J., Nakayama, Acoba, and McKenna, JJ., and  
Intermediate Court of Appeals Chief Judge Nakamura,  
assigned by reason of vacancy)

IT IS HEREBY ORDERED that Rule 12.2 of the Rules of the  
Circuit Courts of the State of Hawai‘i is amended, effective July  
1, 2012, as follows (deleted material is bracketed and stricken;  
new material is underscored):

**Rule 12.2. Alternative Dispute Resolution.**

~~[The court, in its discretion or upon motion by a party, may order the parties to participate in an alternative dispute resolution process subject to conditions imposed by the court.]~~

**(a) Authority to order.** 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. 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) do not apply to ADR

administered by the Hawaii Judiciary, such as the Court Annexed Arbitration Program.

**(b) Factors to consider; fees and expenses.**

(1) Before ordering a case to ADR, the court may 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 may 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 an appropriately reduced amount or rate.

**(c) 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 3 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. 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.

**(d) 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, the neutral shall disclose any other facts and information, including relationships, that a reasonable person would consider likely to affect the impartiality of the neutral, including the neutral's relationships with counsel. 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 likely to affect impartiality of the neutral.

**(e) 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.

**(f) 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 trial judge) about the substance of any position, offer, or other matter related to mediation, nor shall a 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 any 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.

DATED: Honolulu, Hawai'i, June 22, 2012.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Craig H. Nakamura

