

2023 HAWAI‘I ACCESS TO JUSTICE CONFERENCE

“BUILDING TRUST AND UNDERSTANDING ABOUT CIVIL ACCESS TO JUSTICE”

Friday, June 16, 2023

William S. Richardson School of Law, University of Hawai‘i

Summary of the Morning Session¹

8:30 - 9:00 **Welcome: Professor Aviam Soifer and Robert LeClair, co-emcees, Hon. Joseph E. Cardoza, Chair, Hawai‘i Access to Justice Commission, State of Hawai‘i Second Circuit Chief Judge (ret.), Hon. Mark E. Recktenwald, Chief Justice, Hawai‘i Supreme Court**

Welcome. Co-emcee Robert LeClair welcomed attendees to the 14th annual Hawai‘i Access to Justice Conference. He thanked Justice Simeon Acoba, who served as the first Chairperson of the Hawai‘i Access to Justice Commission; Rhonda Griswold and the Cades Foundation, which sponsored the lunch for the Conference; and the William S. Richardson School of Law, which provided the facilities for the Conference.

Recognition. Chief Justice Mark Recktenwald opened the Conference by recognizing two leaders in the Access to Justice Community: Nanci Kreidman, co-founder and outgoing CEO of the Domestic Violence Action Center (DVAC); and M. Nalani Fujimori Kaina, outgoing Executive Director of the Legal Aid Society of Hawai‘i (LASH). Chief Justice Recktenwald remarked that it was impossible to think of DVAC without thinking of Ms. Kreidman, and it was impossible to think of LASH without thinking of Ms. Fujimori Kaina. Together with DVAC, Ms. Kreidman worked with courts and other partners to ensure their operations respect the safety and concerns of domestic violence survivors. Ms. Kreidman thought about domestic violence survivors 24-7 and, when difficult events occurred, Ms. Kreidman was able to put them into perspective and help the community to do better.

Ms. Fujimori Kaina is respected nationally as a leader in access to justice. She led an incredibly busy organization, with not nearly enough resources, with wise strategic decisions. She leveraged technology and developed programs like the Community Navigator Project to train community leaders to identify legal problems. She was also instrumental in establishing

¹ Teri-Ann Nagata, a member of the Commission’s Committee on Education, Communications, and Conference Planning, prepared this summary of the entire morning session.

and staffing Court Self-Help Centers. LASH received great support from the legislature because Ms. Fujimori Kaina was so respected.

Hon. Joseph E. Cardoza, Chair of the Hawai'i Access to Justice Commission.

Judge Cardoza discussed the Access to Justice Commission's aim of increasing access to justice for people with low to moderate income. The Commission pursues this aim through a wide range of activities and projects, primarily through its committee structure. Judge Cardoza gave special thanks to Carol Muranaka, who works tirelessly in many capacities to make the Conference a success with the support of volunteers from the Law School and community. Judge Cardoza also thanked the Law School and Dean Camille Nelson; contributors, Access to Justice Commissioners and committee members; the Hawai'i State Bar Association; and private and public agencies and individuals working to improve the lives of others in Hawai'i. Hawai'i continues to rank among the best states in the nation for access to justice. Such success would not be possible without the support of Chief Justice Recktenwald and the judiciary, the executive and legislative branches, and attendees at the conference. Participating in these efforts makes a real difference.

Judge Cardoza described the vastly different experiences of represented and unrepresented litigants in civil proceedings. He remarked that even a little bit of help can go a long way toward assisting those who must navigate the civil system of justice on their own. It does not take a great deal of effort to help someone trying to figure out a problem.

Judge Cardoza concluded by describing the significant need for additional assistance. In 2021, James Sandman, the former president of the Legal Services Corporation, cited an estimate that every licensed attorney in the United States would need to provide 180 hours of pro bono services every year to provide one hour of service to every household with an unmet legal civil need. With hope, attorneys and others can improve the lives of those who feel there is no hope.

Hon. Mark E. Recktenwald, Chief Justice, Hawai'i Supreme Court.

Chief Justice Recktenwald began his remarks by thanking everyone who made the conference possible. Access to justice relies on great partnerships, including the partnerships among the Access to Justice Commission, legal services organizations, volunteer attorneys, and the legislature, which last year appropriated \$1.2 million in new funding for civil legal services and additional funding for mediation services. Chief Justice Recktenwald thanked the Mediation Center of the Pacific and the legislature for their commitment to access to justice.

Chief Justice Recktenwald spoke about the COVID-19 pandemic as the transformative event of the last three years. During the pandemic, the judiciary dramatically increased the use of remote proceedings. The judiciary has been considering how remote proceedings benefit and, in some ways, hinder access to justice. Remote proceedings are not right for every type of case, but they can be beneficial in cases involving, for example, small claims, landlord-tenant, or debt collection issues, or for parties who reside in outlying areas or require child care. If a party's choice is between attending remotely and not attending at all, it is better for the party to attend remotely.

The judiciary has presided over 600,000 remote hearings. It has increased use of its online dispute resolution program, which allows parties to populate forms, engage in mediation, and pay filing fees remotely. So far, more than 1,600 cases have made use of the program, and the judiciary is considering ways to enhance it.

The judiciary has also supported Self-Help Centers in the courts and use of the Supreme Court Law Library as another way to engage with people seeking information. More than 8,000 users have taken advantage of the Law Library's e-chat feature. Chief Justice Recktenwald recognized a need to look at alternatives for providing legal services, such as trained paralegals, working for legal services organizations, under the supervision of attorneys. In a pilot program on Hawai'i Island, paralegals will be permitted to assist parties in paternity cases.

Chief Justice Recktenwald also described the judiciary's consideration of artificial intelligence and what it means for the legal system and efforts to increase access to justice. He asked whether there are ways in which artificial intelligence could be used to leverage lawyers and resources. Possibilities include client intake at LASH, mediation in its earliest stages, and small claims cases. Chief Justice Recktenwald described a need to consider artificial intelligence and to be careful when considering possible uses such as generating hundreds of thousands of complaints by searching for credit card holders.

Chief Justice Recktenwald concluded by noting that Hawai'i was ranked sixth nationally in the most recent survey for access to justice, and its accomplishments were all attributable to volunteers.

9:00 - 10:00 **“Incomplete Sentences: Judging Poverty”**
Hon. Nancy Gertner, Harvard Law School, Federal District
Judge (ret.)

Judge Nancy Gertner divided her keynote address, “Incomplete Sentences: Judging Poverty,” into two parts: reviewing and updating the

information that she had presented virtually at a prior Access to Justice Conference, and presenting new material.

Part One. In the first part of her address, Judge Gertner revisited the use of digital procedures as a radical approach to increasing access to justice. The use of technology in court proceedings increased dramatically during the pandemic. In *Online Courts and the Future of Justice*, Richard Susskind argued that online courts were critical to addressing issues such as limited access to justice, the substantial cost of litigation, and untenable backlogs. For example, immigration courts formerly operated much like nineteenth century courts, with physical files, in-person hearings, and paper filings. By January 2023, the immigration courts had an extraordinary backlog of two million cases. Then the immigration courts rolled out specially equipped laptops to allow for online hearings with digital audio recordings. This allowed extraordinary access to the courts.

There are potential concerns, however. In online hearings, the only human in the courtroom was the judge. This may raise questions about gravitas, civility, and more summary decision making. Judge Gertner discussed the example of *United States v. Nippon Paper Industries Co., Ltd.*, an antitrust case that she decided as a district court judge. That case involved an alleged conspiracy to set prices for thermal fax paper. One of the critical issues in the case was the translation and interpretation of a word in a memorandum. Judge Gertner received testimony remotely, from a witness testifying in Japanese. She described how difficult it was to assess the testimony when it was presented by a face on a screen testifying in a different language. The context was missing because of the nature of the proceeding.

Judge Gertner asked whether empathy may be erased or sharply curtailed in online proceedings because, when a person is not present, neither the individual nor his or her emotions can be fully appreciated. In this context, will trauma be devalued? Immigration judges are told to consider factors such as consistency of testimony. The implication is that honest memory is like a videotape, free of inconsistencies. Research by the Massachusetts General Hospital Center for Law, Brain and Behavior, however, has found that trauma affects recall and creates inconsistency in memory. Autobiographical memory is especially vulnerable to interference in the encoding, storage, and retrieval stages. How sensitive will judges be to this if parties appear as faces on screen? This may be a training issue for judges.

Judge Gertner asked how digital procedures can change substance, and how we can work to ensure that these changes are for the better. One continuing issue is presented or exacerbated by caseload pressures. Judge Gertner related that, if judges avoid making or writing decisions in an effort to dispose of cases quickly, poorer litigants may bear the burden. In an article in *The Yale Law Journal* titled *Losers' Rules*, Judge Gertner discussed how

avoiding written decisions in close cases can skew precedent. She explained that close cases proceed to trial, generally without a written decision, while losing cases often are disposed of with a written summary judgment opinion. As a result, most opinions are written in cases that seem trivial. When courts of appeals review these decisions, they begin to view most cases as trivial because they do not review opinions in the stronger cases that proceeded to trial or settled, for example.

Part Two. In part two of her keynote address, Judge Gertner addressed the challenge of incomplete or unjust criminal sentences, explaining that a lack of access to civil services can push individuals toward the criminal justice system.

She cited several examples of criminal defendants she had sentenced. These defendants had access to legal services and transportation services to and from court. In some ways they were given increased access to the criminal justice system because their access to everything else had been deficient. For example, Shaheer Bashid appeared before Judge Gertner when he was 59 years old. He had a history of paranoid schizophrenia, bipolar disorder, drug abuse since the age of eight, and family abuse. His record showed a ten-year hiatus in criminal activity while he was taking medication. When he stopped taking his medication, however, police officers found a bullet in Mr. Bashid's duffle bag, resulting in a federal charge of felon in possession of a firearm or ammunition. Because of his record, he was facing a 15-year mandatory minimum sentence. When the government was asked why Mr. Bashid should be sentenced to prison rather than receive mental health treatment, the apparent answer was that sentencing him to prison was easier than getting him care. Judge Gertner sentenced Mr. Bashid to six years in prison, and the government appealed.

Judge Gertner also discussed the case of Calvin Parker, who had suffered a leg injury at birth. He had been eligible for Social Security disability benefits, but he did not receive those benefits until after he was in prison because he had started dealing crack cocaine to survive.

In light of cases like these, there are holistic initiatives that seek to address unjust criminal sentences. The Bronx Defenders, for example, provide holistic criminal defense services, including providing social worker and educational services to persons who have been criminally charged. Yale Law School has a medical-legal partnerships program, in which Yale law students collaborate with medical providers. Yale Professor Emily Yang studies formerly incarcerated individuals and the effects of incarceration on the body. She co-founded the Transitions Clinic Network, which recognizes that formerly incarcerated individuals require access to services because the criminal justice system exacerbates problems.

In summary, Judge Gertner noted her concern that, in criminal cases, defendants have access to courts, counsel, and housing, but they may not have access to justice.

In response to questions from attendees, Judge Gertner discussed the importance of a judiciary with diverse backgrounds. Judges with experience with domestic violence issues may be more likely to ask about battered woman syndrome, for example. Or a judge who has experience working on innocence project cases may make a greater effort to hear the merits of a habeas case.

Regarding overincarceration, Judge Gertner noted that, before the pandemic, officials on the right and left were forming a coalition called “right on crime.” Members of the coalition recognized that overincarceration was economically inefficient, in part because recidivism rates were higher for defendants who went to prison than for those who did not. Judge Gertner was not sure of the current status of the coalition. Following a spike in crime in a few cities, some officials may have defaulted to a tough on crime stance.

10:15 - 11:45 **“Perspectives of Access to Justice in the Current Climate” [Aviam Soifer (facilitator), Chief Justice Mark Recktenwald, Senator Joy A. San Buenaventura, Representative Della Au Belatti, State of Hawai‘i Attorney General Anne E. Lopez*]**

This session will discuss how the three branches of government are addressing the pressing access to civil justice barriers that low and moderate-income residents of Hawai‘i now face.

* Because of a conflict, James Walther, Supervising Deputy Attorney General, Human Services Division, participated on behalf of Attorney General Anne Lopez.

Opening Remarks. Chief Justice Recktenwald opened the panel by noting that it was appropriate to have the three branches of government together to discuss access to justice. During the last legislative session, the three branches collaborated to complete a lot of great work.

Senator San Buenaventura thanked Chief Justice Recktenwald for talking about collaboration. She was proud to be part of the panel as one of the few practicing attorneys in the legislature, and as a solo practitioner in Hilo with a clientele of mostly low- to moderate-income individuals. She noted that low- to moderate-income individuals come to courts primarily for traffic and family law issues. For these issues, self-help court forms are very helpful. One of the first issues Senator San Buenaventura sought to address after her election was the fact that Hawai‘i was one of the few states without domestic relations orders for state employees. Divorced individuals were required to

return to court each month after their former spouse's retirement to request their share of the retirement benefits. Individuals who did not wish to return to court, such as domestic violence victims, sometimes ended up forgoing their shares. Another issue was the lack of automatic restraining orders in divorce cases. Spouses with greater assets sometimes started dissipating assets after filing. With her fellow legislators, Senator San Buenaventura worked to pass legislation making automatic restraining orders mandatory in divorce cases.

Representative Au Belatti participated in the panel virtually and began by noting that the landscape for access to justice coming out of the recent legislative session was good. For example, on the day before the conference, Governor Josh Green signed several domestic violence bills into law. Representative Au Belatti focused the remainder of her opening remarks on mental health initiatives. In 2020, the legislature passed Act 26, which was aimed at diverting non-violent misdemeanants from the criminal justice system to mental health treatment centers. Since then, there has been a collaborative effort among the Department of Health and Human Services, judiciary, prosecutors, public defenders, and agencies such as the Office on Homelessness and Housing Solutions to identify and provide resources for these non-violent defendants. Representative Au Belatti described Act 26 as an opportunity to take up the challenge offered by Judge Gertner. Through the efforts of individuals and groups such as Representatives David Tarnis and Sonny Ganaden and the Malama Ohana Working Group, the legislature is working to address issues such as mass incarceration and child welfare.

Deputy A.G. Walther discussed efforts by his clients, the Department of Human Services (DHS) and the Department of Health, to provide services to low- to moderate-income individuals. Legal services to these individuals may be limited, but they can have a huge impact on an individual who receives assistance obtaining a restraining order, for example. Deputy A.G. Walther noted that each of the DHS benefits programs has rules allowing individuals to challenge benefits decisions. A challenge first results in an informal review. Individuals then may request an appeal. Appeals of benefits decisions are intended to be informal and simple. Hearings in administrative appeals are offered via telephone, Zoom, and Teams. These virtual appeals hearings increase access for individuals who have limited mobility or who live in rural areas. After an administrative appeal, individuals may appeal to the circuit court. LASH often will provide representation for individuals at this stage. DHS, the Attorney General's Office, LASH, and the judiciary have been participating in a roundtable to increase access to these types of legal services.

Chief Justice Recktenwald picked up on Deputy A.G. Walther's comments regarding the roundtable and noted that the idea was borrowed from the federal government. Different federal agencies that came into contact with low- to moderate-income individuals met to discuss overlapping interests such as access to services and access to the courts.

Chief Justice Recktenwald began his remarks by echoing Judge Gertner's observations regarding the overlap between the criminal justice system and access to civil services. He described a formerly common scenario of an individual on the street with obvious mental illness. If the individual became disruptive and was arrested, and if the public defender did not believe the individual could meaningfully engage with the public defender, the individual likely remained in jail for a period before being transferred to a mental hospital and then released with no follow-up services.

Chief Justice Recktenwald observed that some courts have started treating these individuals differently. In Miami-Dade County, courts are diverting mentally ill individuals from the criminal justice system whenever possible.

In Hawai'i, Act 26 was a modest first step. Petty, non-violent misdemeanants are evaluated quickly. If they are determined to be competent, they remain in the criminal justice system. If they are determined to be incompetent, they are released, but with a warm hand-off to available services. More recently, a team from Hawai'i, with representatives from the judiciary, prosecutor's office, and public defender's office, traveled to Miami, Florida, to learn more about what Miami courts are doing to divert a broader category of people from the criminal justice system.

Chief Justice Recktenwald remarked that a lot of progress has been made. For example, the state has removed some of the barriers to using assisted community treatment as an alternative to civil commitment. Assisted community treatment allows individuals to remain in the community, subject to receiving ongoing treatment. There were a few initiatives that have not been implemented. One initiative was to establish a drop-off center as a place where police officers can bring individuals to engage with doctors and nurses and receive opportunities for treatment rather than entering the criminal justice system. This is a practice that works well in Arizona.

Questions and Answers. The panel then responded to questions from attendees.

In response to a question regarding representation by non-lawyers in administrative hearings, Deputy A.G. Walther noted that nonlawyers may represent individuals in any administrative hearing. Once a decision is appealed to circuit court, however, the representative must be an attorney.

In response to a question regarding homelessness, Senator San Buenaventura discussed past consideration of ideas such as housing individuals on Navy carriers or cruise ships and in packaged homes. Representative Au Belatti discussed a pilot program to build housing that

targeted populations with special needs. Senator San Buenaventura added that the target population included individuals who had been recently released from incarceration or were undergoing detoxification treatment. This housing would help to meet the needs of homeless individuals who require five to fifteen days of housing to get stabilized. This is a longer duration than can be supported by emergency rooms (overnight stays only), or kauhale villages (three- to five-day stays only).

Senator San Buenaventura discussed another critical idea that came out of the pandemic: getting landlord-tenant issues mediated. She noted that, in cases that were mediated, 85% resulted in tenants being able to remain in their homes. Before the pandemic, just 11% of summary possession cases were resolved in settlement discussions. This was a huge improvement. Critically, landlords were treated fairly. They had access to funds to keep tenants in their homes. There are proposals to reinstate mediation with access to funding.

In response to a question regarding mental wellness and access to justice, Senator San Buenaventura discussed efforts to increase access to support, particularly on neighbor islands. Initiatives include pilot programs for mobile clinics providing mental health services for children and adolescents on Oahu and Hawai'i Island, efforts to allow psychologists to prescribe medication, and the interstate medical licensure compact. Representative Au Belatti echoed Senator San Buenaventura's comments, agreeing that there is more work to be done. One success has been House Bill 907, which formalized reimbursement for telehealth services. This is an area that will be very important in terms of increasing access to mental health treatment.

In response to a question regarding homelessness and emergency proclamations, Senator San Buenaventura stated that there is question whether the emergency proclamations, which have been in place for over six years, are constitutional. There is a need for options such as kauhale villages, but the emergency proclamations may be challenged in the future. Deputy A.G. Walther shared that his office is working on a legislative proposal to allow for development of shelters or temporary housing in a way that expedites the process so emergency proclamations are not necessary. Representative Au Belatti discussed the use of emergency proclamations to navigate the requirements to contract for services to assist vulnerable individuals.

In response to a question regarding the time for decide appeals, Chief Justice Recktenwald stated that the Intermediate Court of Appeals (ICA) has a huge caseload. Since 2006, the ICA has heard nearly all appeals from trial courts and some state agencies. A seventh judge was added to the ICA, and additional staff attorneys have also helped with managing the caseload. There is also an ability to appoint former ICA judges to assist the ICA on a temporary basis.

In response to a question regarding per diem judges, Chief Justice Recktenwald shared that practicing lawyers can be appointed to sit as needed as a district court or family court judge. Per diem judges assist the courts in fillings gaps and gain experience and an ability to show that they can be effective on the bench.

In response to a question regarding training for law enforcement officials, Senator San Buenaventura agreed that there is a need for more education and funding. Chief Justice Recktenwald discussed the work of task forces focused on pretrial reform and prison oversight. The panel also discussed the need to provide cost of living adjustments to attract and retain service providers, court appointed attorneys, and court interpreters.

In response to a question regarding access to justice for young adults, Senator San Buenaventura observed that youth and young adults face a number of issues, including child abuse, sleep deprivation, mental health issues, a lack of safe places, a need for self-help to escape abusive or exploitative situations, and the epidemic of youth suicide.

In response to question regarding prisons, Senator San Buenaventura agreed that more space is needed. Representative Au Belatti stated that there are a number of open questions that tie into the issues the panel had been discussing. To have a right-sized prison, the community must have services in place to divert individuals from prison.

Final remarks. In her final remarks, Senator San Buenaventura agreed that there is still a lot of work to be done on issues such as civil asset forfeiture without representation by court-appointed attorneys and increasing exemptions from creditors. Representative Au Belatti echoed Judge Cardoza's call for hope and expressed a need to work together to find solutions. Deputy A.G. Walther pointed to successes in finding alternatives to incarceration and the Hawai'i Youth Correctional Facility. He expressed his appreciation for the opportunity to jointly discuss and shape policy and legislation. Chief Justice Recktenwald discussed a number of successes and initiatives, including a reduction in juvenile detention of approximately 80%, the creation of a criminal justice research institute in the judiciary, expansion of the drug court model to women's court, and efforts to apply improvements in the juvenile justice system to adults.