Appendix 3

Dissent by Task Force Member, Roy Chang

I, Roy Chang, respectfully disagree with the Task Force's decision to exclude all CAAP tort cases from the case triage and tier program. In establishing this Task Force, our Chief Justice intended for us to come up with changes and recommendations to our current civil justice system which would help to "reduce the costs of and delays in civil litigation, and to streamline the litigation process." He also directed that the "recommendations should seek to achieve demonstrable improvements with respect to the time and costs expended in resolving civil cases." Tort cases constitute 25% of all civil filings, and amount to 40% of all non-foreclosure civil cases. The proposed exclusion of CAAP cases from this program would be contrary to the intent and purpose of the Chief Justice's initiative, and would leave a large number of cases out of the proposed streamlining process.

The Conference of Chief Justices Civil Justice Improvements Committee ("CJI Committee") made several key recommendations ("CJI Recommendations") which are cited, in part, below:

> Recommendation 1.1 requires the court to manage civil cases from "time of filing to disposition" by setting requirements for reaching just and prompt case resolution. "These requirements should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information."
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> Recommendation 4.2 requires the court to "establish deadlines to complete key case stages, including a firm trial date."
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> Recommendation 4.3 states: "To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter."

As a plaintiff attorney who has participated in the CAAP program since its inception, I have seen first-hand the problems with the program. The CAAP statistics are deceiving. While they show that CAAP cases are being resolved with limited number of appeals, they also show that a significant majority of the cases usually take more than a year to resolve. The primary reason for this delay is because the Hawaii Arbitration Rules ("HAR") leave discovery and case management solely to the arbitrators and parties themselves. As a result, there is no uniformity in discovery, very little deadlines, and no management from the arbitrator (unless a dispute arises). CAAP cases are put on the back burners, and arbitration dates are routinely moved. The reality is that cases without deadlines and a firm trial date take longer to resolve.

The changes being recommended by this Task force, in many ways, mirror the federal rules, and for good reason. The federal system works and is in keeping with the CJI Recommendations. By comparison, when tort cases (which would have been in CAAP had the case been filed in state court) are in federal court, they proceed more efficiently and resolve sooner because of the early involvement of a judge, a scheduling conference within 2-3 months of filing, required initial disclosures, discovery deadlines, and the setting of a firm trial date. Under the CAAP program, none of this exists, and no trial date is set until 8 months down the road, at the earliest. In my experience and as pointed out by CJI Recommendations 1.1 and 4.2, the absence of a firm trial date removes the incentive and urgency to resolve cases.

CAAP cases alone make up 20 % of the civil cases filed in the circuit courts. That's more than any other type of civil case that is being kept within the proposed triage and tier program. The one group of cases which would benefit the most from this new program is being excluded because of the concern that it would unduly burden the state judges. I disagree.

I may be mistaken, but I believe our Chief Justice's mandate was to come up with a system that would expedite the resolution of **all** civil cases at a reduced and proportionate cost. If in doing so it would require hiring more judges to serve in a similar role as a federal magistrate, then that should be the recommendation of this Task Force, rather than taking it upon ourselves to remove an entire class of cases from the program.

Removing CAAP cases from this program will not reduce the number of times judges will have to meet with the parties in CAAP cases. Under the current CAAP program, judges are required by Circuit Court Rule 12 to hold a trial setting conference 8-10 months after filing. The proposed new rules would still require the judge to hold a pretrial conference 8 months after the filing of a CAAP case which, in the great majority of these cases, would occur before the CAAP arbitration. If CAAP cases were to be included in this new program, the judge would be holding that same **one** conference, but months earlier, which would actually be a good thing.

If CAAP cases are excluded from this program and the circuit court rules and civil rules of procedure are changed as recommended by this Task Force, then the HAR rules would also have to be changed as several of the HAR rules rely upon and specifically reference the existing rules.

I had urged the Task Force to create a third tier, an arbitration tier, where CAAP cases would go through the triage process just like any other case, and thereafter be assigned to the appointed arbitrator for oversight, management, and if necessary, arbitration. The benefits would be many. All CAAP cases would have already gone through a scheduling conference where they would have been given a firm trial date, an initial disclosure date, a proportionate discovery plan, and other deadlines, all within 3 months of filing. Thereafter, the assigned arbitrator would, in effect, be assuming the role of a federal magistrate (at no cost to the state) to monitor the progress of the case, resolve discovery disputes, and ultimately bring the case to resolution, either by way of a settlement conference, mediation, or arbitration. This would create uniformity in all CAAP cases, provide direction to the arbitrator (especially the inexperienced ones), and speed up the ultimate resolution of the case.

In my experience, federal court tort cases resolve much faster because of the Rule 16 requirements, the same rule requirements which are being proposed by this Task Force, but not for CAAP cases. Early court involvement, early discovery, and early setting of a firm trial date will more likely result in CAAP cases resolving earlier and at a reduced cost, a result which is directly in keeping with the CJI Recommendations and the Task Force's original purpose, as mandated by our Chief Justice. Excluding CAAP cases would run counter to this purpose and would have the exact opposite effect.