FINAL REPORT OF THE TASK FORCE ON CIVIL JUSTICE IMPROVEMENTS

Submitted to the Chief Justice of the Supreme Court of the State of Hawai‘i on July 24, 2019

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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.

II. BACKGROUND

National studies reveal that civil litigation for many has become too costly and prolonged, compromising its essential function of providing an effective means of resolving disputes. The CCJ Committee, based on comprehensive case-analysis data, concluded that the costs of litigating cases in court commonly exceed their economic value. See 2016 CCJ Committee Report at 9. Litigation costs, especially those associated with discovery, are disproportionately high, and these costs, more than the merits of a dispute, are driving how a case is resolved. As a result of excessive costs and delay, more people cannot afford to hire a lawyer and must represent themselves; more meritorious cases cannot be bought to court, or if brought, cannot be resolved on the merits; and more people are turning to private alternative dispute resolution services, outside of court, to resolve their disputes.

The implications of these trends are profound. Reducing costs and delay are critical to ensuring access to justice. The CCJ Committee warned that without necessary reforms, the public may lose its trust and confidence in the courts as a fair and effective forum for resolving disputes. See id. at 10-11.

III. WORK OF THE TASK FORCE

Chief Justice Mark Recktenwald established the Task Force to provide recommendations, including rule amendments, on ways to

improve the civil justice system by reducing costs and delay and streamlining the litigation process. Because of the differences in the types of cases typically brought in circuit court and district court, and the difficulty of proposing specific rule amendments applicable to both courts, the Chief Justice directed the Task Force to focus on developing recommendations for circuit court. In developing our recommendations, we concentrated on actions classified as "civil" under the Rules of the Circuit Courts of the State of Hawai‘i (RCCH).[7/] Accordingly, our recommendations do not encompass cases filed in family court, probate court, land court, or tax appeal court, to which rules separate from, or in addition to, the Hawai‘i Rules of Civil Procedure (HRCP) and the RCCH apply, and our recommendations do not encompass cases classified as special proceedings. By focusing our attention on circuit court cases classified as "civil," the Task Force was able to go beyond recommending general principles for improvement, and to offer specific rule amendments to show how principles for improvement can be implemented.

[7/] Under the RCCH, the following types of cases are classified as "civil" and given a "Civil No." designation by the clerk upon filing: agency appeal, agreement of sale foreclosure, assault and battery, condemnation, construction defects, contract, declaratory judgment, environmental court, foreclosure, legal malpractice, medical malpractice, motor vehicle tort, product liability, other civil action, other non-vehicle tort. RCCH Rule 1, 2(a), 3(c)(5).

A. Resources Consulted

The Task Force considered a variety of resource materials in developing our recommendations. These include: the 2009 ACTL/IAALS Report and the 2015 update to that report;[8/] the 2016 CCJ Committee Report; reports and proposals from task forces and committees on civil justice reform formed in other jurisdictions; reform proposals implemented by other jurisdictions; the Federal Rules of Civil Procedure and Advisory Committee Notes; the Local Rules of the Hawai‘i federal court; and reports of Civil Bench Bar Conferences and Civil Law Forums sponsored by the HSBA Judicial Administration Committee as well as the Chief Justice's response to the reports.

During Task Force meetings, we heard presentations by Chief Justice Mark Recktenwald on the circumstances leading to the formation of the Task Force; Chief Judge J. Michael Seabright and Magistrate Judges Barry M. Kurren (ret.) and Kevin S.C. Chang (ret.) of the United States District Court for the District of Hawai‘i on federal court rules and practices;[9/] Associate Judge Keith K. Hiraoka, a Task Force member, on civil justice reforms in other state jurisdictions; Brandon M. Kimura, Deputy

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[8/] American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System, Reforming Our Civil Justice System: Report on Progress and Promise (April 2015), referred to as "2015 ACTL/IAALS Update Report."

[9/] Magistrate Judge Chang retired a short time after his presentation to the Task Force. Although retired, Magistrate Judges Kurren and Chang are on recall status and continue to hear cases in Hawai‘i federal court.

Administrative Director of the Courts, on civil case filings and terminations in the circuit courts; and Frances A. Yamada, CAAP Administrator for the First Circuit, Bert S. Sakuda, Esq., and Lyle Y. Harada, Esq., on the CAAP.

In considering civil justice reforms in other jurisdictions, the Task Force asked: Are these reforms necessary for Hawai‘i? Will they work in Hawai‘i circuit courts? To answer these questions, we sought input and feedback from the Hawai‘i bar to inform and supplement the collective knowledge and experience of Task Force members. Through the gracious cooperation of the HSBA Committee on Judicial Administration, the 2018 Civil Law Forum, held on October 16, 2018, was largely devoted to discussing issues facing the Task Force. The Forum came at a favorable time for the Task Force because we were still in the early stages of gathering information and ideas and formulating our recommendations. During the Forum, the Task Force's four committees gave presentations on the preliminary proposals on which they were working, followed by open and lively discussion by Forum participants on these proposals and related issues. The Forum provided the Task Force with valuable insights, ideas, and suggestions.

B. Task Force Survey

The Task Force also prepared and circulated a survey to obtain input and recommendations from HSBA members with civil

litigation experience in the circuit courts.[10/] The survey was distributed in paper form at the 2018 Civil Law Forum, the 2018 Fall Judicial Conference, and a meeting of per-diem judges. Through the generous assistance of the HSBA, the survey was also emailed (to be completed online) to all members of the HSBA.[11/] The survey was extensive, with over 80 questions, including subparts, and contained several open-ended questions asking respondents to provide suggestions and recommendations on how to improve the civil justice system in our circuit courts.

The survey results show a total of 330 lawyers and judges as answering "yes" to the survey's first question which asked whether the respondent has past or present civil litigation experience in the Hawai‘i circuit courts.[12/] Of those who

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[10/] In developing the survey, the Task Force received assistance from Brittany K.T. Kauffman, J.D., Senior Director, IAALS, and Shelley C. Spacek Miller, J.D., Court Research Associate, National Center for State Courts, who both reviewed a draft survey and provided feedback.

[11/] A copy of the survey distributed in paper form and the survey that was emailed for online completion are attached as Appendix 5a and 5b, respectively. A compilation of the survey results is attached as Appendix 6.

[12/] Among the 330 respondents counted in the survey results as answering "yes" to the first question, there is one respondent to the written survey who did not answer the first question, but whose responses to the other questions clearly indicated that the respondent has past or present civil litigation experience in circuit court. Among the 78 respondents counted in the survey results as answering "no" to the first question, there is one respondent who submitted a written survey that was completely blank. The respondents who answered "no" to the first question were not permitted to proceed further in the online version of the survey and were informed in the paper form of the survey that they "may stop here" after the first question. There was no response beyond the first question received from any of the respondents who answered "no" to the first question. Therefore, the survey results after the first question are based only on responses from respondents who affirmed, and the one respondent who indicated, that they are an attorney or a judge with past or present civil litigation experience in the circuit courts of Hawai‘i.

described their current position, 62 percent are lawyers in law firms or solo practitioners, 15 percent are judges, and 12 percent are government lawyers.[13/] Approximately 55 percent of respondents have 20 years or more of civil litigation experience, and 75 percent have 10 years or more. The respondents are almost evenly split between those who predominantly or more frequently represent plaintiffs and those who predominantly or more frequently represent defendants. The respondents identified the most common areas of their practice as contract (56%), other non-vehicle tort (40%), motor vehicle tort (34%), and foreclosure (23%).

Consistent with national surveys, the Task Force survey reveals that the Hawai‘i bar has serious concerns regarding the costs of and delays in civil litigation in our circuit courts. Over 80 percent of respondents agree or strongly agree that the civil justice system in circuit court is too expensive and takes too long. Over 75 percent agree or strongly agree that fundamental changes need to be made to reduce costs and delay and to streamline the litigation process in circuit court.

[13/] Not all of the 330 survey respondents who affirmed or indicated they have civil litigation experience in the Hawai‘i circuit courts answered every survey question. For example, 287 respondents provided an answer to the multiple-choice question asking for a description of their current position, and 253 respondents provided an answer to the question asking how often are litigation costs proportional to the value of the case. In discussing survey questions, we use "respondents" to refer to the people who answered the particular question, and the percentages we cite are based on the respondents for that question. The survey results attached as Appendix 6 include the number of respondents for each question and percentages that are based on their answers.

Accordingly, the Task Force survey reflects a broad consensus that significant changes to improve the efficiency of the civil justice system in circuit court are necessary.

The survey indicates that litigation costs have significant access-to-justice implications. Among respondents who describe their current position as "[l]aw firm lawyer or solo practitioner," 35 percent said that their firm would refuse to file or defend a case based on the amount in controversy. The median threshold amount for accepting a case cited by this 35 percent group is $25,000. Most respondents (57%) believe that litigation costs are almost never or only occasionally proportional to the value of the case in circuit court. Sixty percent of respondents agree or strongly agree that cases in circuit court are resolved based on considerations unrelated to the merits of the parties' claims or defenses. Sixty-four percent of respondents reported that almost always, often, or 50 percent of the time the costs of litigation force cases to settle that should not settle based on the merits. Forty-two percent of respondents reported that almost always, often, or 50 percent of the time cases are forced to settle, that should not settle based on the merits, because of the length of time it takes to get a case to trial.

With respect to right-sizing, 74 percent of respondents agree or strongly agree that Hawai‘i should incorporate

considerations of proportionality in defining the scope of discovery (which the FRCP did through 2015 amendments to FRCP Rule 26(b)(1)). Seventy-nine percent of respondents agree or strongly agree that efficiency and cost savings would be enhanced by separating cases into different pathways based on criteria such as amount in controversy and complexity, and then applying appropriate levels of discovery and judicial resources to each pathway.

The survey demonstrates strong support for early judicial involvement in scheduling and case management similar to the procedures used in Hawai‘i federal court. The overwhelming majority of respondents agree or strongly agree that: (1) Hawai‘i should adopt procedures to facilitate early judicial involvement in a case (83%) and the early establishment of the trial date and pretrial deadlines (83%); (2) Hawai‘i should adopt procedures similar to the scheduling conference provisions of FRCP Rule 16 (79%); (3) judges should take a more active role in imposing deadlines and managing the progress of a case (79%); and (4) early judicial involvement helps to narrow the issues (82%) and narrow discovery to the information necessary for case resolution (75%).

The survey also demonstrates strong support for the adoption of federal discovery rules and reforms beyond incorporating considerations of proportionality. The overwhelming majority of

respondents agree or strongly agree that: (1) Hawai‘i should adopt mandatory initial disclosure requirements, such as the ones imposed by the federal rules (80%); (2) Hawai‘i should adopt a mandatory requirement that parties confer on discovery and a discovery plan, such as the one imposed by the federal rules (81%); (3) Hawai‘i should adopt rules similar to the federal rules (a) imposing specific deadlines for disclosure of expert witnesses and expert reports (82%), (b) regarding what an expert's report must contain (79%), and (c) regarding the extent to which communications between counsel and an expert are discoverable (76%); and (4) judges should be more willing and available to resolve discovery disputes on an informal (non-motion) and expedited basis (90%).[14/]

Included in the survey were several open-ended questions asking respondents for their suggestions, recommendations, and comments on how to reduce costs and delay, streamline the litigation process, and improve the civil justice system in the circuit courts. We received over 500 responses to these

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[14/] We note that respondents were evenly split when asked the general question of whether they prefer to litigate in Hawai‘i circuit courts or in Hawai‘i federal court. However, those who preferred litigating in Hawai‘i circuit courts generally gave reasons unrelated to the efficiency of the litigation process, such as the inconvenience of travel from the neighbor islands and greater familiarity with state rules, whereas those who preferred litigating in Hawai‘i federal court frequently cited efficiency, including faster resolution of cases and better pretrial, discovery, and case management rules and procedures. When asked specifically about whether Hawai‘i should adopt rules similar to the federal rules on scheduling conferences, initial disclosure, conferral on discovery planning, and expert disclosure and discovery, the vast majority of respondents agreed or strongly agreed that Hawai‘i should adopt such rules.

questions, which are shown in the survey results attached as Appendix 6.

C. Developing Our Recommendations

The Task Force used the following process in developing our recommendations. The Task Force was organized into four substantive committees: (1) Case Triage/Tiering and Other Case Differentiation Measures; (2) Case Management; (3) Discovery; and (4) Expedited Trial and Other Innovations. Each committee prepared proposals that it presented to the Task Force for consideration at Task Force meetings. The Task Force discussed and debated the committee's proposals, voted in favor of certain proposals, suggested revisions to others, and voted against certain proposals. Often the Task Force would agree with the concept or principle underlying a proposal, but ask that the proposal be revised to address concerns or to incorporate suggestions of the Task Force. Based on the Task Force's request, the proposal would be revised, and the revised proposal presented to the Task Force for further consideration, voting, and revision (if necessary). Through this process, the Task Force reached consensus on the recommendations presented in this report.[15/]

[15/] The voting was not unanimous on all of the proposals approved by the Task Force. Certain objections or concerns regarding several of the approved proposals are noted in this report.

IV. TASK FORCE RECOMMENDATIONS

Central to the Task Force's recommendations is our belief that litigation costs and delay in Hawai‘i circuit courts can be reduced by: (1) right-sizing discovery, procedures, and case management to fit the needs of a case; (2) providing more certainty in the litigation process; and (3) simplifying discovery. Our proposals encompass all these means of reducing costs and delay.

Right-sizing discovery, procedures, and case management is critical to reducing costs and delay. The current rules in Hawai‘i are generally one-size-fits-all, in that they typically permit the same level of discovery and provide the same procedures and case management for every case. For many cases, the one-size-fits-all approach leads to inefficiencies. Parties engage in disproportionate discovery; cases receive too much or too little process and are not managed to meet their particular needs.

Requiring that discovery be proportional to the needs of the case is an essential element of right-sizing. Proportionality requires the parties to consider, among other things, the amount in controversy, the parties' resources, and whether the costs of discovery will likely outweigh its benefits before seeking discovery. Another means of right-sizing is to use a tiering

system to separate cases into different pathways based on their characteristics and to apply discovery and trial-setting limitations appropriate to that tier. Foreclosure actions constitute a significant portion of the circuit court's civil caseload. The development of specialized rules and procedures to address the particular issues presented by foreclosure litigation would serve to reduce costs and expedite the resolution of foreclosure cases.

The court can establish greater certainty in the litigation process and make it more efficient by holding a scheduling conference and issuing a scheduling order early in the case. Through an early scheduling conference and scheduling order, the court can establish clear deadlines and requirements that the parties must satisfy, and it can address disputes before they escalate. An early scheduling order establishes a roadmap for resolving the litigation, motivates the parties to prioritize their activities, and sets standards that prevent disputes over collateral issues.

Discovery is a major contributor to the costs and delay in litigation. The burdens of discovery can be reduced by simplifying the discovery process -- requiring the early exchange of basic information without the need for a discovery request; compelling parties to confer on discovery planning;

requiring expert disclosures and clarifying expert discovery; and streamlining resolution of discovery disputes.

The FRCP and the LR have worked well to increase efficiency in Hawai‘i federal court. The federal rules and concepts we have used as models for our proposals are strongly endorsed by respondents to our survey and provide the benefits that flow from familiarity and uniformity. We recognize, however, that state circuit court judges carry a larger caseload than Hawai‘i federal court judges and that the benefits derived from our proposals may be less in certain types of cases than others. To alleviate caseload concerns and facilitate the implementation of our proposals, we exempt a group of actions that would benefit the least from a number of our proposals.

What follows is a description of our specific proposals. As we have come to realize, amending rules is a difficult process. Where we believe it may be helpful, we have included our reasons for proposing the rule amendments to provide guidance, beyond the words themselves, of our intent. Should the Hawai‘i Supreme Court determine that our proposals for rule amendments are worthy of circulation for public comment, we suggest that our report be included to provide relevant background, explanation, and commentary.

A clean version of the proposed amendments to the HRCP and the RCCH is attached as Appendix 7. A red-line version, showing

how our proposals will change the existing HRCP and RCCH, is attached as Appendix 8.[16/]

A. Right-sizing to secure proportionality in discovery, procedures, and case management

1. Proposed Amendments to HRCP Rule 26(b)(1)

"Discovery is not the purpose of litigation." 2009 ACTL/IAALS Report at 7. Discovery is not an end in itself; it is a means of obtaining evidence relevant to the parties' claims and defenses to facilitate the fair resolution of a case. National studies cite unchecked discovery as a major cause of excessive costs and emphasize the need for discovery reform. Proportionality is an essential principle for right-sizing discovery and preventing excessive discovery costs. See 2015 ACTL/IAALS Update Report at 17 ("Proportionality should be the most important principle applied to all discovery."); 2016 CCJ Committee Report at 24. The Task Force survey reflects strong support for incorporating considerations of proportionality in defining the scope of discovery.

The Task Force proposes to amend HRCP Rule 26(b)(1) to track the language of FRCP Rule 26(b)(1). The proposed amendment infuses the principle of proportionality into the definition of

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[16/] Our proposed rule amendments are intended to apply only to cases classified as "civil" under the RCCH. See RCCH Rules 1, 2(a), 3(c)(5). We have not attempted to assess the impact of our proposed rule amendments on cases outside the "civil" classification, or on cases not completely governed by the HRCP and the RCCH, such as cases subject to rules separate from, or in addition to, the HRCP and the RCCH.

the scope of discovery by requiring that discovery be "proportional to the needs of the case." Therefore, proportionality becomes a touchstone for discovery that is applicable in all cases. As in the federal rule, the revised HRCP Rule 26(b)(1) adopts the following factors to consider in determining whether discovery is proportional: "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). The revised rule thus not only identifies the proportionality principle, but provides factors to consider in applying it.

We note that proportionality considerations are not entirely new to the HRCP; they are reflected in the existing HRCP Rule 26. The current HRCP Rule 26(b)(2)(iii) directs the court to limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit" based on almost the same proportionality factors set forth in the federal rule. The current HRCP Rule 26(g) also authorizes the court to impose sanctions for discovery abuse based on several of the proportionality factors. However, expressly incorporating proportionality into the scope of discovery is vital to developing the proper mind-set in litigants, lawyers, and judges.

It will definitively establish that proportionality is integral to discovery and must always be considered.

The revised HRCP Rule 26(b)(1) also replaces: (1) "relevant to the subject matter involved in the pending action" with "relevant to any party's claim or defense"; and (2) "It is not ground for objection that the information sought will be inadmissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" with "Information within this scope of discovery need not be admissible in evidence." Similar changes were made to FRCP 26(b)(1) through a combination of amendments made in 2000 and 2015. As to the first change, the Advisory Committee Notes to FRCP Rule 26 indicate that the "relevant to the subject matter" language was rarely invoked after a good cause requirement was imposed in 2000, and that the "relevant to any party's claim or defense" language permits discovery that is sufficiently broad, "given a proper understanding of what is relevant to a claim or defense." FRCP Rule 26(b)(1), Advisory Committee's Note (2015 Amendment). As to the second change, the Advisory Committee Notes indicate that the "reasonably calculated" language had been incorrectly used to define the scope of discovery, and that if used for this purpose, the phrase "might swallow any other limitation on the scope of discovery." Id. (internal quotations marks omitted).

2. Proposed New HRCP 16.1 -- Assignment of Cases to an Appropriate Tier

An important means of right-sizing is to separate cases into tiers or pathways based on their characteristics, with each tier subject to discovery and trial-setting limitations appropriate to that tier. This type of tiering system enhances efficiency by enabling courts to match cases more closely with their discovery and trial-setting needs. Separating cases into tiers with different discovery limitations reinforces proportionality and prevents unnecessary costs by imposing discovery limits based upon the characteristics of the case. Applying specific discovery limits to a tier serves to curtail discovery disputes, which lessens the need for court involvement, and enhances discovery planning by informing parties in that tier, from the outset of the case, what the ceiling is on their discovery. Delay is also reduced by linking the standards for setting a trial date with the characteristics of the case.

The Task Force proposes a new HRCP Rule 16.1 (with the current HRCP Rule 16.1 renumbered as HRCP Rule 16.2) to help right-size discovery, procedures, and case management by assigning cases to one of two tiers. In deciding on a two-tier system, the Task Force observed that Hawai‘i already practices certain forms of case tiering. For example, civil actions involving an amount in controversy not exceeding $10,000 generally fall within the exclusive jurisdiction of the district

court. Hawaii Revised Statutes (HRS) § 604-5. The district court also has concurrent jurisdiction with the circuit court over civil actions involving claims that exceed $10,000 but do not exceed $40,000, id.; HRS § 603-21.5, and such actions are frequently filed in district court, which uses procedures that are more streamlined and usually less costly than circuit court. In addition, tort cases with a probable jury award value of $150,000 or less are generally resolved by arbitration through the CAAP. See HRS § 601-20.

Under the new HRCP Rule 16.1, the court will assign a case based on its characteristics into one of two tiers: Tier 1 for more straightforward cases and Tier 2 for the remaining cases. As set forth in the new rule, "[t]he purpose of the tier assignment is to secure the just, speedy, and efficient resolution of cases by placing them into an appropriate pathway based on considerations of proportionality, fairness, cost-effectiveness, and expedition." The new rule directs the court to consider a variety of factors in assigning a case to a tier, such as the degree of readiness of the case for resolution, the number of parties involved, whether any party is self-represented, and whether the amount in controversy is greater or less than $150,000. However, no factor is dispositive, and the court has the discretion to consider any factor relevant to fulfilling the purpose of the tier assignment. The Task Force

considered tiering systems from other jurisdictions, such as Utah, which establishes tiers based solely on the amount in controversy. The Task Force believes that this type of system is too restrictive and has opted to give the court greater discretion in assigning the case to a tier.

The new HRCP Rule 16.1 establishes limitations on discovery for Tier 1 cases. For these cases, each party shall be limited to: (1) no more than four oral depositions with a cumulative time of sixteen hours on the record; and (2) no more than a total of thirty-five, in any combination, of interrogatories, requests for documents, and requests for admissions. Other jurisdictions impose specific numerical limitations for each method of written discovery, but the Task Force decided to give parties more flexibility to decide how to allocate their discovery among the various methods. We reasoned, for example, that it may be more helpful in one case to use more interrogatories and less requests for documents than in another case. A party in a Tier 1 case may seek discovery beyond Tier 1 limits by motion or stipulation upon a showing that such discovery is necessary and proportional.[17/]

For Tier 2 cases, the new HRCP Rule 16.1 does not impose discovery limitations beyond those contained in other discovery

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[17/] In conjunction with imposing discovery limitations for Tier 1 cases, the Task Force proposes to amend HRCP Rule 29 to make clear that parties cannot modify Tier 1 discovery limitations just by their own stipulation, but must comply with the requirements for modification set forth in the new HRCP Rule 16.1.

rules. The Task Force feels that the principle of proportionality set forth in our proposed amendment to HRCP Rule 26(b)(1) will serve to impose necessary constraints on discovery in Tier 2 cases.

The new HRCP Rule 16.1 imposes trial-setting limitations for each tier. The court is required to assign a tier and set the trial date at the initial scheduling conference.[18/] For Tier 1 cases, the court must set trial to commence within nine months of the initial scheduling conference. For Tier 2 cases, trial shall be set within twelve months of the initial scheduling conference, unless a party requests a later trial date. If such a request is made, the court may set the trial between twelve and eighteen months from the date of the initial scheduling conference.

For Tier 1 cases, continuances of the trial date will only be granted based on extraordinary circumstances. Imposing a high standard for trial continuances is consistent with the benefits of establishing a firm trial date. Cases are resolved more quickly and at less cost when courts adhere to trial dates and keep continuances to a minimum. A firm trial date motivates the parties to prioritize their work and to focus on what is necessary to resolve the case. For Tier 1 cases, matters that must be accomplished to prepare the case for trial should be

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[18/] As discussed below, the Task Force's proposed amendments to HRCP Rule 16(b) and RCCH Rule 12 provide for the court to hold a scheduling conference during the early stages of the case.

relatively straightforward, and a firm trial date will help expedite the case to resolution.

For Tier 2 cases, the less stringent standard of good cause is applicable to continuance requests. The greater complexity associated with Tier 2 cases makes them more unpredictable and warrants granting parties more leeway in obtaining a trial continuance.[19/]

3. Establishing a Foreclosure Task Force

Foreclosure actions not only represent the largest category, approximately 40 percent, of cases classified as civil filed in the circuit courts, but the median time to resolve foreclosure cases is higher than for other types of civil cases. Foreclosure actions are a prime candidate for specialized rules and procedures. They share distinctive characteristics that differentiate them from other cases. Foreclosure cases typically involve the same type of documents, are often resolved through summary judgment, and frequently have parties who represent themselves. Foreclosure cases also have been the subject of recent appellate decisions that have articulated requirements a foreclosing plaintiff must satisfy to prevail.

For these reasons, the Task Force recommends the formation of a foreclosure task force, to include judges and lawyers who

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[19/] The Task Force kept intact the RCCH Rule 12 provision for designation of a case as complex litigation, which gives the court discretion to establish deadlines and right-size the management of cases designated as complex.

specialize in foreclosures, to develop recommendations for rule amendments and procedures specifically designed to reduce costs and delay in foreclosure cases. These recommendations, for example, could include proposals for the automatic early disclosure of documents routinely used in foreclosure cases, the early exchange of information pertinent to the alleged default or relevant to the potential for loan modification, and the establishment of deadlines for dispositive motions. We believe that a foreclosure task force, a group with particular expertise in foreclosure litigation, can best develop recommendations to right-size foreclosure cases so that they can be resolved with less costs and greater speed.

B. Creating Greater Certainty in Litigation and Improving the Court's Management of Cases

1. Proposed Amendments to HRCP Rule 16 and RCCH Rule 12

The early and active involvement of the trial judge in establishing a trial date and other significant deadlines, and in managing discovery, creates greater certainty in the litigation process. It establishes standards and provides direction to the parties, which serves to contain costs and avoid unnecessary delay.

> Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

FRCP Rule 16(b), Advisory Committee's Note (1983 Amendment).

Delays in setting a trial date are correlated with a longer time to resolve the case.[20/] "Without a firm trial date, cases tend to drift and discovery takes on a life of its own." 2009 ACTL/IAALS Report at 20.

Under Hawaii's existing circuit court rules, there is a significant, built-in time lag between the filing of a complaint and the court's involvement in setting a trial date. RCCH Rule 12 currently uses the filing of a pretrial statement to trigger a judge's involvement in setting a trial date. However, the pretrial statement is not due until eight months after a complaint has been filed, and the plaintiff has an additional two months to schedule a trial setting status conference or file a trial setting document with the court.[21/] Therefore, ten months may elapse before a judge's first involvement in a case in setting the trial date or addressing other case management issues.[22/] The elapsed time may even be longer if continuances are granted and depending on when the judge holds the trial setting status conference or otherwise rules on the trial date.

[20/] See Institute for the Advancement of the American Legal System, Civil Case Processing in the Federal Courts: A Twenty-First Century Analysis, 3, 30-32 (2009).

[21/] A plaintiff in the First Circuit is required to schedule a trial setting status conference within 60 days of the filing of the initial pretrial statement. RCCH Rule 12(c)(1). In the Second, Third, and Fifth Circuits, unless the court adopts the First Circuit procedures, a plaintiff, within 60 days of the filing of the initial pretrial statement, is required to file a document providing three agreed-upon weeks for trial or requesting a trial setting status conference. RCCH Rule 12(c)(2).

[22/] The current rules do not require the parties to appear for any case scheduling or management conference prior to the court's holding of a trial setting status conference or otherwise ruling on the setting of a trial date.

The Task Force believes that amending the rules to promote the judge's active involvement at a much earlier stage in setting a trial date and other deadlines and in managing discovery will make the litigation process more efficient. By holding a scheduling conference with the parties and issuing a scheduling order early in the case, the court will be able to establish a framework and timetable for completing the case, address troublesome issues, encourage parties to establish priorities, and help narrow discovery to what is necessary to resolve the case.[23/]

Task Force members find that the early scheduling conference/order requirements set forth in FRCP Rule 16(b) and LR Rules 16.2 and 16.3 have been effective in expediting cases to resolution and reducing costs and delay in Hawai‘i federal court. Respondents to the Task Force survey apparently concur in this assessment as 79 percent agree or strongly agree that Hawai‘i should adopt procedures similar to the scheduling conference provisions of FRCP Rule 16. The Task Force also heard from Magistrate Judges Kurren and Chang who strongly endorsed the federal rules' early scheduling requirements and reported that

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[23/] Respondents to the Task Force survey overwhelmingly agree that judges should take a more active role in imposing deadlines and managing the progress of a case, and that early judicial involvement helps to narrow the issues and narrow discovery to the information necessary for case resolution. They also overwhelmingly agree that Hawai‘i should adopt procedures to facilitate early judicial involvement in a case and early establishment of deadlines.

these requirements have enhanced their ability to effectively manage cases. The early scheduling conferences allow the Magistrate Judges to learn about the case from the parties and to be more proactive in managing the case. It gives them the opportunity to address discovery disputes before they grew into larger battles, identify cases that would benefit from an early settlement conference or mediation, establish deadlines for motions that must be heard for the case to progress, and set a schedule that meets the particular needs of the case.

The Task Force proposes to amend HRCP 16(b) to incorporate provisions of FRCP Rule 16(b) and to amend RCCH Rule 12 to, among other things, incorporate provisions of LR Rules 16.2 and 16.3. Like the federal rules, the revised HRCP Rule 16(b) and RCCH Rule 12 provide that, unless the judge finds good cause for delay, the judge must issue a scheduling order within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared. Accordingly, the revised rules require judicial involvement and the issuance of a scheduling order at a much earlier stage in the litigation than the current rules.

Working backward from the judge's deadline to issue the scheduling order, the revised rules impose deadlines and obligations on the parties to maximize the effectiveness of the scheduling conference with the judge and the scheduling order.

Within fourteen days after any defendant is served with the complaint or enters an appearance, the plaintiff must file a notice requesting a scheduling conference to be set by the court. After the court issues an order or a notice setting the scheduling conference date, the plaintiff must promptly serve that order or notice on parties who were served with the complaint but have not yet appeared (with the court serving parties who have appeared). At least twenty-one days before the scheduling conference, the parties must confer on a variety of issues, including settlement possibilities, initial disclosures, discovery planing, and tier assignment.[24/] At least seven days before the scheduling conference, the parties must submit a discovery plan and file a scheduling conference statement covering issues on which they were required to confer. Requiring the parties to confer and submit reports on matters critical to discovery and case management, including matters on which they agree, will reduce costs by narrowing the scope of the litigation and enabling the court to set deadlines and impose limitations that are tailored to the needs of the case.

[24/] As further discussed in subsequent sections, the Task Force is recommending the adoption of initial disclosure requirements similar to FRCP Rule 26(a)(1), discovery planning requirements similar to FRCP Rule 26(f), and expert disclosure and discovery requirements similar to FRCP Rule 26(a)(2) and 26(b)(4). The revised RCCH Rule 12 incorporates provisions of FRCP Rule 26(f) that require parties to confer on discovery planning and submit a discovery plan to the court before a scheduling conference.

Under the revised rules, the court must issue a scheduling order that sets the date for trial; assigns the case to a tier; and governs and addresses initial and expert disclosures, the extent of permitted discovery, the discovery completion date, and deadlines for motions to be filed and heard, to join other parties, and to amend pleadings. The court is also permitted to include other appropriate requirements and deadlines in the scheduling order, such as those pertaining to the exchange and submission of trial materials. The revised rules will empower the court to issue scheduling orders designed to ensure that the case progresses to resolution in an expeditious and cost-effective manner.

2. Proposed New RCCH Rule 12.1

The Task Force proposes a new RCCH Rule 12.1 (which will require the renumbering of the current RCCH Rules 12.1 and 12.2 to 12.2 and 12.3, respectively). The new RCCH Rule 12.1 sets forth requirements for a pretrial statement to be filed shortly before trial. Under the existing rules, the filing of the pretrial statement, which triggers the setting of the trial date, comes too late in the process for scheduling and case management purposes. But, it also frequently comes too early before trial to provide an effective means of narrowing the issues for trial and addressing disputes likely to arise at trial. The new RCCH Rule 12.1 requires the filing of the pretrial statement no later than seven days before any final pretrial conference set by the

court or, if no final pretrial conference is set, no later than fourteen days before trial. Thus, the pretrial statement required under the new RCCH Rule 12.1 will be due at a time when the parties should be familiar with their trial strategy and provide a more effective vehicle for narrowing trial issues and resolving trial disputes. The new RCCH Rule 12.1 requires parties to address in their pretrial statement matters that will allow the trial to proceed efficiently, with a minimum of disruption.[25/]

3. Proposed Amendments to the Renumbered RCCH Rule 12.2

The Task Force believes that improving the effectiveness of settlement conferences will serve to reduce costs and delay. In this regard, the Task Force proposes to amended RCCH Rule 12.2 (formerly RCCH Rule 12.1) to generally require the judge to set a settlement conference date at the scheduling conference held pursuant to the revised HRCP Rule 16(b) and RCCH Rule 12.[26/] The revised RCCH Rule 12.2 also requires that alternative dispute resolution (ADR) be discussed at the scheduling conference, and it encourages the court to include orders scheduling and

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[25/] We note that by including deadlines in the scheduling order for the exchange and submission of trial materials, such as exhibits, stipulations, and deposition testimony, the court can help the parties better prepare and plan for trial, which will allow the case to proceed to trial in a more orderly fashion.

[26/] The revised RCCH Rule 12.2 creates an exception to this requirement in situations where there are concerns about the trial judge also serving as the settlement judge, in which case the court is given an additional 30 days to issue the settlement conference date.

facilitating ADR processes, where appropriate, in the scheduling order. The Task Force believes that a settlement conference should be held in every case that is proceeding to trial, and that where ADR is appropriate, including orders addressing ADR processes in the scheduling order will make ADR more effective.

The Task Force believes that staggered settlement offers generally make settlement negotiations more productive. Therefore, the revised RCCH Rule 12.2 provides that, unless otherwise ordered by the court, the plaintiff's offer shall be made before the defendant's offer. To enhance the opportunity for settlement, the revised rule requires that the timing of settlement offers be discussed at the scheduling conference and encourages the court to include deadlines for offers in the scheduling order.

The revised RCCH Rule 12.2 eliminates the provision in the current rule that requires the filing of a settlement conference statement, which both lawyers and judges on the Task Force felt was not helpful. Instead, the revised rule provides that much of the information currently required for the settlement conference statement be included in the confidential settlement conference letter submitted to the court.[27/]

[27/] The Task Force proposes to amend RCCH Rule 12.3 (formerly RCCH Rule 12.2) to provide that the court may order parties to participate in a non-binding ADR process upon "request" as well as upon motion or sua sponte. This revision is to clarify that a party may seek the court's assistance regarding ADR without having to file a formal motion.

C. Simplifying and Streamlining Discovery

Discovery should be simplified and streamlined to avoid unnecessary expense. In addition to incorporating the principle of proportionality, the FRCP and the LR have implemented discovery reforms directed at simplifying and streamlining discovery. The federal rules have reformed discovery by imposing initial disclosure and discovery planning and conferral obligations on parties; establishing expert disclosure requirements and clarifying and simplifying expert discovery; and providing a cost-effective letter-briefing procedure for resolving discovery disputes. The Task Force survey shows strong support for these federal discovery rules, with 76 percent or more of respondents agreeing or strongly agreeing that Hawai‘i should adopt rules, or judges should engage in practices, similar to the federal provisions. The Task Force recommends amendments to the HRCP and the RCCH that are patterned after these federal discovery rules. Magistrate Judge Kurren informed the Task Force that the mandatory initial disclosure and expert disclosure rules, in particular, have served to decrease discovery disputes by reducing "friction" between the parties over discovery and have made managing discovery easier.

1. Proposed New HRCP Rule 26(a)(1) and Proposed New HRCP Rule 26(f)

The Task Force proposes a new HRCP Rule 26(a)(1) to impose initial disclosure requirements, without the need for a discovery

request, similar to FRCP Rule 26(a)(1). We also propose a new HRCP Rule 26(f) that requires the parties, prior to the scheduling conference, to confer, to make or arrange for initial disclosures and discuss discovery planning, and to submit a discovery plan, similar to FRCP Rule 26(f).

The initial disclosure requirement accelerates the exchange of basic information about the case and eliminates the need to request such information. Providing the parties with relevant information early in the case helps them to determine the critical issues, the discovery that is necessary, and whether an early resolution is possible. The requirements that the parties confer, make or arrange for initial disclosures, engage in discovery planning, and submit a discovery plan prior to the scheduling conference helps to identify and narrow discovery issues and avoid protracted discovery disputes. It provides parties with the opportunity to work out problems on their own without court intervention. It also provides the court with information necessary to address discovery disputes early in the case, tailor discovery deadlines to the circumstances of the case, and use the scheduling conference and scheduling order to manage the case more effectively.

Under the new HRCP Rule 26(a)(1), a party, without awaiting a discovery request, must disclose: (1) the identity of all witnesses, except retained or employee experts, the disclosing

party reasonably expects to call at trial and a general statement concerning the nature of the expected testimony, unless the witness's use would be solely for impeachment; (2) a copy, or description by category and location, of documents, electronically stored information, and tangible things that may be used to support the disclosing party's claims or defenses, unless the use would be solely for impeachment; (3) a computation of each category of damages claimed by the disclosing party as well as documents and other evidentiary materials, unless privileged or protected, on which each computation is based; and (4) the declaration page of relevant insurance agreements and any reservation of rights letter received by the disclosing party.[28/] The Task Force, for Item 4, decided to only require initial disclosure of the declaration page and reservation of rights letter, rather than the entire insurance agreement as required by the federal rule. The reasons for this decision are that: (1) the declaration page and reservation of rights letter typically contain the information needed by a plaintiff; (2) it may be difficult for defense counsel to secure the entire insurance

[28/] A Task Force member objected to the "solely for impeachment" exception in Items 1 and 2 on the ground that the exception allows a party to conceal potentially critical evidence, which is inconsistent with the purpose of discovery to facilitate early resolution of a case and avoid trial by ambush. It was noted, however, that this exception is contained in the corresponding federal provisions; that it applies to initial disclosure and does not preclude discovery of impeachment evidence; and that some courts have explained the exception as necessary to preserve the value of impeachment evidence in attacking a witness's credibility. The Task Force decided to include the "solely for impeachment" exception in Items 1 and 2.

agreement, especially for multi-line policies or for policies covering operations in several jurisdictions; and (3) a party may request production of the entire insurance agreement though discovery if desired.

The timing for the initial disclosures, the conferral of the parties on discovery planning, and the parties' scheduling conference with the court pursuant to the revised HRCP Rule 16(b) and RCCH Rule 12 are all linked together. Under the new HRCP Rule 26(f), the parties in general must confer on discovery planning and make or arrange for initial disclosures at least twenty-one days before the scheduling conference, and they must submit their discovery plan to the court within fourteen days after their HRCP Rule 26(f) discovery-planning conference. The new HRCP Rule 26(a)(1) provides in general that a party must make the initial disclosures at or within fourteen days after the parties' HRCP Rule 26(f) conference, unless a different time is set by stipulation or court order, or unless the party objects during the HRCP Rule 26(f) conference. The court must rule on any such objection during the scheduling conference. Therefore, under the revised rules, the parties ordinarily will confer on discovery planning and initial disclosures at least twenty-one days before the scheduling conference and will make initial disclosures and submit their discovery plan at least seven days before the scheduling conference.

2. Proposed New HRCP Rule 26(a)(2) and Proposed Amendments to HRCP Rule 26(b)(5)

The Task Force proposes a new HRCP Rule 26(a)(2) that is based on FRCP Rule 26(a)(2) and an amended HRCP Rule 26(b)(5) that is based on FRCP Rule 26(b)(4). Under the new HRCP Rule 26(a)(2), a party, without awaiting a discovery request, must disclose information regarding experts the party expects to call at trial. The new HRCP Rule 26(a)(2) divides experts the party expects to call at trial into two categories: (1) experts who are retained or specially employed by the disclosing party, or whose duties as the disclosing party's employee regularly involve the giving of expert testimony (Category 1 experts); and (2) experts who do not fall within the first category, such as the plaintiff's treating physician in a personal injury case (Category 2 experts). For Category 1 experts, the party calling the expert must disclose a written report, prepared and signed by the expert, which contains specified information, including the expert's opinions, the basis for the opinions, and the facts and data considered by the expert in forming the opinions. For Category 2 experts, the party calling the expert must disclose the subject matter on which the expert is expected to present evidence and a summary of the facts and opinions to which the expert is expected to testify. Unless otherwise stipulated or ordered by the court, the party having the burden of proof on a claim or affirmative defense must serve the related disclosures no later than 120 days before the trial date; the opposing party

must serve the related disclosures no later than 90 days before the trial date; and a party intending to present evidence solely to rebut the opposing party's disclosure must serve the related disclosures no later than 60 days before the trial date.[29/]

The amended HRCP Rule 26(b)(5) provides that the deposition of a Category 1 expert may only be conducted after the expert's written report is disclosed. It also provides trial-preparation-materials protection for drafts of any required expert report or disclosure and for communications between a party's attorney and a Category 1 expert, except for communications that relate to compensation, that identify facts or data provided by the attorney and considered by the expert in forming the expert's opinions, and that identify assumptions provided by the attorney and relied upon by the expert in forming the expert's opinions.[30/]

Mandating expert disclosures without the need for a discovery request, and clarifying the protection provided for draft expert reports and disclosures and attorney-expert communications,[31/] will help to prevent disputes and simplify the

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[29/] The Task Force also proposes a new HRCP Rule 26(a)(3) to impose an obligation on parties to supplement or correct disclosures made under the new HRCP Rule 26(a)(1) and (a)(2).

[30/] The revised HRCP Rule 26(b)(5)(A) and (D) include language stating that they are "subject to the provisions of Rule 16.1 in Tier 1 cases" to incorporate the limitations on depositions and interrogatories in Tier 1 cases set forth in the new HRCP Rule 16.1.

[31/] The 2015 ACTL/IAALS Update Report specifically endorses the federal provisions on which the revised HRCP Rule 26(b)(5) protections for draft expert reports and disclosures and attorney-expert communications are based. 2015 ACTL/IAALS Update Report at 28.

discovery process. Requiring Category 1 experts to prepare a written report, permitting the deposition of such experts only after the report is disclosed, and requiring disclosure of a Category 2 expert's opinion will all serve to reduce costs by obviating the need to depose the expert in certain cases or by reducing the time necessary for the expert's deposition.

3. Proposed New RCCH Rule 15.1

The Task Force proposes a new RCCH Rule 15.1 to provide for streamlined discovery assistance, which is similar to the letter-briefing procedure for resolving discovery disputes under LR Rule 37.1. Discovery disputes can cause the progress of a case to grind to a halt. Frequently, the parties do not want to incur the time and expense of resolving the dispute though a formal motion. Rather, their primary interest is to obtain an answer from the court on their dispute so they can move forward with the case.

The new RCCH Rule 15.1 provides the parties with the option of seeking to resolve discovery disputes through a procedure that is more streamlined than a formal motion. Under the streamlined procedure, the parties simultaneously submit letter briefs to the court. The letter briefs must be five pages or less, including all exhibits, unless otherwise ordered by the court. Upon receipt of the letter briefs, the court determines the procedure for resolving the dispute. The court, for example, may issue an

order based upon the letter briefs, set a conference with the parties, or require the parties to file a formal motion. If the court rules without requiring a formal motion, the court will issue an order of its decision and attach the letter briefs, for purposes of appellate review.[32/]

The streamlined letter-briefing procedure does not remove current methods for resolving discovery disputes, but provides an additional tool for the parties to use. Parties still retain the option of resolving discovery disputes by filing a formal motion. The streamlined procedure may only be used if all parties involved in the discovery dispute agree. In addition, before seeking the court's assistance, the parties must confer and attempt to resolve or minimize the scope of the dispute in a good faith effort to eliminate the need for the court's assistance, and each party must certify that it complied with these requirements.

D. Exempting Certain Actions

1. The Exempted Actions

We recognize that state circuit court judges carry a larger caseload than Hawai‘i federal court judges. Thus, while the federal rules have worked well in Hawai‘i federal court, we are

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[32/] We note that one judge on the Task Force raised concerns that a judge's calendar may prevent the judge from immediately responding to the letter briefs, and that the new rule may create unrealistic expectations on the part of litigants regarding how soon the judge would be able to rule. In response to these concerns, the new rule gives the judge discretion to determine what procedure will be used to resolve the discovery dispute.

cognizant of concerns that it may be difficult to utilize certain of the federal rules incorporated in our proposals in circuit court, given the larger caseload carried by state judges. To address these concerns and to provide assurance that our proposals can be implemented successfully in the circuit courts, we have exempted a group of cases from a number of our proposals.

No case is exempt from our proposal to incorporate proportionality into the scope of discovery. Proportionality considerations apply to discovery in all cases. However, we have exempted from our proposal to impose early scheduling conference/order requirements, which are similar to those used in Hawai‘i federal court, the following group of cases: foreclosures, CAAP cases, agency appeals, consumer debt collection cases, quiet title actions, and mechanic's and materialman's lien cases.[33/] These are cases that would derive the least benefit from the early scheduling conference/order requirements because they typically involve limited discovery, are resolved by default or summary judgment, or are already governed by specialized procedures, such as CAAP cases. At the same time, exempting these cases will significantly reduce the number of cases subject

[33/] We note that "consumer debt collection" is not in the list of claim categories that may be selected to describe claims asserted in a civil case. See RCCH Rule 3(c)(5). To facilitate the exemption of consumer debt collection actions, it may be helpful to add "consumer debt collection" to the list of claim categories. We also note that mechanic's and materialman's lien cases are not classified as "civil" under the RCCH and thus are not intended to be covered by our proposals. See note 16, supra. Nevertheless, we include mechanic's and materialman's lien cases among the exempted actions to provide additional notice that they are excluded.

to the early scheduling conference/order requirements.[34/] In particular, foreclosure cases have comprised approximately 40 percent, and CAAP cases roughly 20 percent, of the cases classified as civil filed in the circuit courts in recent years.[35/]

For reasons similar to those for exempting these cases from the early scheduling conference/order requirements, we are also exempting the same group of cases from our proposals for mandatory initial disclosure and early conferral on discovery planing, expert disclosure and discovery, and tier assignments. Cases in the exempt group that involve limited discovery or are already governed by specialized procedures would tend to garner diminished benefits from these proposals. Consistency in using the same group of cases for the exemptions will also serve to avoid confusion and simplify the implementation of the proposals.

[34/] Under the current rules, at least in the First Circuit, in all cases except those designated as complex litigation, the plaintiff must schedule a trial setting status conference within sixty days of filing the initial pretrial statement that must be attended by each party or each party's lead counsel. See RCCH Rule 12(c). Thus, the proposed early scheduling conference/order requirements do not create an entirely new burden on the court to hold a conference, but rather modifies conference burdens already existing under the current rules.

[35/] It is possible that the proposed foreclosure task force could modify the effect of the foreclosure exemption by deciding to recommend some form of early scheduling conference for foreclosure cases. It is also possible, on the other hand, that the proposed foreclosure task force could recommend rules that impose mandatory disclosure obligations and establish dispositive motion and other deadlines that obviate the need for an early scheduling conference. In any event, we believe that the proposed foreclosure task force should be able to recommend specialized rules and procedures that will reduce the overall burden that foreclosure cases impose on circuit court caseloads and thereby free-up additional judicial resources.

The exemptions create a margin of safety to address caseload concerns and to help insure that our proposals can be successfully implemented.[36/]

We believe that in exempting this group of cases from a number of our proposals, we have reached an appropriate balance between securing the benefits provided by the rule amendments and addressing caseload and implementation concerns. With respect to whether circuit court judges, given their larger caseloads, will be able to successfully utilize the scheduling conference/order procedures of the Hawai‘i federal court, the comments of Magistrate Judge Chang in his presentation to the Task Force are instructive.

Magistrate Judge Chang was formerly a Hawai‘i circuit judge and is in the unique position of having experience managing cases under both the state circuit court system and the current federal rules. Magistrate Judge Chang believes that if state foreclosure cases and CAAP cases are exempted,[37/] the early scheduling conference/order rules used in Hawai‘i federal court would transfer very well to circuit court and could effectively be

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[36/] As set forth in his dissent attached as Appendix 3, Task Force member Roy K.S. Chang disagrees with the Task Force's decision to exempt CAAP cases from a number of our proposals. It was noted, however, that the CAAP is designed to remove cases from a judge's caseload by facilitating resolution of a case through arbitration, without significant court involvement unless and until an appeal of the arbitrator's award and a trial de novo is sought. After considering Mr. Chang's views, the Task Force decided to include CAAP cases in the group of exempted actions.

[37/] Magistrate Judge Chang believes that CAAP cases should be exempted until a trial de novo of the arbitrator's award is requested.

implemented under the caseloads carried by circuit court judges. He stated that these rules enable a judge to be more efficient in managing cases, and he recommended that they be adopted, with an exemption for foreclosure and CAAP cases, by the Hawai‘i circuit courts.

2. Trial Setting for the Exempt Actions

The proposed amended rules remove the filing of the pretrial statement as the trigger for setting a trial date. For cases subject to the early scheduling conference/order requirements, trial and other important deadlines will be set by the scheduling order issued pursuant to the revised RCCH Rule 12(a). To provide a trial date or other case resolution deadlines for exempt actions, the Task Force proposes to amend RCCH Rule 12(b) to require plaintiffs in exempt actions to file a notice requesting a trial setting/status conference eight months after the complaint is filed. It is anticipated that many of the exempt cases may be resolved before such conference through default, dispositive motion, or resolution through the CAAP, thereby avoiding the need for further action. For cases that have not been resolved, the revised RCCH Rule 12(b) requires the court to establish a trial date or other appropriate deadlines for resolving the case. The court also has the discretion to require the parties to comply, in whole or in part, with the scheduling conference procedures applicable to non-exempt cases.

Under the current RCCH Rule 12, an action may be dismissed sua sponte for want of prosecution if a pretrial statement has not been filed within eight months after a complaint has been filed (or within further extensions granted by the court) or if a trial setting status conference has not been scheduled as required by the rule. RCCH Rule 12(q). We propose to amend this provision by replacing these grounds for dismissal with: (1) for exempt cases, the failure to file a notice requesting a trial setting/status conference as required by the revised RCCH Rule 12; and (2) for non-exempt cases, the failure to file a notice requesting a scheduling conference as required by the revised RCCH Rule 12. Our proposed amendment, which is set forth in revised RCCH Rule 12(i), does not change other aspects of the current rule for dismissal for want of prosecution.

E. Additional Recommendations

1. Proposed Amendments to HRCP Rule 5

The current HRCP Rule 5 does not permit service of documents by email. However, email is widely used and provides a very inexpensive means of serving documents. The Task Force proposes amending HRCP Rule 5 to include service of documents by email as an option. Under the revised rule, parties must consent in writing to service by email before it can be used. The consent requirement will serve to avoid disputes, such as what email address(es) to use, and protect non-lawyers who do not have ready

access to email. The revised rule provides that service by email is complete upon transmission of the entire document, unless the sender learns that it did not reach the person to be served. The Task Force is aware that the electronic filing (e-filing) of documents will soon be available in circuit court and will likely be accompanied by rules relating to service of e-filed documents. Certain documents, however, such as discovery materials, are not filed in court and therefore may not be covered by those e-filing rules. The Task Force recommends that our email service proposal be integrated with rules for service of e-filed documents.[38/]

2. The CAAP

Since 1986, Hawai‘i has used the CAAP as a means of resolving tort cases with a probable jury award value of $150,000 or less. See HRS § 601-20. The CAAP is a mandatory program in that tort cases are subject to the program unless the case is exempted. Id; Hawai‘i Arbitration Rules (HAR) Rule 8. A party may appeal the CAAP arbitrator's award and obtain a trial de novo in circuit court, but if there is no appeal, the arbitrator's award is entered as a final judgment of the court. HAR Rule 21, 22.

Similar to the purposes of this Task Force, the CAAP was designed to reduce litigation costs by managing and reducing

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[38/] In conjunction with our proposal to amend HRCP Rule 5(b) to permit service by email, the Task Force proposes to amend: (1) RCCH Rule 3 to require parties to include an email address in the caption of pleadings; and (2) RCCH Rule 4 to require parties who appear without counsel to notify the clerk of their email address.

pretrial discovery and expediting tort cases to resolution at a faster pace. See John Barkai and Gene Kassenbaum, Hawaii's Court-Annexed Arbitration Program Final Evaluation Report, 1 (1992). An evaluation of the CAAP performed in 1992 concluded that the CAAP had been successful in reducing litigation costs and pretrial discovery and in increasing the pace of litigation for tort cases included in the program. Id. at 12, 35-36, 53-54. The Task Force survey also indicates some support for the CAAP in that a majority of respondents: (1) agree or strongly agree that the $150,000 ceiling should be increased (53%) and that the program should be expanded to cases besides torts (61%); and (2) disagree or strongly disagree that the program should be modified to make participation voluntary (52%).

The Task Force, however, also heard questions raised about the experience and availability of CAAP arbitrators and whether improvements in the CAAP can be made. Under HAR Rule 4, a Judicial Arbitration Commission, established by the Chief Justice, has "the responsibility to develop, monitor, maintain, supervise and evaluate the [CAAP] for the State of Hawai‘i." The Task Force recommends that the Judicial Arbitration Commission solicit input on and evaluate the current condition of the CAAP and develop recommendations on how the program can be improved.

3. E-filing in Circuit Court

The Task Force notes that the Hawai‘i Judiciary will soon expand its Judicial Electronic Filing System (JEFS) to include e-

filing in circuit court. Respondents to the Task Force's survey frequently recommended e-filing as a means of using technology to reduce costs and delay in the circuit courts. The new e-filing system in circuit court provides a valuable resource and tool for making the civil justice system more efficient and user-friendly and for reducing costs and delay. We recommend that every effort be made to utilize the new e-filing system to further these goals.

V. CONCLUSION

We have done our best to offer recommendations on ways to improve the civil justice system by reducing costs and delay and streamlining the litigation process in Hawaii's circuit courts. We know that we do not have a monopoly on good ideas. We hope that our recommendations can be used, and improved upon, to make the civil justice system more accessible, affordable, efficient, and just.

We thank Chief Justice Recktenwald for giving us the opportunity to serve on this Task Force. It has been an honor and a privilege.

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