

I. EXECUTIVE SUMMARY

It is the mission of the Hawai'i Judiciary, as an independent branch of government, "to administer justice in an impartial, efficient and accessible manner in accordance with the law." In furtherance of this mission, the Judiciary has continually sought ways to improve the administration of justice and to meet the needs of the public. On June 18, 2018, Chief Justice Mark E. Recktenwald established the Task Force on Civil Justice Improvements (Task Force) as part of the Judiciary's ongoing efforts to enhance, update, and improve our civil justice system.^{1/}

A. *National Reform Studies*

The court system has long been recognized as the best and most reliable forum for resolving civil disputes in a fair, impartial, and transparent manner. National surveys, however, reflect serious concerns that resolving disputes through the court system costs too much and takes too long. Unconstrained and disproportionate discovery is often identified as a major cause of this problem. Excessive costs and delay, in turn, deny access to justice, not only by discouraging people from bringing disputes to court, but by making it too expensive to resolve disputes brought to court on the merits.

^{1/} The Chief Justice's Order establishing the Task Force and his Order of extension are attached as Appendix 1.

In 2007, the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) embarked on a two-year joint project to evaluate the condition of the civil justice system in the United States. Their report, published in 2009,^{2/} concluded that: (1) the civil justice system, while not broken, is in serious need of repair; (2) in many jurisdictions, cases are not filed, or are not resolved on the merits, due to litigation costs and delay; (3) the existing rules structure does not promote efficiency in discovery or in identifying contested issues; and (4) early and active case management by judges is a key factor in containing costs. See 2009 ACTL/IAALS Report at 2.

At the state level, the Conference of Chief Justices ("CCJ") formed the Civil Justice Improvements Committee (Committee) to develop guidelines and best practices for civil justice reform to meet the needs of litigants in the 21st century. In formulating its recommendations, the CCJ Committee studied the current landscape of civil litigation by analyzing approximately one million cases that were resolved in 2012-2013 in state courts across the nation. The CCJ Committee's report, published in

^{2/} The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System, Final Report (March 2009), referred to herein as the "2009 ACTL/IAALS Report."

2016,^{3/} confirmed the criticism that the civil justice system takes too long and costs too much. See 2016 CCJ Committee Report at 10. It observed that the one-size-fits-all approach is not working and advocated "right-sizing" the litigation process to match the needs of a case. See id. at 12, 18. The CCJ Committee issued a "Call to Action" to state courts for civil justice reform and provided cogent recommendations for reducing costs and delay.

B. The Purpose and Work of the Task Force

In establishing the Task Force, Chief Justice Recktenwald directed that we consider the recommendations of the national studies and the reform efforts undertaken in other jurisdictions. The purpose of the Task Force is "to develop recommendations, including rule amendments, on ways to reduce the costs of and delays in civil litigation, and to streamline the litigation process, in Hawaii's circuit courts."

The Task Force is comprised of eight current and retired judges and nineteen lawyers with a broad range of civil litigation experience and expertise. The Task Force includes circuit judges from each circuit; lawyers who reside and practice in each circuit; lawyers who represent plaintiffs, defendants, individuals, businesses, and the government; lawyers with

^{3/} Conference of Chief Justices, Civil Justice Improvements Committee, CALL TO ACTION: Achieving Civil Justice For All (2016), referred to herein as the "2016 CCJ Committee Report."

experience working at private law firms of all sizes, at non-profit, public interest law firms, and for the government; a law professor; and three former presidents of the Hawai'i State Bar Association (HSBA).

Beginning in July 2018, the Task Force met at least once a month for the next year, usually in three-hour sessions. In all, the Task Force met fifteen times. The Task Force was also organized into four substantive committees, who met on their own to formulate proposals for the Task Force's consideration. The four committees are: (1) Case Triage/Tiering and Other Case Differentiation Measures; (2) Case Management; (3) Discovery; and (4) Expedited Trial and Other Innovations.^{4/}

In developing our recommendations, the Task Force drew upon the collective experience of our members, considered the 2009 ACTL/IAALS and 2016 CCJ Committee Reports, examined the Federal Rules of Civil Procedure, and studied reform efforts and best practices to reduce costs and delay from other jurisdictions. We also sought input and recommendations from members of the Hawai'i bar. Among other things, we participated in panel discussions at the October 2018 Civil Law Forum, and we circulated an extensive survey to all HSBA members to obtain their views and suggestions.

^{4/} A roster of the Task Force showing the members of each committee is attached as Appendix 2.

C. The Task Force's Recommendations

After much work, consultation, debate, and deliberation, the Task Force is pleased to offer our recommendations on ways to reduce costs and delay, and to streamline the litigation process, in Hawaii's circuit courts. In recommending ways to achieve these goals, our proposals focus on right-sizing discovery, procedures, and case management so that they are proportional to the needs of a case; providing more certainty in the litigation process through early judicial involvement; and simplifying discovery. Our proposals embrace the following principles:

1. The one-size-fits-all approach creates inefficiencies. To reduce costs and delay, cases should be right-sized so that discovery, procedures, and case management are aligned with the needs of the case.

2. Discovery is a means to achieve the just resolution of the case; it is not an end in itself. Discovery should be right-sized with proportionality as its guiding principle. As another means of right-sizing, cases should be separated into tiers or pathways based on their characteristics, with appropriate standards applied to each tier.

3. Litigation proceeds more efficiently, with less costs and delay, if clear deadlines and "ground rules" are established early in the case and discovery is simplified and effectively managed. Judges should take an early and active role in setting deadlines and managing discovery. Rules and procedures should

also be implemented to simplify discovery and streamline the resolution of discovery disputes.

Many of our proposals are based on the Federal Rules of Civil Procedure (FRCP) and the Local Rules of Practice (LR) for the United States District Court for the District of Hawai'i (Hawai'i federal court). In the experience of Task Force members, the rules and procedures utilized by the Hawai'i federal court have worked well to reduce costs and delay. In addition, respondents to the Task Force survey strongly endorse the federal rules and concepts we use as models. Incorporating the language of the federal rules has many built-in advantages: the federal rules are already familiar to many Hawai'i practitioners; they are supported by research and have been used in practice; and they provide a body of federal precedents that, while not binding on a Hawai'i court, offer guidance on how the rules have been interpreted and applied.

1. With respect to right-sizing, we propose to infuse the principle of proportionality into the scope of discovery by adopting FRCP Rule 26(b)(1). Under this proposal, discovery must not only be relevant to a party's claim or defense, but must be "proportional to the needs of the case," considering the proportionality factors set forth in the federal rule.^{5/}

^{5/} These factors are: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FRCP Rule 26(b)(1).

2. To further achieve right-sizing, we propose to establish a tiering system to align discovery and the trial date with the needs of the case. Under our proposal, the trial judge, through an early scheduling conference, will assign cases based on their characteristics to different pathways. After considering a variety of factors, the judge will assign a case either to Tier 1 for relatively straightforward cases that do not require significant discovery and can be expedited to resolution, or to Tier 2 for more complicated cases. Tier 1 cases will be subject to greater discovery limitations and receive an earlier trial date than Tier 2 cases.

3. Foreclosure actions represent the largest category of cases classified as civil filed in circuit court, approximately 40 percent, and they take more time than other types of civil cases to resolve. Foreclosure actions would greatly benefit from specialized rules and procedures because they share distinctive characteristics that differentiate them from other cases. We recommend that a foreclosure task force be formed, to include judges and lawyers who specialize in foreclosures, to develop recommendations to reduce costs and delay that are tailored to foreclosure actions.

4. To secure the early and active involvement by judges in case management, we propose to adopt early scheduling

conference/order requirements patterned after FRCP Rule 16(b) and LR Rules 16.2 and 16.3. We note that under the current circuit court rules, ten months or more may elapse before a judge becomes actively involved in setting deadlines and managing a case. In the meantime, the case may languish due to inaction or become bogged down by unresolved discovery disputes.

Under our proposals, the trial judge will be required to hold a scheduling conference and issue a scheduling order in the early stages of the case. Prior to the scheduling conference, the parties must confer and submit their positions on discovery planning and other case management issues. Through the early scheduling conference and scheduling order, the judge will be able to establish a roadmap for resolving the case by setting the trial date and other significant deadlines, addressing discovery issues, and establishing prerequisites for trial.

5. We propose to simplify discovery, improve discovery planning and management, and provide a streamlined procedure for resolving discovery disputes by: (a) imposing mandatory initial disclosure obligations similar to FRCP Rule 26(a)(1); (b) requiring parties to confer on discovery and discovery planning similar to FRCP Rule 26(f); (c) establishing mandatory expert disclosure obligations and expert discovery requirements similar to FRCP Rule 26(a)(2) and (b)(4); and (d) offering parties the

option of using a streamlined letter-briefing procedure, instead of a formal motion, to resolve discovery disputes similar to LR Rule 37.1.

6. While the federal rules have worked well to improve efficiency in Hawai'i federal court, we recognize that state circuit court judges carry a heavier caseload than their federal counterparts. To address caseload concerns and to facilitate the implementation of our proposals, we propose to exempt, from a number of our proposals, a group of actions that in our view would derive the least benefit from the proposals. The exempted actions are: foreclosures, cases in the Court Annexed Arbitration Program (CAAP), agency appeals, consumer debt collection actions, quiet title actions, and mechanic's and materialman's lien cases.

Exempting these actions from the early scheduling conference/order requirements will serve to avoid placing an undue burden on state judges by significantly reducing the number of cases subject to those requirements. At the same time, the exempted cases would benefit the least from the early scheduling conference procedures for a variety of reasons, including that they typically involve limited discovery, are resolved by default or summary judgment, or are already governed by specialized procedures, such as CAAP cases and agency appeals. Based on similar considerations regarding diminished benefit, and to apply the exemptions consistently, we exempt the same group of actions

from our proposals for initial disclosure and early conferral on discovery plans, expert disclosure and expert discovery requirements, and tier assignments.^{6/}

D. Appreciation

The Task Force would like to acknowledge and express our heartfelt gratitude to the members of the Hawai'i Judiciary staff who provided invaluable assistance and support to the Task Force. The names of these conscientious and hard-working women and men are set forth in Appendix 4.

^{6/} Task Force member Roy K.S. Chang disagrees with the Task Force's decision to exempt CAAP cases from a number of our proposals. Mr. Chang's dissent to the exemption of CAAP cases is attached as Appendix 3.