Trial Court Consolidation in Hawaii: The Road Already Taken?

Susan Ekimoto Jaworowski
Researcher

Report No. 4, 1991

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813

FOREWORD

This study was prepared in response to House Resolution No. 68, adopted during the Regular Session of 1991. The Resolution requested an examination of the feasibility of consolidating Hawaii's two tier trial court system into one tier. The Resolution also requested information concerning the history and rationale behind establishing the two tier system, an evaluation of the current trial court system and judicial administration, the rationale behind the differing job requirements and qualifications for judges in the two tiers, and the feasibility of establishing the same requirements for all trial level judges.

The assistance of Bureau researcher Charlotte Carter-Yamauchi was a significant factor in the timely completion of this study. Ms. Carter-Yamauchi interviewed many of the circuit court judges and provided invaluable input into several areas, including the structure of the district court questionnaire.

The Bureau extends its appreciation to all who cooperated with and participated in this study, particularly Chief Justice Herman Lum; Dr. Irwin Tanaka, Administrative Director of the Courts; and C. Michael Hare, Chairman of the Judicial Selection Commission. It is hoped that the issues raised by the study will assist the Legislature and the Judiciary in making further inquiries and decisions on this matter.

Samuel B. K. Chang
Director

November 1991

TABLE OF CONTENTS

Page

Appendices

CHAPTER 1

INTRODUCTION

Nature and Scope of this Study

The House of Representatives of the Sixteenth Legislature of the State of Hawaii, Regular Session of 1991, adopted House Resolution No. 68 (see Appendix A), requesting the Legislative Reference Bureau (Bureau) to study specific facets of the trial court system in Hawaii. The resolution states that at present Hawaii has a dual trial court system composed of a circuit court and a district court, and points out that the qualifications for judges differ between the courts. The resolution further states that all litigants have the right to a qualified judge and that the requirements for all trial judges should be the same. Last, the resolution notes that the dual system of trial courts appears to duplicate judicial administrative functions and that some observers view this as inefficient and wasteful.[1]

The Bureau is requested to study the feasibility of merging the two trial court systems and include an examination of the following four issues:

(1) The history and rationale behind establishing two trial court levels;

(2) An evaluation of the Hawaii trial court system and whether it meets the rationale and objectives of its origination;

(3) An evaluation of the present judicial administration and whether there is a duplication of practices and functions; and

(4) The rationale behind the differing job requirements and qualifications for judges at the district and circuit court levels, and the feasibility of establishing the same job requirements and qualifications for all judges at the trial court level.

The study contains seven chapters. The first is this introduction. The second discusses the history and rationale behind our present two tier trial court system. The third discusses the history of trial court reform in this century, describes the differing views on the elements of a consolidated system, and briefly examines the structures of ten states generally considered to have consolidated systems. The fourth chapter evaluates the current trial court system and judicial administration. Chapter five reports on the differences between circuit and district court judicial functions as evaluated by the judges themselves, and discusses the judges' positions on court consolidation. Chapter six discusses the feasibility of consolidating the trial court system in Hawaii. Chapter seven contains the findings and conclusions.

ENDNOTES

1. The resolution also states that "the number and organization of the trial courts generally indicate the amount of cases the judiciary disposes of in a given time period." This statement does not appear to be supported by the evidence examined in researching this study. The resolution also states that the circuit court is provided for by the state constitution and the district court was established by the legislature. Actually, both courts are specifically authorized by the state constitution.

CHAPTER 2

HISTORY OF THE TRIAL COURT SYSTEM IN HAWAII

Pre-1840 Judicial System

Prior to the Constitution of 1840, the system of government in the Kingdom of Hawaii was feudal in nature.[1] Under this system, all functions of government, including the judicial function, were carried out by the king and the chiefs.[2] According to a monograph written by former Chief Justice Philip L. Rice, "there was no distinct judiciary and scarcely any conception of distinct judicial power, and yet judicial forms were to some extent observed. Our authentic knowledge of them is meager."[3] The kings and the chiefs, including the minor chiefs, served as judges. One who had suffered an injury could either rectify matters personally, or, if the wrongdoer was of higher rank or a subject of another chief, the injured party could appeal for justice to any chief within whose territory the wrongdoer resided, or to the king himself. "Any chief from the immediate lord of the wrongdoer to the king might take cognizance of the offense[,] and from the decision of any chief an appeal lay to any one of his superiors."[4]

During the reign of King Kamehameha I, the courts were reduced to three types: the supreme court, presided over by the king; the island or superior court, presided over by the governor of the island; and two classes of inferior or district courts, one presided over by the underchiefs and the other by tax officers. There were also ecclesiastic courts, but with the death of King Kamehameha I in 1819, they ceased to exist.[5]

The Constitution of 1840

The Constitution of 1840 codified the traditional three branches of government.[6] However, again the implementation left something to be desired in terms of American notions of separation of powers: the Supreme Court consisted of members of the executive branch (the king, the premier, and four other chiefs), and the island courts were still held by the governors of the island.[7] As there were no attorneys in Hawaii until 1844,[8] there were no requirements that anyone in the judicial process be an attorney.

The next reference to the court system occurs in the session laws of 1842, relating to the lower trial level courts. It states that tax officers and the district judges were to sit without a jury, the former to hear tax and landlord-tenant cases, and the latter to hear other cases in which the fine or damages amounted to less than $100. Cases in which the penalty was greater were heard by the governor's courts, or even by the Supreme Court.[9]

It appears from the session laws that trials involving foreigners were initially heard before the supreme court.[10] Rice states that in 1844 special judges were appointed on Hawaii and Kauai to handle cases involving foreigners, but this is not reflected in the session laws of the times.[11]

In 1847 the Legislature enacted "An Act to Organize the Judiciary Department." It provides for the appointment of one or more judges in Honolulu to have original jurisdiction in cases over $100 in value, and appellate jurisdiction over cases from the lower courts.[12] This court was denominated the "superior court of law and equity" and functioned as a governor's (later circuit) court.

Another lower trial court was added in Lahaina and Honolulu: "police justices" were established to sit in cases with value less than $100. According to Rice:[13]

> A police justice differed from a mere district justice chiefly in respect that the former had jurisdiction over cases arising on the high seas as well as those arising in his district and when there were both a police and a district justice in one district, the latter had no jurisdiction over foreigners; and for the purposes of arrest, examination and commitment in criminal matters the former ... had jurisdiction over the entire island or circuit in which his district was situated.

The 1847 legislation also reorganized the former governor's courts and changed their designation to circuit court.[14] The circuit courts had appellate jurisdiction from cases heard in the lower courts, and original jurisdiction in most other cases. As there was still a "great lack of men learned in the law available as judges," the supreme court judges went individually to the various circuits to sit with the circuit court judges and try cases.[15]

In 1850, the superior court of law and equity in Honolulu was given concurrent jurisdiction with the circuit courts over civil and criminal matters.[16] Also in 1850, the first Penal Code was established, specifying the criminal jurisdiction of the trial courts.[17]

In 1851, the judicial powers of the tax officers were removed and given to the "ordinary courts of justice."[18]

In 1852, a new constitution and new session laws again changed the face of the Judiciary. The Constitution of 1852 provided that the powers of the State should not be united in one person, and so the former Supreme Court, led by the king, was abolished, and its powers given to the superior court of law and equity on Oahu.[19] The Supreme Court also handled the Oahu circuit court matters, and there was no separate circuit court during this time.[20]

In 1856 a new court was instituted, the Commission of Private Ways. This court was established in each district to settle claims for rights of way arising from the Great Mahele. In 1860, the court was also given jurisdiction over water rights. This court was later abolished.[21]

The 1859 Civil Code set forth the civil jurisdiction of the trial courts,[22] and also specified that a license to practice law was not necessary to practice in any police or district court.[23]

In 1873, the practice in police and district courts was restricted; a practitioner now had to be examined and admitted by either the supreme or circuit court before he could practice. Each license to practice was for a two-year term.[24] This law was reiterated in 1878.[25]

Some major revisions were made to the judicial system in 1892. The different categories of district and police justices were merged, and all became district magistrates, holding the same powers that the police justices had had.[26] At this time, original jurisdiction of most actions (except some writs) was removed from the supreme court, leaving it with only appellate jurisdiction. Its powers of original jurisdiction were transferred to the circuit courts, and a circuit was reestablished on Oahu.[27] An additional change was the establishment of a procedure to appoint a substitute to sit for the district magistrates when a position became temporarily vacant.[28] This is the genesis of the criticized but heavily used per diem judge system in use today.

The Provisional Government and Annexation

In 1894, at the time of the provisional government, there were thirty-five courts in the State: one supreme court, 5 circuit courts, and twenty-nine district courts.[29] After annexation of July 9, 1898, President McKinley directed that the officers of the Republic of Hawaii continue to exercise the powers held by them.[30] The court system apparently remained in place until the territorial government was organized.

The Territorial Period

The court system underwent some changes during the territorial period. In 1909, financial responsibility for the district courts was transferred to the counties,[31] although the system was apparently still administered by the state Judiciary.

The number of circuits was reduced to four in 1943 by combining the third and fourth circuits on the island of Hawaii.[32] By the time of statehood, the number of district courts had been reduced to eighteen.[33] Each district court was presided over by a district magistrate. The district courts were not courts of record.[34] This meant that appeals from them were heard by the circuit court, which was a court of record, and that further appeals could be taken based on the circuit court record to the supreme court. Only the district judges in North

and South Hilo, Puna, Wailuku, and Honolulu, needed to be attorneys; the rest needed merely to be an "elector" of the county and pass an examination for admission to the district courts, except for the district magistrate of Kalawao, who need not have passed the examination.[35] District magistrates were further distinguished by their jurisdictional limits; magistrates in the county of Hawaii, Wailuku, and Honolulu had jurisdiction over claims up to $2,000, while the other had jurisdiction only up to $1,000.[36] Non-attorneys licensed by the supreme court were still allowed to practice law in the district courts, except that after January 2, 1940, no additional practitioners could be licensed in the First Judicial Circuit, except for the district court of Kalawao.[37]

Two divisions of circuit court were established: juvenile court headed by a selected circuit court judge in each circuit, and land court, presided over, for the whole State, by a selected circuit court judge from the Honolulu circuit.[38]

Statehood

The first constitution of the State of Hawaii[39] made only minor changes to the judicial system. The only significant change was that, for the first time, circuit court judges were required to have been licensed to practice in the State for ten years before they could be appointed. A statutory change was also made to the district court practitioner law, forbidding new practitioners after July 1, 1959.[40]

In 1965, Act 97 of the Hawaii Legislature declared that the administration and operation of district courts was now to be a state function. The district court judges were transferred to the direct control of the Judiciary. Also at this time the juvenile court was abolished and family court, a division of circuit court, was established in its place.

In 1967, a tax appeal court, another division of circuit court, was added. Like land court, it was made the responsibility of one of the Honolulu circuit court judges. All claims had to be filed in the Honolulu circuit.[41]

In 1970, the district courts were reorganized.[42] Major changes included the creation of a single district court for each county and the establishment of district courts as courts of record. This latter change was quite important to the overall administration of justice as it was the necessary prerequisite to making appeals from district court directly to the supreme court, instead of the cumbersome and time-consuming process of having all district court judgments appealed to circuit court for a new trial. Another change was to abolish the term "district magistrate," replacing it with the term "district judge." Jurisdiction was increased in civil actions from a limit of $2,000 to $5,000, and the salary of the district judges was set at eighty per cent of that of the circuit court judges. The requirements for district judges were licensure as an attorney in the State for at least five years. Additionally, the category of temporary district magistrate, in place since 1892, was changed to per diem judge. All these changes were effective January 1, 1972.

In 1972, the jurisdiction of the district courts was enlarged to include landlord-tenant cases and small claims cases.[43]

In 1973, a further change was made in the family law area. Chapter 571, Hawaii Revised Statutes, which regulated family law referees who helped the circuit family court judge, was amended by transforming the family court referees into district court judges.[44] District family courts were permitted to be established in each judicial circuit (as opposed to the circuit family court, which was mandatory). The requirements for an appointment as a district family judge were the same as that for regular district judges, with the same compensation, except that the requirement that the judge be a licensed attorney was not to apply to incumbent referees. Jurisdiction over cases to be heard by the new district family judges was to be decided by the judge of the family court of the circuit.

In 1974, in an Act entitled, "A Bill for an Act Clarifying the Relationship of Executive Agencies with the Judicial Branch and the Legislative Branch,"[45] the Legislature found that, while the state constitution provided for three separate and co-equal branches of government, the Hawaii Revised Statutes were not completely consistent with that principle. The Act affirmed the Judiciary's status as an equal branch of government, and required it to submit its own budget.

The 1978 Constitutional Convention created a middle tier court, the intermediate court of appeals, to hear appeals as authorized by the supreme court.[46]

Today

The present judicial structure contains two appellate courts, the supreme court and the intermediate court of appeals, and two trial courts. The lower level trial court (also referred to as a court of limited jurisdiction) is the district court. There is one district court in each county. Honolulu has twenty-three judges (fourteen designated regular district judges, nine designated district family judges), Maui has five (two regular, three family), Hawaii has five (two regular, three family), and Kauai has two (both regular).[47] The statutes also provide for per diem judges (literally, judges by the day) to supplement the district court judge staff.[48] The use of per diem judges in Hawaii is quite extensive, as the per diems, in addition to filling in for district judges when they are ill or on vacation, substitute for the district judges when they are called to sit on the circuit court, which occurs frequently. The district court judges are transferred at the discretion, and by order, of the Chief Justice.

The district court hears civil cases in which the monetary value is not more than $10,000,[49] all landlord-tenant and small claims matters,[50] violations of county ordinances,[51] and criminal misdemeanors in which the offense of punishable by fine and/or imprisonment

for up to a year.[52] In addition, the district family court hears almost all family law related matters, including divorce, domestic violence, and cases involving juveniles. The district court does not have jurisdiction over matters in which a jury trial is requested, real actions including title to real estate, libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction.[53] For years the salary of district judges was set at eighty per cent of the salary for circuit court judges, but that gap has been narrowed recently. The salary for all district judges is set as of January 1, 1990 at $81,780 per year.[54] In 1988, the last district court practitioner passed away, and so the Legislature abolished the category of district court practitioner in 1989.[55] Now each person practicing law in district court, with the exception of persons representing themselves, must be a licensed attorney.

The upper level trial court (also known as a court of general jurisdiction) is the circuit court. There is one circuit court in each county. The Honolulu circuit has eighteen judges, Maui has three, Hawaii has three, and Kauai has one. The circuit court has concurrent jurisdiction with the district court of civil matters in which the amount in controversy is between $5,000 and $10,000, and exclusive jurisdiction of matters greater than $10,000. The circuit court also hears criminal felony matters, probate, land court, tax appeals, suits relating to the execution of trusts, foreclosure of mortgages, and for the specific performance of contracts. The salary of the circuit judges, as of January 1, 1990, is $86,780 per year, $5,000 more than the salary of the district court judges.[56]

Trial courts in Hawaii 1840 - 1991

Year	Courts hearing trials de novo
1840	Supreme Court (also appellate) Governor's Court (also appellate) "Common judges" Tax Officers
1847	Supreme Court (also appellate) Circuit Court (formerly governor's court) (also appellate) Superior Court of Law & Equity (also appellate) Police justices District courts (the "common judges") Tax officers
1852	Supreme Court (old court abolished, Superior court renamed) (also appellate) Circuit courts (also appellate) Police justices District courts
1892	Circuit courts (also appellate) District courts (merger of police justices and district judges)
1965	Circuit court (also appellate) divisions: family and land courts District court (transferred from counties to State)
1967	Circuit court (also appellate) divisions: family, land, tax appeal District court
1970	Circuit court divisions: family, land, tax appeal District court (made courts of record)
1972	Circuit court divisions: family, land, tax appeal District court division: small claims
1973 and today	Circuit court divisions: family, land, tax appeal courts District court division: small claims court District family court

Summary

While the trial court system in the Kingdom of Hawaii had up to six courts handling trial matters at one time, since 1892, Hawaii's present two tier system of a circuit and a district court has basically been in place. These courts have roots in the 1840 constitution, the circuit courts arising from the governor's courts and the district courts from the so-called "common judges." There is also a supplemental system of judges at the district court level, called per diem judges, who are used to substitute for the district judges when they are ill, on vacation, or temporarily assigned to the circuit court.

ENDNOTES

1. Philip L. Rice, Chief Justice, Supreme Court, "The Judiciary of Hawaii," (undated) typed pamphlet, 34 pp., at 2 (hereafter Rice). Note: Rice states that the material concerning the early Hawaiian legal system comes from Chief Justice Walter F. Frear's "The Evolution of the Hawaiian Judiciary," Hawaiian Historical Society Paper No. 7, June 29, 1894.

2. Id.

3. Id.

4. Id. at 3.

5. Id. at 7.

6. For an interesting social history on the impact of Westerners in forming the court system, see Jane L. Silverman, "Imposition of a Western Judicial System in the Hawaiian Monarchy," in The Hawaiian Journal of History, vol. 16 at 48-64 (1982).

7. Rice, supra note 1, at 8.

8. Id. at 10.

9. Id. at 8-9.

10. Chapter XLVII, Laws of 1842, section 15, as the law states that "[t]here are only two places [Oahu and Maui] where there is a sufficient number of foreigners to justify the holding of a session of the Supreme Court among them [because either 8 or 12 foreigners would be required for the jury]."

11. Rice, supra note 1, at 14.

12. Id. at 13.

13. Id. at 16-17.

14. Id. at 19.

15. Id. at 18.

16. Act to Extend the Jurisdiction of the Superior Court and of Police Justices of Honolulu and Lahaina, (unnumbered) July 10, 1850.

17. The courts had jurisdiction over the minor forms of the following offenses: assault and battery; adultery and fornication; larceny; embezzlement; receiving stolen goods; gross cheats; malicious injuries; cruelty to animals; felonious branding of cattle; furious and heedless riding, driving, or conducting animals and frightening animals; obstructing and perverting the course of justice; affrays; drunkenness, blasphemy, and profanity; disturbing religious worship and violating the Sabbath; common nuisances; being a vagrant or disorderly person; gaming; disturbing the quiet of the night; and keeping a disorderly house. The Penal Code of the Hawaiian Kingdom, 1850, Chapter LIII.

18. An Act Transferring to the Courts of Justice the Judicial Power of the Tax Gatherers, (unnumbered), August 4, 1851.

19. Rice, supra note 1, at 17.

20. Id. at 20.

21. Id. at 21.

22. The circuit courts had jurisdiction over all civil suits involving an amount of indebtedness or claim greater than $100; all suits involving private actions sounding in consequential injury or damages, regardless of amount; the power to partition real estate; grant writs of ejectment and possession; admeasure dower; affiliate bastards; grant warrants of summary arrest and imprisonment; restrain by writs of ne exeat, injunction, and attachment; enlarge prisoners on bail; decree annulments, divorces, and separations; and foreclose on real estate or chattels. The Civil Code of the Hawaiian Islands, 1859, section 880. The original criminal jurisdiction was defined as everything not covered by the police and district courts, except for death penalty cases, which were to be heard by the supreme court. Id., section 881. The police justices had jurisdiction over torts and wrongs arising on the high seas, of controversies between masters and crews of vessels (subject to certain exceptions), and over civil cases where the property in dispute is not over $100. Id., section 893. The district courts had jurisdiction of all cases in which the amount in controversy, in a civil case, or the amount of the fine for the specified criminal offenses in the Penal Code, did not exceed $100, except that the district court had no jurisdiction over foreigners if there was a police justice in the same district. Id., sections 915 and 916. The police and district justices lacked the power to try jury cases or any case involving slander, libel, defamation of character, malicious prosecution, breach of promise of marriage, false imprisonment, or seduction. Id., sections 903 and 920.

23. Id., section 1073.

24. Chapter XXXI, sec. 31, Session Laws of 1878.

25. Chapter 31, Session Laws of 1878.

26. Rice, supra note 1, at 17.

27. Id. at 19-20.

28. Chapter 57, §26, Laws of 1892 provided that "[i]n case of the temporary disqualification of any District Magistrate from any cause, some other person may be appointed by the Circuit Judge ... to perform the duties of the office for the time being." Earlier that year, the enactment of chapter 20 also provided for the appointment of acting police justices.

29. Rice, supra note 1, at 21. The district magistrates were located at Honolulu, Ewa, Koolaupoko, Koolauloa, Waianae, Waialua, Lahaina, Wailuku, Honuaula, Makawao, Hana, Kipahulu, Molokai, Lanai, Kalaupapa, North Kohala, South Kohala, North Kona, South Kona, East and West Ka'u, South Hilo, Hamakua, North Hilo, Puna, Lihue, Koloa, Waimea, Kawaihau, and Hanalei. Act 12, Laws of the Territory of Hawaii, Special Session 1904.

30. Id. at 22.

31. Act 122, Laws of the Territory of Hawaii passed by the Legislature at its Regular Session, 1909.

32. Chapter 141, Haw. Sess. Laws, 1943.

33. District courts were held at Honolulu, Ewa, Waianae, Waialua, Koolaupoko and Koolauloa, Wahiawa, Hamakua and North and South Kohala, North and South Kona, Ka'u, North and South Hilo and Puna, Lihue and Koloa, Waimea, Kawaihau and Hanalei, Lahaina and Lanai, Wailuku, Makawao and Hana, Molokai, and Kalawao. Act 262, Laws of the Territory of Hawaii passed by the Thirtieth Legislature, Regular Session, 1959.

34. Rice, supra note 1, at 24-25.

35. Id. at 30.

36. Id.

37. Sec. 217-11, Rev. Laws of Hawaii, 1955.

38. Rice, supra note 1, at 31-32.

39. Effective August 21, 1959.

40. Act 3, Haw. Sess. Laws, 1959.

41. Act 231, Haw. Sess. Laws, 1967.

42. Act 188, Haw. Sess. Laws., 1970, effective January 1, 1972.

43. Act 142, Haw. Sess. Laws, 1972.

44. Act 219, Haw. Sess. Laws, 1973, now codified as §571-8, Hawaii Rev. Stat.

45. Act 159, Haw. Sess. Laws, 1974.

46. The amendment was ratified by the electorate on November 7, 1978, and the implementing legislation enacted the following year.

47. According to a list transmitted to the Bureau from the Chief Justice's office. The 1991 Directory of State, County, and Federal Officials, compiled by the Bureau, lists opposite figures for Maui and Kauai.

48. Sec. 604-1, Hawaii Rev. Stat.

49. Except that in civil actions involving summary possession and ejectment, the district court will retain jurisdiction over a properly brought counterclaim even if the counterclaim exceeds that amount.

50. Sec. 604-5, Hawaii Rev. Stat.

51. Sec. 604-11, Hawaii Rev. Stat.

52. Sec. 604-8, Hawaii Rev. Stat.

53. Sec. 604-5, Hawaii Rev. Stat.

54. Sec. 604-2.5, Hawaii Rev. Stat.

55. Act 140, Haw. Sess. Laws, 1989.

56. Sec. 604-5, Hawaii Rev. Stat.

CHAPTER 3

AN EXAMINATION OF UNIFICATION THEORIES AND UNIFICATION IN OTHER STATES

Court unification has been discussed in the United States since Roscoe Pound's seminal address to the American Bar Association in 1906, in which he suggested that the multitude of trial courts plaguing most states be unified into one. In 1940, he changed his view on the ideal number of trial courts from one to two levels, one for civil and criminal cases for all matters "'above the grade of small causes and petty offenses and violations of municipal ordinances,'" and a county court to handle the "small causes."[1]

Commentators have been split on the desirability of one level versus two levels for decades (and there are even a few who regard consolidation as an evil, an evidence of court dysfunction, not a desirable state).[2] After Pound's 1940 change of view, the Municipal League's Model State Constitution of 1942 withdrew its endorsement of a two tier system, while the American Judicature Society continued to support it. In 1962, the American Bar Association also called for a two tier system. In 1963, the Municipal League changed its position again and supported a two tier system, as did the President's Commission on Law Enforcement in 1967 and the Advisory Commission on Intergovernmental Relations in 1971.[3] However, more recent reports have rejected the two tier system in favor of a one tier system, such as the 1971 report of the National Conference on the Judiciary, the 1974 American Bar Association's Commission on Judicial Standards,[4] and the 1990 Standards Relating to Court Organization of the American Bar Association's Judicial Administrative Division.

It has also been noted that considerable progress in court reform can be made without full unification, or as a prelude to full unification:[5]

> Yet, these [specified] steps can be taken, and many of the advantages of a unified trial court realized, without complete merger having been accomplished. Thus, it is possible in a two-level court system to formulate integrated court rules and administrative policies, to establish a single administrative office to serve all trial court levels, to select a single chief judge having general supervisory responsibility for all trial court levels, and to integrate financial administration through a single budget, disbursement, and accounting process. **Adoption of such measures could at the same time improve the efficiency of a two-level system and facilitate the eventual merger of all trial courts into a single system.** (emphasis added)

Simple unification of the trial courts is only one part of the general goal of unifying the trial court system. In 1909, Pound listed three main components of unification: the

organization of judicial personnel, the organization of judicial business, and the organization of judicial administration.[6] These categories have been explored, examined, and reevaluated by many academics, attorneys, and legal organizations in trying to devise the ideal court system. One source lists up to twenty-two possible elements involved in court consolidation,[7] although most authorities list from two to five concepts.[8] The five basic components listed by one prolific author in the field are: consolidation and simplification of court structure, centralized management, centralized rule-making, centralized budgeting, and state financing.[9] Hawaii 's current system is quite unified by these standards, having all of the last four elements and at least, according to some sources, also having the first, as Hawaii's system is simplified into two levels. In fact, some commentators class Hawaii as a state that has a unified court system.[10]

Other sources base the requirements for trial court consolidation on the goals sought: improved quality of justice, better court management, or an enhanced political position for the judiciary,[11] or on the type of unification desired - structural or administrative.[12] The extent to which the commentators focus on such a wide array of topics is a reflection on the complicated and sometimes chaotic organization of other states' court systems, particularly the larger and older states whose systems grew as a function of need and not planning. "Multiple courts and excessive local autonomy have plagued state judiciaries throughout their histories. So many different trial courts existed that at times state lost track of their number, types, and location."[13] When Kentucky was in the process of adopting a new judicial article in 1975, for example, their office of judicial planning undertook a survey of its trial courts. "'In some instances, the staff was not able to locate judges or find the places where court was held.'"[14] New York's system confuses commentators, who disagree at the total of trial courts there (one commentator finally calculates it at thirteen).[15] The court administrator's office in Illinois reported that, prior to consolidation, there were eighteen hundred independent courts in Cook County alone.[16]

Hawaii's court system has never been in that desperate a state, and since the later 1800s has been simple in format. Other unification measures -- unified administration and budgeting -- are mostly in place. The only question for Hawaii is whether Hawaii wants to proceed to further streamline a system that already receives high marks for its organization.[17]

A number of states have attempted to achieve trial court unification. As there are no absolute standards for what constitutes a unified system, the trial court organizations in these states differ between them and from textbook examples. Perhaps one reason for the variations between theory and practice reflect the difficulty of tooling a system for real people, not abstract concepts. As one commentator notes, the[18]

> "single trial court" concept, almost universally recommended by reformers, has proved an elusive goal. Even in the few states that have theoretically achieved that result, the use of magistrates, commissioners or other parajudicial officers has tended to take over the lesser cases in the single trial court.

Another reason could be that consolidation is not merely an end in itself, but is a means of realizing a set of goal and objectives.[19] To the extent the goals of the individual states vary, they will structure their court systems differently.

The writer spoke with court administration officials in five states generally considered to be unified: Illinois, Iowa, Massachusetts, Minnesota, and Iowa, and examined the judicial structure as implemented in the statutes in five more: Connecticut, Idaho,[20] Kansas, Missouri, and Vermont.[21] The results are interesting: only one state utilizes the most extreme type of consolidation, a one tier court with one type of judge system, while the others are more diversified.

Illinois

Illinois sought unification to abolish its tangled multiplicity of courts.[22] Prior to unification, in Cook County alone there were 1,800 separate and independent courts and judges, such as justices of the peace, village courts, county courts, and superior courts, which created tremendous confusion, waste of time, and needless procedural problems. Illinois sought unification to end this confusion, and also because it forecast a more efficient administration with a reduced number of trial courts.

The Illinois system now consists of a single trial court, but with two classes of judges. Circuit judges are elected, and have the broadest jurisdiction. Associate judges are appointed, and can automatically hear any case, except for felonies. They may handle a felony case if granted permission by the Supreme Court of Illinois.[23]

Illinois believes that unification has been a success from an administrative point of view, but that problems still exist. The acting director added that unification is only the first step in improving the court system, and is not, alone, the key. Illinois did face some opposition to unification from local communities, which felt threatened by the loss of "their" judges, and also experienced some opposition from the highest tier of trial court judges.[24]

Currently, judicial assignments vary from county to county. A large metropolitan area such as Cook County has very highly specialized divisions in which judges hear only one type of case. The more rural counties do not have the luxury of divisions, and each judge there must hear the gamut of cases. However, even in a county with judicial divisions, judges are viewed as fully interchangeable, and it is possible that a judge could spend one day hearing a felony matter and be transferred to probate court the next.

Iowa

While the Iowa judicial system has only one trial court, that system is composed of three types of judges with overlapping jurisdictional capabilities: judicial magistrates, district associate judges, and district judges.[25] The judicial magistrates are part-time, and are not

required to be lawyers. They have jurisdiction over small claims matters up to $2,000, traffic offenses, parking violations, and simple misdemeanors with a maximum of a $100 fine or thirty days in jail. They can also handle preliminary hearings and initial appearances for any case. The district associate judges serve full time and must be lawyers. They have jurisdiction over all of the above matters, plus the "indictable misdemeanors" such as drunk driving and drug charges, with a maximum penalty of two years in jail and/or a $5,000 fine. On the civil side, they can handle cases where the amount in controversy is up to $5,000, mental commitments, and juvenile matters. The district judges have jurisdiction over everything.

Trial court consolidation was only part of Iowa's goal to generally improve its court system by improving its economies of scale, ease of use for citizens, simplicity and responsiveness, and its equality across the state. The judiciary is "very happy" with the results of its reforms. Cases have continued to move, and more rapidly than they would have in the past. Overall management of the system is better due to changes in accountability.

The judicial assignments depend on the district, although all of the judges do a lot of rotating. In Des Moines, for example, out of the thirteen or fourteen judges, a few would be assigned for a year to domestic relations, three to the criminal divisions, and the rest would have general jurisdiction to handle anything. The judges are rotated annually by the chief judge of the judicial district. Outside of the metropolitan areas, the judges do not only handle all types of cases, but are rotated to different counties at least quarterly.

There was little opposition to consolidation. Both the bar and the judges association supported it, while there was some opposition from some of the justices of the peace. Many of the prior judges were "grandfathered" into the new positions: for example, the municipal court judges basically became the new district associate judges. Unlike Hawaii, there were no requirements that judges be licensed for a particular number of years before becoming eligible for the bench.

Massachusetts

While others may bill Massachusetts as a unified court, one administration official in the Supreme Judicial Court likens its organization to merely dropping an administrative superstructure onto the pre-existing multi-trial court system.[26] The pre-existing courts (housing, land, probate and family, Boston municipal, juvenile, district, and superior) were renamed "departments" of the trial court of the commonwealth with their statutes generally remaining intact.[27] The tendency of the departments to retain their original character can be seen through the judicial assignments and statutory references.[28] Some of the older judges were simply grandfathered in with an assignment to a specific department, while the more recent judges are more often appointed "at large," to handle a broad mix of cases. While this format may facially appear to be unified, it lacks many indicia of administrative unification and appears more as an attempt to please everyone involved rather than a full-fledged attempt at unification.

Massachusetts sought unification as a way to make better use of existing judicial resources, and to improve a "bad situation" without adding personnel. Thirteen years after unification, the trial court system continues to receive criticism, including allegations that the situation is as bad now as it was prior to unification in 1978. A recent article in the American Bar Association Journal classified the system as a "trial court system on the verge of collapse," citing numerous problems referenced from a recent $150,000 management study of the system. The study recommended "unifying the seven departments of the court by 1996 under a court administrator."[29] Whether a fully-integrated unified system along these lines will succeed in Massachusetts cannot be ascertained at this time.

Minnesota

Minnesota labels itself a state with a unified court system. It has only one trial court, but the judges are assisted, in specialized areas, by county-supported referees. The goals of trial court consolidation were to reduce travel costs for the judges, increase judicial efficiency, and reduce delay and backlogs.[30] The goals of consolidation have been met, although other delay-reduction programs have also been instituted. Judges can now be moved around to maximize their usefulness. This is particularly necessary in the large, sprawling rural areas. Even in the metropolitan areas such as Hennepin County, all judges handle each different type of case, except in the areas of family, juvenile, and probate, which are special, one-year assignments. For these three areas -- family, juvenile, and probate -- county-funded referees sit with the judges. These referees can do anything that the parties agree they can, but a judge must still sign all orders. The unification was opposed by the judges of the court of general jurisdiction (the equivalent to Hawaii's circuit court), while it was favored by the judges holding the lesser positions.

The planning for unification and implementation took five years. The Judiciary first permitted voluntary unification in each judicial district by a majority vote of each bench, and later the unification was made mandatory. The more established judges in the court of general jurisdiction were allowed to opt out of handling the work previously done by the judges holding lesser positions. Initially some of the districts agreed to unification only if their high level judges could remain doing high-level work, and not have to handle the more mundane matters. At the present, only one district still has this type of restriction.

South Dakota

While South Dakota is frequently referred to as a unified court, its structure differs little from Hawaii's. It has one trial court of general jurisdiction, and a law magistrate court, which is a court of limited jurisdiction.[31] There are two types of magistrates in the law magistrate court: lay magistrates and law-trained magistrates. The lay magistrates are composed of the non-lawyer clerks of the court, and are empowered to receive guilty pleas in minor cases such as small claims. They cannot hear contested cases. The law-trained magistrates, consisting

of lawyers, usually part-time, hear civil matters up to $2,000 in damages, and handle criminal misdemeanors. The circuit court receives the more serious civil and criminal matters.

South Dakota sought unification as a way to reduce the number of trial courts and to decrease the backlog of cases. Opposition was experienced from some counties, which felt that they had lost control over their judges, and from the bar, which initially opposed the law-trained magistrates. However, over the years the law-trained magistrates have become accepted.[32] There was minimal opposition from the judges to the unification.

Judicial assignments differ between the metropolitan and rural areas. In metropolitan areas, the judges have developed a system of rotation. Each judge will eventually handle all types of cases. The only exception occurs in handling juvenile cases. In rural areas, because of the smaller number of judges, all judges handle every type of case.

At the time of unification, each judge had to run for office again. Almost all of the circuit court judges were retained, but many of the county judges did not make the transition to the unified system.

Connecticut

Connecticut, another state frequently referred to as unified, has more than one trial-level court. While Connecticut has repealed its municipal courts and courts of common pleas, leaving its Superior Court as the sole trial court,[33] it still retains a separate probate court,[34] a system of magistrates for handling small claims cases and taking pleas for motor vehicle violations and minor infractions,[35] and a family support magistrate division within the Superior Court to handle child and spouse support matters.[36]

Idaho

The Idaho court system consists of one trial court called the district court, with three classes of judges. The regular district court judges have original (trial) jurisdiction over all cases and proceeding, as well as appellate jurisdiction over all cases assigned to the magistrate's division of the district court.[37] The magistrate division of the district court has jurisdiction over civil matters where the amount in controversy is not over $2000, and over misdemeanors and "quasi-criminal" actions.[38] There are two categories of magistrates, attorney and non-attorney magistrates. The attorney magistrates have broader jurisdiction than the others.[39]

Kansas

The Kansas system uses two types of courts, a municipal court to hear and determine all cases involving violations of city ordinances[40] and a district court to hear all other cases of original (trial) jurisdiction, as well as appeals from the municipal court.[41] Within the district court system, there are two classes of judges: district judges and district magistrate judges.[42]

The district judges have "full judicial power,"[43] while the district magistrates are more limited, having jurisdiction over more minor offenses such as misdemeanors, state traffic infractions, and certain civil actions where the amount in controversy is not over $10,000.[44]

Missouri

Missouri facially has a single tier court system, but it has significant internal divisions. There are municipal courts that are technically a division of the circuit court, although municipal judges in cities with a population over 400,000 are not subject to circuit court management, docketing, or rules.[45] The circuit court proper utilizes two types of judges, circuit judges and associate circuit judges. The circuit judges have full jurisdiction over cases, while the Missouri Constitution gives associate circuit judges the power to hear and determine cases "as now provided by law for magistrates or probate judges," and they may also be assigned other cases by law.[46]

Vermont

The Vermont trial court system involves four types of trial courts. The superior court has jurisdiction over all civil actions, except for family law issues, environmental issues, and issues delegated to the district court.[47] The district court handles small claims, DWI license suspensions, extraditions, traffic violations, and liquor, fish and wildlife, and drug forfeitures.[48] The family court, in addition to regular judges, also contain the "office of magistrate." The magistrates can establish, modify, and enforce child support obligations and hear cases under the Uniform Reciprocal Enforcement of Support Act.[49] Last, there is the environmental law division, a division within the judiciary, that is run like a superior court, but has exclusive jurisdiction over environmental issues.

Summary

Only one state - Massachusetts - has a trial court system like that envisioned by the Judiciary: one in which there is a single court with all judges at the same level. That state's implementation of its unification has been half-hearted and its current functioning characterized as being on the verge of a breakdown. Of the rest of the states, five have a single trial court, but use two or three types of judges (denominated associate judges, magistrates, or referees) to assist in handling the caseload. This division of judges often involves different types of qualifications for each type of judge and prohibits them from being freely interchangeable. (The ability to freely exchange judges to fill in for each other is one of the reasons cited by the Hawaii Judiciary for the proposed consolidation.) Three other states are similar to Hawaii in that they have two courts at the trial level, one handling the major matters and one the minor. One other state has four trial level courts.

These observations illustrate the extent to which a disagreement exists as to what elements a unified trial court system should contain. The original Roscoe Pound 1906 model postulated only a single trial court, but his 1940 plan adopted two level of trial court, as

Hawaii has today, dividing the jurisdiction between major and minor cases. Even the courts that facially appear to have a single level in fact are generally divided into internal divisions handling specified major or minor cases.

It appears that Hawaii, with its two level trial court each with one type of judge, is already very unified -- comparable in degree to other states that claim to be or are referred to as being unified. Further unification into a system with one trial court and only one type of judge would rank Hawaii among the top two most unified court systems in the country. It is noteworthy that even Massachusetts, with its single tier, single type of judge system, places its judges into specialized divisions. If Hawaii decides to follow a one tier pattern like that in Massachusetts, the State should also consider the benefits of separating judges into specialized divisions to maximize judicial efficiency. Use of divisions might also address the concerns of many circuit court judges and district family judges (see chapter 5) who want to continue to handle the type of cases they are presently handling and who do not want to handle other types of cases.

ENDNOTES

1. Larry C. Berkson, "The Emerging Ideal of Court Unification," Judicature, Vol. 60, No. 8, at 372, 373 (March 1977). (hereafter Emerging Ideal)

2. Id.

3. Id. at 374.

4. Id.

5. American Bar Association, Judicial Administration Division, Standards Relating to Court Organization, (1990), commentary to section 1.12(a) at 23-24.

6. Larry Berkson and Susan Carbon, Court Unification: History, Politics and Implementation, (U.S. National Institute of Law Enforcement and Criminal Justice, August 1978) at 1 (hereafter Court Unification).

7. These elements are rule-making authority vested in the supreme court, assignment power vested in an administrative judge, simplified court structure, elimination of justice of the peace courts, state financing of courts, greater use of judicial councils, merit selection system for choosing judges, judicial qualifications commissions, abolition of lay judges, use of parajudges, full-time judges, mandatory retirement age for judges, judicial compensation commissions, appointment of a professional court administrator, professional administrative staff, unified bar, requirements for statistical records keeping, decriminalization of public drunkenness and minor traffic offenses, operation under modern rules of criminal and civil procedure, transcription of all pretrial court proceedings, uniform appeal procedures, and independent personnel plan for non-judicial employees. Court Unification, supra n. 6, at 2.

8. Two factors: administrative direction by a state's highest court over the entire judicial system, and consolidation of the state courts; three factors: the necessity for a simplified state court structure, the need for centralized supervision of judicial and non-judicial personnel, and state assumption of all or most of the financial responsibility for its court system; and four factors: elimination of overlapping jurisdictional boundaries, hierarchical and centralized state court structure with administrative responsibility vested in the chief justice, unitary budgeting at the state level. Id. at 3.

9. Id.

10. Larry Berkson, Susan Carbon, and Judith Rosenbaum, "Organizing the State Courts: Is Structured Consolidation Justified?" 45 Brooklyn Law Review 1 (Fall 1978) at 12 (hereafter Structured Consolidation).

11. Thomas A. Henderson and Cornelius M. Kerwin, "The Changing Character of Court Organization," 7 The Justice System Journal 449 (1982).

12. Harry O. Lawson, "State Court System Unification," 31 Amer. Univ. L. Rev. 273 (1982).

13. Judith Rosenbaum, Larry Berkson, Susan Carbon, "Implementing Court Unification: A Map for Reform," 17 Duquesne Law Review 419 (1978-79) at 420.

14. Susan Carbon, Larry Berkson, Judy Rosenbaum, "Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy," 27 Emory Law Journal 559 (Summer 1978) at 559, citing Davis, *"Kentucky's New Court System,"* KY. Bench & Bar *(Apr. 1976) at 20.*

15. Structured Consolidation, supra note 10, at 2, fn. 2

16. Telephone interview with acting director William Madden, Administrative Office of the Courts, State of Illinois, on July 24, 1991.

17. Berkson et al. ranked Hawaii as the most overall unified state in 1978, before the addition of the Intermediate Court of Appeals. Structured Consolidation, supra note 10, at 217, Table A-5.

18. Ralph N. Kleps, "Reorganization and Simplification of Court Structure," in Fannie J. Klein, editor, The Improvement of Justice, the American Bar Association Judicial Administrative Division Handbook, 6th edition (1981) at 23.

19. Thomas A. Henderson and Cornelius Kerwin, Structuring Justice: the Implications of Court Unification Reforms, *(U.S. Dept. of Justice, National Institute of Justice, March 1984) at 6.*

20. We also contacted Idaho's court administration, which declined to participate.

21. The authorities do not agree over what constitutes a unified state. See, e.g., James A. Gazell, "An Anatomy of an Advanced Revolution: Analyzing the Progress in American Judicial Administration," 8 Glendale Law Review 67 (1986-87), figure 1 at 70.

22. Telephone interview with acting director William Madden, Administrative Office of the Courts, State of Illinois, on July 24, 1991.

23. Id.

24. Id.

25. Telephone interview with David Boyd, assistant court administrator, Judicial Department, Iowa, on July 29, 1991.

26. Telephone interview with John Burke, administrative assistant to the Supreme Judicial Court, State of Massachusetts, on July 22, 1991.

27. Chapter 211B, §1, Mass. Gen. Laws. Ann.

28. E.g., the trial court justices are still appointed according to department, id. §2. and the statutes seem to have been amended in general by having prefatory language added to the many sections detailing the various courts simply stating that where the statute reads "court" it should now read "department."

29. "Running Courts like a Business," 77 American Bar Association Journal 30 (September 1991).

30. Telephone interview with Sue Dosal, court administrator, State of Minnesota, July 22, 1991.

31. Telephone interview with Dan Schenk, personnel and training officer, South Dakota Unified Judicial System, on July 23, 1991.

32. Id.

33. See section 51-164s, General Statutes of Connecticut, 1991.

34. Id., chapter 801.

35. Id., §§51-193t, 51-193u.

36. Id., §46b-231.

37. Idaho Code §1-705.

38. Id. §1-2201.

39. See, e.g., id. §1-2210 (non-attorney magistrates' jurisdiction over civil actions more restricted than for attorney magistrates.).

40. Sec. 12-4104, Kan. Stat.

41. Id. §§12-4601, 20-301.

42. Id. § 20-301a.

43. Id. § 20-302.

44. Id. §20-302b.

45. Sec. 479.020, Mo. Stat.

46. Art. V §17, Mo. Const.

47. Title 4, §113, Vt. Stat. Ann.

48. Id. §437.

49. Id. §461.

CHAPTER 4

CURRENT FUNCTIONING OF THE COURT SYSTEM

House Resolution No. 68 requested an evaluation of the Hawaii trial court system and whether it meets its rationale and objectives, and an evaluation of the present judicial administration and whether there is a duplication of practices and functions.

Duplication of Administration Between Circuit and District Courts

The Judiciary agrees that there is a similarity of certain functions and practices between the circuit and district court administrations.[1] This difference in practices can be attributed to several factors. Generally, cases in the district court are more routine in nature and require less formal judicial interventions. Circuit courts, on the other hand, deal with issues which are more complex. All courts of record share certain common functions. The circuit court was established as a court of record by the Organic Act of 1900. A court of record is obligated to document all of its proceedings; administrative processes are more formal if compared with a municipal or limited jurisdiction court. The district court became a court of record in 1972. Many of the practices and policies which existed prior to 1972 in the district court are still in existence. The circuit and district court systems have evolved independently of each other. This can be attributed in part to the clear and distinct functions assigned to each court. Because these systems evolved separately, many of the practices, reports, forms, and information systems, including computer applications, are dissimilar. Certain segments of the courts' automated system are not compatible.

The court administrator takes the position that there should be a single administration for the trial court system. He has already begun the process of consolidation. The first part of the plan is to pool all the information systems. That has been accomplished: at present, all data collection functions are under one office. Second, there has to be agreement between the courts on the elements of the database. This is presently being done by a consultant from the Institute for Court Management under the National Center for State Courts. This process will standardize the data to be collected, as well as the forms and reports.

However, even if the data systems are consolidated, this still leaves other examples of duplication in functions, such as different administrative offices, fiscal divisions for the two courts, different clerical staffs, and different support staffs. Even though the functions of the courts may differ, it does not necessarily mean that the administration of, for example, the fiscal officers or the court clerks needs to be accomplished by two separate entities.

Evaluation of the Hawaii Trial Court System

House Resolution No. 68 asks for an evaluation of whether Hawaii's trial court system meets the "rationale and objectives of its origination." From the records that exist today, no "rationale or objective," other than the resolution of disputes, can be ascertained. The generally accepted goal of a judicial system is to administer "the democratic ideal" of uniform justice in a prompt and timely manner.[2] Hawaii has been moving toward implementing those goals through court consolidation,[3] and other court improvements, and has an impressive standing among the states in terms of consolidation, as was described in chapter 3. This study will not recapitulate the comments made by the Legislative Auditor in its 1989 Management and Financial Audit of the Judiciary, its 1990 Report on the Judiciary's Implementation of the Recommendations in the Management and Financial Audit of the Judiciary, and its 1990 Follow-Up on the Management and Financial Audit of the Judiciary. What this report will do is look at other objective data on the functioning of the system, as well as the more subjective perceptions of attorneys and others throughout the State on how the system is functioning.

One of the most pressing issues before the Judiciary is the delay in processing cases. The Judiciary is aware of this problem, both with respect to the general backlog of cases and the backlog in processing documents in the Honolulu district court system.[4] The Judiciary has instituted a project team to evaluate improvements to the district court system. It was the project team that initiated the three-week shutdown of district court to clear up the backlog in judgments and post-judgment documents referred to later in this chapter.

The Judiciary's case completion statistics for July 1, 1989 to June 30, 1990 (the most recent year available) demonstrate that the court system is not serving the public as well as it could. In fiscal year 1989-90, 13,910 original cases were filed in the circuit court system throughout the State. These new cases were added to the 34,583 case backlog pending from the previous years, for a total caseload of 48,493. Of these cases, less than a third (15,644) were terminated, leaving a backlog of 32,849 cases pending for the next year.[5] All four circuits contributed to the backlog, which was most severe in Honolulu, with the largest number of backlogged cases as well as the largest percentage of backlogged cases as compared to new cases filed (the backlog at the beginning of the year was approximately 2.8 times as great as the number of new cases filed all year). All the circuit courts except Maui terminated more cases than they filed, but still left a backlog considerably larger than the annual number of new cases (Maui terminated 1779 but left 3673 pending, or approximately 1.9 times the number of new cases filed; Hawaii County terminated 2630 but left a backlog of 4306, or approximately 1.7 times the number of new cases filed, and Kauai terminated 970 cases, leaving 1749 pending, or approximately 2.2 times the number of new cases filed).[6]

The situation was worse in the criminal divisions than in the civil divisions. While the overall civil backlog decreased slightly,[7] the criminal division generally ended up with more. There were individual variations between the circuits, with marked decreases in Maui and Kauai, a moderate increase in Hawaii county, and a large increase in Honolulu.[8] This

suggests that, while at the present rate, the civil backlog may ultimately vanish, the criminal backlog in Honolulu and perhaps Hawaii county will not, and thus extra attention needs to be paid to the criminal court system.

The family court system worked hard enough to have cleared their calendar entirely -- if not for the backlogs. Statewide, the family courts faced the fiscal year with 38,506 cases pending, acquired 43,499 through the filing of new cases, and terminated an impressive 48,438. However, that still left 33,567 cases pending at the end of the year.[9] Again, the Maui circuit was the only circuit to gain more cases than it was able to terminate.

The district courts handled an amazing caseload. There were 892,362 new cases filed, and 897,864 were terminated. However, the district courts had a backlog of 501,953 cases, so there were 496,451 cases left unresolved at the end of the year.[10] The overall decrease is due solely to the Maui court, as only the Maui district court was able to terminate more new cases than were filed.

These statistics demonstrate that most of the trial court system could hold its own in the prompt resolution of cases, were it not for the enormous preexisting backlog of cases. In fact, in a recent nationwide evaluation of trial court clearance rates, Hawaii did rather well in the circuit court civil division, with an estimated 99.5 percent clearance rate in 1989, placing it in the top fifteen of the forty-three state rated, up considerably from its clearance rate of only 86 percent in 1988. The civil district court rate was lower, at 92.3 percent. The criminal courts varied widely: 73.9 percent, up from 53.4 percent in 1988 at the circuit level, and 98.3 percent for the district criminal cases, placing it among the top three states in the latter category. In the category of juvenile cases, Hawaii had a relatively low clearance rate of 92.3 percent, ranking it nineteenth out of twenty-eight.[11]

Some backlog is to be expected in any American legal system simply because some complex civil litigation takes years before the lawyers have prepared their cases sufficiently to take them to trial. However, a backlog of this dimension cannot come solely from those types of cases even in circuit court, and should not play a significant factor in family and district court cases. The rate of decrease in the backlogs is so modest that unless powerful measures are taken, they will exist indefinitely, which is harmful to the public interest in justice. Recent newspaper articles illustrate the maxim "justice delayed is justice denied" and demonstrate a drastic step the Judiciary was forced to undertake to help move the system along. In September 1991, the papers reported that the backlog of drunk driving cases was over 1,800 -- and at the present rate of termination, it would be 25 to 30 years before they would all be disposed of.[12] The situation was highlighted because of the recent amendments to the drunk driving law that affected the law by decreasing the penalties for first and second time offenders, thus bringing into question the issue of whether a jury trial in circuit court would be necessary or whether the cases should be heard at district court. The circuit court judge handling the question referred the issue directly to the supreme court, and at this time it remains to be seen whether the supreme court will accept the referred question.[13] The same week, the Judiciary announced that the civil division of the Honolulu

district court would be closed down for three weeks in October, except for emergencies, to permit the clerical workers to handle backlogs in processing motion, order, and judgments.[14] The delay to process judgments had risen to three months, while the delay for post-judgment motions had risen to six months. One attorney criticized the closing of the courts, stating that it would have been a better idea to hire University of Hawaii law students for the summer to help the clerks handle the backlog, and that closing the courts for most of October will simply guarantee more cases filed in November.

While some remedies for court congestion and smooth overall functioning of the system may be in the Judiciary's hands, others can only be done with the cooperation of the Legislature and of attorneys and clients. For example, in a September 1991 newspaper article, the Hawaii State Bar Association went on record as supporting mediation for cases. Mediators would reduce the burden on the court system to the extent that they were used. The Legislature could aid the hearing of cases by increasing the number of judges and decriminalizing certain proceedings, such as minor traffic offenses, to remove them from the court system.

To examine further the efficacy of the trial court system, the Bureau sent letters to twenty-two different groups of attorneys throughout the State requesting their input on two areas: an evaluation of the current system, and their opinions on consolidation.[15] We received responses from fourteen, just over one-half of the attorney groups.[16] Some groups requested anonymity, so for the most part, no specific references are given. We also included comments made by individual members of the bar spontaneously generated when hearing of this report. We also contacted four former members of the Judicial Selection Commission for their opinions, including their comments on how consolidation would affect the judicial selection process.

There is a considerable amount of ambivalence among the respondents, which may be one reason that so few groups responded. Another factor may be true indifference to the issue; as the Maui County Bar Association put it: "[W]e solicited input from our membership. However, none was forthcoming. It would seem that the topic has not generated much interest. I will leave it to you as researcher to draw any appropriate conclusions from the lack of response."[17]

Evaluation of Current System

Honolulu

The most telling comment on the court system in Honolulu was that it is "functioning as well as it can, given its [inadequate] budget." Attorneys found that Honolulu needs both more judges and more clerical staff. There were also comments that there was an overuse of per diem judges in Honolulu, the implication being that the per diem judges were in general not as effective as the full time district judges. The consistent use of district court judges to

substitute for circuit court judges was also criticized. One source approved per diems, but only for traffic cases, small claims, and misdemeanors.

The district court system came in for some additional criticism: their calendar calls were alleged to be too time-consuming and not efficiently monitored. Another criticism was of the district court clerical staff; they were cited as being "too quick" to "bounce" (return as unacceptable) documents for minor variations. The source stated that clerks in the federal courts and the neighbor island circuits of the state courts were much more helpful and seemed to want to work with, and not against, the attorneys.

Another general comment was that "Hawaii is subject to the same types of scheduling delays, procedural maneuvering, excessively long trials, and tardy decisions that most other judicial trial systems face," although these problems are not as serious here as in other states as Hawaii is a smaller state and fewer people are involved in the system. Another source criticized the extensive use of memorandum opinions, not found in the official case reporters or the court rules, to supplement court rules and procedures. The suggested solution to this "hide the ball" approach to court rules was to revise the rules to place all procedures in the official rules where they are available to all attorneys.

The need for more specialization, not less, among circuit court judges was raised. The growth of interest in arbitration was cited as precedent, on the ground that parties prefer to have their cases heard by someone with experience in their area. Some areas that could profit by specialization are high technology cases, construction litigation, malpractice, and intellectual property. Treating all judges as fungible, rather than as specialists, could be a step backward for the efficiency of the court system. There also was a question among some attorneys whether a consolidated system would be the best system as it would eliminate the opportunity for potential judges to "break in" at the district court level.

One source mentioned that the lack of firm trial dates had been a problem, but that the situation has improved materially over the past six months and that many attorneys are now satisfied. Another criticized problem is the lack of firm calendar dates -- the ability to have motions and trials set for a firm date instead of being subject to continuances. For parties who have doctors and other expert witnesses waiting on standby, the cost of this uncertainty is great. One source understands that the civil court administrator will be working on this issue. The need for more judges and courtrooms was also cited, as was the need to keep the district court judges in district court and not up at the circuit court level, and to diminish substantially the use of per diem judges.

In the criminal area, case congestion was cited as a "significant, growing problem," with about 12,000 felony and 800 DUI cases awaiting trial with only seven judges available to handle them, and thousands of new cases filed every year. The criminal court "float," or number of cases ready to go to trial but lacking a courtroom and judge, was estimated at 450 cases in mid-1991. Even though prosecutors may be prepared to go to trial, because of the delay caused by court congestion, some cases are ultimately discussed solely due to this

delay, and not to any fault on the part of the prosecutor. This backlog of cases is alleged to place pressure on judges to dismiss cases just to reduce the load, and results in miscarriages of justice when the defendant is allowed to go free just to reduce the Judiciary's statistics, without regard to the bottom line of protection of the public. The criminal justice system was also criticized for not strictly enforcing deadlines set for pre-trial motions, which allows defense attorneys to buy time and shop for a sympathetic judge, while weakening the State's case as witnesses become discouraged or forget details with the passage of time. Another cited problem was the setting of "floating" rather than firm trial dates. Giving a case a floating date enhances uncertainty and can result in the case going to trial with only a few hours notice.

Finally, several sources observed that while some judges arrive promptly, convene their courts early, and work a full day, others "coast," starting late, ending early, and taking a regular half-day or more off. Given the large backlog of cases, such cavalier work schedules should not be permitted.

The opinion of the Department of the Attorney General was received too late to be incorporated in the text of this report. A copy of the letter received from the Department is included as Appendix B.

Moving the Family Court to Kapolei

One issue of more than ordinary interest that arose this year was the Chief Justice's recommendation to move the family court system to Kapolei, approximately a forty-five minute drive from downtown Honolulu.[18] The Chief Justice favors the move as the family court is overcrowded in Honolulu, and the present juvenile detention center also needs more space. As more family court cases and issues arise, an increase in the number of family judges is needed, which cannot be accommodated in the present space. Additionally, there is little extra space for circuit court judges (family court is located in the circuit court building), and removal of the family court judges will provide additional needed space. Originally, plans were made to expand the facilities next to the circuit court building, but zoning considerations and cost negated that option. Cost would be less of a factor in Kapolei, since the Judiciary would presumably be building the facility on land donated to the State.

Family court attorneys oppose this idea, as does the prosecutor's office, for issues of logistics and cost. The prosecutors oppose the move as it would increase the time spent on the road and away from their cases, and would increase mileage reimbursement payments. If the family court section was forced to relocate to Kapolei, the prosecutors would expend additional costs to maintain a working link with the main Honolulu office. The private attorneys also would spend much more time on the road, time that is traditionally billed to the client. One trip to Kapolei would cost the client an hour and a half's worth of fees just for travel costs.

Perhaps one solution to the overcrowding issue would be to move a full-facility court out to Kapolei, composed of circuit, family, and district court judges. This would ease the overall crowding in the downtown courthouses, and would simplify matters for attorneys who could move to Kapolei and still be able to handle a full range of cases. Discussions with members of the bar have indicated that the family law section of the bar is in favor of this type of arrangement, and will introduce a resolution at the November 1991 Judicial Conference to this effect.

Hawaii County

The evaluation of the Hawaii county trial court system ranged from it "appears to be working quite well," to a less enthusiastic, "it's functioning." Sources that criticized the system focused on per diem judges and overcrowding. One source found that "using anything less than full time judges has made the system at times unworkable and lacking in justice." Also cited were burgeoning caseloads, and inadequate space, courtrooms, judges, and staff. Other hindrances to the smooth flow of justice were the "ever increasing demands and exponential complexities involving environmental laws and regulations, narcotics laws, family disintegration, escalating living costs, ill-thought-out mandatory sentencing laws, civil rights and liberties, vocal demands by minorities, women, and other disadvantaged and formerly quiescent groups, and land use regulations." A third group of criticism was directed at the appellate courts and the Legislature for their lack of resolution of these and other issues.[19] The source felt that the appellate courts were abdicating their responsibility to establish case law by issuing memorandum opinions (which are neither published nor citable as precedent) on important issues, and also felt that the Legislature was failing in its duty to provide statutory guidance and standards on subjects not covered by the common law.

One unofficial source stated that the criminal system is functioning effectively, but commented on the less than ideal circuit court facilities in Hilo and Kona (only one jury deliberation room in Hilo, no rooms for attorneys and clients to consult in private).

Maui

There were few comments on the Maui county trial court system. The Bar Association had no comments at all. The Maui prosecutor joined in the Honolulu prosecutor's remarks. The Corporation Counsel noted that there was not a majority opinion among the attorneys there, and responded with their individual comments, not an official response. The only response on the current state of the system came from an attorney who had practiced out-of-state and who commented that the courts here function better than most.

Kauai

There also was no official response from organizations on Kauai. Individual attorney comments were mixed: one attorney stated that "there is nothing wrong with the system at

present," while another said that, with only one circuit courtroom, it was difficult to schedule hearings and trials.

Opinions on Consolidation

Honolulu

Two offices in Honolulu, including the prosecutor's, thought that trial court consolidation would be beneficial, as it would help ease the backlog and would allow for more flexibility. This assumption is predicated on the number of judges and staff remaining the same or increasing, and would not apply if consolidation would result in fewer trial level judges. In addition to consolidation, the prosecutor's office suggested allowing the courts to specialize according to specific types of crimes, such as white collar crimes, sexual assault, homicide, and drug-related cases. These specialized courts would handle all related motions and schedule the trials. This change would result in judges more knowledgeable in the substantive law, as well as more familiar with the individual cases, making the courts less vulnerable to delaying tactics by attorneys, who now can manipulate the motions judge against the trial judge to gain more preparation time. This point, that specialization leads to familiarity and thus more efficient case processing, has also been raised by some circuit court judges. See chapter 5.

Another thought on improving the system through consolidation was to require all judges to be confirmed by the Legislature and have their performance reviewed every five years, or even annually, by the Judicial Selection Commission.

One respondent opposes consolidation, on the ground that the two tier division is beneficial. The source cites the psychological benefit to citizens of retaining the perception that the less formal district court is "more available to them, more attainable, more a 'people's' court. To look only to efficiency and cost in refining the existing system may overlook other benefits of retaining both entities." This respondent joins with one other to state that court consolidation alone without other reforms would have little or no impact on the operations of the trial court as they affect attorneys and citizens (as opposed to administrative benefits to the Judiciary itself).

Another reason cited against consolidation was the inability of certain district court judges, who function effectively at the more limited district court level, to handle the type of issues presented by circuit court cases. A related issue is the waste of resources in harnessing an outstanding, judicially sophisticated circuit court judge to handle routine and mundane matters such as traffic and small claims matters. One respondent would favor a system where circuit court and district court judges were "consolidated," but remained at their current functions. On the other hand, another participant wrote that attempting to "make a system more efficient by merely changing a title ... but not altering the [judges'] functions --

the duties of the job, the methods of performing the work, the tools used in performance -- will not be successful."

The Hawaii State Bar Association was contacted for its members' thoughts on this issue. Unfortunately, the committee designated to consider the issue found that they could not agree on a position. The issue will be raised at the Judicial Conference in November 1991.

The opinion of the Department of the Attorney General was received too late to be incorporated fully in this report. Briefly, the department's position is that trial court consolidation will not have much impact on the overall efficiency of the courts. The complete text of the letter is contained in Appendix B.

Hawaii County

The views from Hawaii county on consolidation were lukewarm. One source stated that the system was working well, and quoted the old cliche, "if it ain't broke, don't fix it." This source found itself unable to recommend a unified system because it was unclear what the benefits from a consolidated system would be. This source found that to the extent there are shortcomings in the system, they can be resolved administratively or by the Legislature. For instance, uniform salaries, the addition of more full-time judges to reduce the reliance on per diem judges, and legislative approval of additional district court judicial positions could be done legislatively.

Another office views the issue "indifferently," saying that unless the other problems it outlined are addressed "with vigor and vision," consolidation will yield administrative benefits to the Judiciary's workload and organization, but little substantive results to the people using the courts.

A further resource found that there was insufficient information to form an opinion on the merits of consolidation. The source pointed out that H.R. No. 68 cites differing judicial qualification requirements, the right to a competent judge, and the duplication of administrative functions, yet none of these issues will necessarily be resolved by unifying the courts. Conversely, these problems can be addressed without consolidation, by changing the requirements for district judges, requiring additional, extensive judicial training, and having the Judiciary continue to combine judicial administrative functions. The source brought up certain considerations relating to judges, suggesting that the appointing authority be centralized for all judges.[20] However, the source also points out that subjecting all candidates to public confirmation may decrease their willingness to serve.

One individual brought up valid concerns relating to rural courts. Presently, in Hawaii county, there are two circuit court divisions, one in Kona, with one judge, and one in Hilo, with two judges. There are seven district court divisions: North & South Hilo, Puna, Ka'u, North and South Kona, North Kohala, South Kohala, and Hamakua, although there are only three

district court judges. The three district court judges "ride the circuit" and sit alternately at the district courts.[21] At present, when a case of sufficient magnitude rises in the district court area, it is transferred to Hilo or Kona for a circuit court hearing or trial. Like district courts throughout the State, the Hawaii county district courts begin each session with a lengthy calendar call, the processing time of which is two to three hours, exclusive of trials. This individual points out that the district courts are not physically equipped to handle jury trials, and there would not be enough time to hold a typical lengthy circuit court type trial and hold the regular calendar as well. The individual points out that either the Legislature would have to appropriate more funds to expand the facilities and staff to make the expanded services feasible, or consolidate the courts from the rural areas into either Hilo or Kona. The individual notes that the latter course would require defendants, complainants, witnesses, and prospective jurors to spend much more time traveling to Hilo and Kona rather than having their more minor disputes settled "in the neighborhood," and further notes that the public transportation system is not "even remotely comparable" to that of Honolulu.

On the issue of parajudges, the thoughts of one individual can be summarized in one quote: "would you want neurosurgery by a para-neurosurgeon?" One objection to their use is that few issues actually prove to be minor in preparing a case. Many, although simple in terms of the time they may take, can have crucial effects on the way the case finally is settled or goes to trial. Another objection is that use of parajudges just substitutes another type of two tier system, and that this system would be unfair to the low and middle income earners. Decisions of parajudges should be subject to review by a "real" judge, and such reviews would be expensive and time-consuming and ultimately not affordable for the less affluent.

Maui

The individuals replying from Maui thought that combining the courts would be a mistake as the collections and possessions matters would be added to the motion and discovery practice, and would be a hindrance, rather than an aid, to efficiency. Another attorney suggested that paid arbitrators for civil hearings and preliminary hearings for criminal cases could ease the backlog. Another thought that eliminating hearings on discovery motions or having a part-time or parajudge assisting on motions could ease court functioning.

Kauai

The individuals replying from Kauai were split on the desirability of consolidation. One liked the idea of practicing before more than one judge (Kauai has only one circuit court judge), so was in favor, while another pointed out the problems of mixing petty misdemeanors and violations with major felonies, and wondered what would happen to the rural district court system. This individual concluded tersely, "If it ain't broke, don't fix it."

Overall

The Bureau also contacted former members of the Judicial Selection Commission for their opinions these issues and on how consolidation would affect the judicial selection process. (Comments from the current commission are found in chapter 6.) One respondent took the position that consolidation was not desirable as it removed the traditional function of district court as both a training ground, where judges could develop the skills and temperament necessary for the circuit court, and as an "observatory" in which this readiness can be evaluated. It also would skew the present criteria for selecting judges, in which each type of court has its own requirements. A judge who can handle the high volume and pro se litigants prevalent at district court may be a terrific district court judge but is not evaluated for or intended by the Commission to hear circuit court or family law cases. The respondent also disfavored both the heavy use of district court judges at the circuit court level, and the concept of "grandfathering" the current district court judges into a combined court, for these reasons.

The same respondent found validity to the concern that attorneys of good caliber may be less likely to join the bench after ten lucrative years in practice. It would be harder for these attorneys to handle the cut in pay after ten years of practice that it would be if they joined the bench between their fifth and ninth years, when they are making less money and the pay differential between private practice and judicial service is smaller. The respondent also stated that requiring one pool of "all purpose" judges would make the task of the Judicial Selection Commission very difficult and frustrating, as the Commission would have to look for candidates capable of handling all types of cases, and would be forced to exclude candidates with excellent capabilities in only one area of judicial expertise.

Another respondent said that there had often been a problem coming up with a complete list of candidates (under the state constitution, the committee must submit at least six names to the governor), and that there would be a "definite problem" with compiling a complete list if all qualifications were raised to the higher circuit court level. This respondent also thought that a consolidated court (with all qualifications set at the current circuit court standard) would be harder on the younger attorneys. The institution of the Judicial Selection Committee took the politics out of the system and allowed younger judges to make the Judiciary a career. Most of the circuit court judges spent time in district court and worked their way up to qualifying for circuit court. Many of them would not have been qualified for circuit court without that district court experience. If district court is to be eliminated, then the training ground for many potentially good judges will be lost. This respondent also believes that the interest of top candidates in circuit court positions would decline if they had to handle a mixed workload of cases and not just the more complex and intellectually interesting circuit court cases.

About the possible grandfathering in of the current district court judges into a consolidated system, this respondent stated that it "would be a mistake." The respondent acknowledged that the commission definitely looks for a higher caliber of judge for circuit

court. Last, the respondent noted that most of the complaints heard by the commission about judges concerned per diem judges, and that part of the solution may be to eliminate per diem judges and create more full-time judicial positions at both court levels.

Another respondent stated that consolidation would affect the judicial system "quite a bit," that there might possibly be less interest in the consolidated court than there is in circuit court now, and that there may not be enough of a pool of qualified candidates for a consolidated system. This respondent noted that district court work was in general less stimulating, that the attorneys were of a different caliber, and that little research and writing were required. Some district judges prefer this type of practice and would not be interested in a mixed court practice.

This respondent did not view sharing judicial staffs as a possibility, remarking that loyalty and teamwork is needed in a staff in order for a judge to function at peak efficiency. These qualities would be diluted if staff was pooled, and productivity would slow. This respondent saw some merit in annual evaluations of the judges by their peers and/or by attorneys.

This respondent stated that per diem judges should be abolished. This respondent thought that, aside from per diem judges who serve after having retired from active practice, that the system encourages applications from more marginal attorneys, those who need to supplement their practices, or who want the job because they want to be able to call themselves "judge." This respondent was against consolidation, and stated that more specialization for judges may be better.

Another respondent thought that we were "very fortunate" to have the system that we have in Hawaii and that it was in better shape than many jurisdictions on the mainland. Specially mentioned were Hawaii's system of merit selection for judges, instead of elected judges, and Hawaii's alternative dispute resolution system (ADR). This respondent had a mixed but basically positive response to the concept of consolidation, although the respondent felt that two issues need to be addressed. One is the concern about who would handle the repetitive, routine cases such as traffic cases, small claims, landlord-tenant, and even some routine family matters. This respondent took the position that it might not be worthwhile to have a circuit court level judge handle these issues and that it might be more efficient to have those matters handled by a non-judicial administrative officer. The other concern was the loss of judges in specialized areas such as family court and landlord-tenant actions. This respondent commented that the loss of expertise in these areas would be hard to duplicate.

The respondent stated that in certain areas with a "critical mass" of cases, having a specialized judge would be very helpful. The respondent saw evidence of this in the many cases now being shifted to ADR, where the parties can choose an arbitrator with special skills or background in the case. In other states, ADR and "rent-a-judge" have proved popular with attorneys who seek judges with special expertise in the type of case in dispute.[22]

In terms of the impact on the selection process, the respondent thought that the selection system might be enhanced, as lawyers with ten years of experience or more would be better prepared to assume a judicial position. The respondent did acknowledge that financial concerns might make those lawyers licensed between ten and twenty years less likely to apply for judicial positions, but felt that older lawyers, licensed for twenty to thirty years and with fewer financial obligations, might be more willing to make the jump to the Judiciary.

The respondent also took the position that it would be better to have more permanent judges than to use per diem judges. As far as the actual transition between the court systems, the respondent felt that all district court judges with ten years of licensure should be grandfathered in, and that those with fewer years should be grandfathered in, subject to review by the commission.

Summary

To the extent that the Hawaii trial court system terminates almost a million cases a year, it serves its purpose of settling disputes. But to the extent that a backlog of over half a million cases still exists, prompt justice is not being administered, and some kind of adjustment or reform is needed, or is at the very least, desirable. The subjective data by attorneys on how the system is working is mixed. Respondents from Kauai and Maui report few problems, while those from Hawaii county and Honolulu criticize the system in some detail and offer suggestions for general reform. The attorney opinion on consolidation is similarly fragmented: the State's largest group of attorneys, the Hawaii State Bar Association, was subject to so many conflicting views that it was unable to make a recommendation. Perhaps part of the reason for this, as was reflected in other comments, is that the resolution fails to fully address the alleged benefits of consolidation and cites as concerns some issues that would not necessarily be addressed by consolidation, or could be more directly affected by other action. For example, if the concern is that judges in the district court are underqualified, judicial education and training may provide a quick and direct means of solving the problem, while consolidation may, but not necessarily will, also address the same problem, as well as being time-consuming and cumbersome to institute.

The arguments pro and con on court consolidation are thoughtful. Two in particular should be highlighted: one is the belief that court consolidation, whatever benefit it may have, is not the only solution to the problems with the court system. The other is that the issue of consolidation is different for the neighbor islands. There are far fewer judges on the neighbor islands than in Honolulu, and the specialization between circuit and district allows the few circuit court judges (three each in Maui and Hawaii counties, one in Kauai) to specialize in the longer and more complex trials, while allowing the district court judges the flexibility to handle a large number of smaller cases. In the rural courts, where only one judge is available, it may

not be physically possible for one judge to handle both types of cases. An alternative solution must be sought for the neighbor islands.

The objective data show an overwhelming number of backlogged cases. Most courts are able to keep up with the new cases, but at best chip away only a small portion of the backlog, while for a few the backlog grows faster than it can be handled. This delay frustrates the real object of the judicial system, the people who need to use it. To the extent that they are thwarted by continuances and delays, they are not being well served by the system. Consolidation may be a partial answer to this problem, but other answers must come from the Judiciary, the Legislature, and the attorneys involved in the process.

ENDNOTES

1. Interview with Dr. Irwin Tanaka, Administrative Director of the Courts, Clyde Namuo, Acting Deputy Administrative Director of the Courts, and Abelina Shaw, court staff attorney, with Susan Jaworowski and Charlotte Carter-Yamauchi, June 18, 1991.

2. See, e.g., "Court Unification: Information Guide for the Judiciary, Court Administrators, Concerned Legislators and other public Officials, Citizen Court Improvement Organizations and Concerned Criminal Justice Personnel," (Bureau of Justice Assistance, U.S. Dept. of Justice, April 1988) at 1.

3. See, e.g., Craig Kugisaki, Legislative Reference Bureau, "Article V: The Judiciary,", part of the Hawaii Constitutional Convention Studies 1978, chapter 4.

4. See Jerry Hiatt, "An Interview with Judge Yim," Part I, in the Hawaii Bar News, August 1991 at 12.

5. The Judiciary, State of Hawaii, 1990 Annual Report Statistical Supplement (July 1, 1989 to June 30, 1990) at Table 7. The Judiciary's statistics are inconsistent on the backlog: Table 3 reports a backlog of 35,250 for the same period.

6. Id., tables 8-11.

7. The statewide statistics show that while the starting backlog for civil cases was 12,151, the ending backlog was 11,609. Backlogs also decreased for probate proceedings and what the Judiciary terms "miscellaneous" proceedings, and rose slightly for guardianship proceedings. Id.

8. The overall criminal court backlog rose from 3,934 cases to 4,199. Id., Table 7. Broken down by circuit, the criminal backlog in Honolulu rose by over 500 cases during the year, from 1,321 to 1,753; decreased in Maui from 947 to 813; increased in Hawaii county from 1,235 to 1,305, and decreased in Kauai from 431 to 328. Id., tables 8-11.

9. Id., Table 17.

10. Id., Table 22.

11. Court Statistics Project, State Court Caseload Statistics: Annual Report 1989, National Center for State Courts in cooperation with the Conference of State Court Administrators (Williamsburg, Va: 1991), text table 1 at 10, text table 3 at 15, text table 4 at 18.

12. This figure is a media projection of how long the backlog would take, given the current rate of one to two

cases tried per week. However, as a practical matter, the cases would probably be dismissed sooner as the length of time would at some time be judged prejudicial to the defendant's ability to defend his or her case. This would have the facially beneficial effect of disposing of the case, but would have the long-term negative effect of putting these drivers back on the road without trial and treatment or punishment if they were in fact guilty.

13. "1800 DUI Cases in Limbo," Honolulu Advertiser, September 18, 1991, at A-1.

14. Administrative Order 91-5, from Tany S. Hong, Administrative Judge, District Court of the First Circuit, to all district court judges and supervisory personnel, September 18, 1991; "Backlog Blamed for Oahu District Court Freeze," Honolulu Advertiser, September 19, 1991, at A-1.

15. The organizations were: The Department of the Attorney General; the offices of the public defender in Honolulu, Hawaii, Kauai, and Maui; the Department of the Prosecuting Attorney in Honolulu; the Office of the Prosecuting Attorney in Hawaii county; the Office of the Prosecuting Attorney on Kauai; the Department of the Public Prosecutor on Maui; the offices of the corporation counsel in Honolulu, Hawaii, and Maui; the Office of the County Attorney on Kauai; the Hawaii State Bar Association; The Hawaii State Bar Association/Young Lawyers Division; the West Hawaii Bar Association; the Hawaii County Bar Association; the Maui County Bar Association; the Kauai County Bar Association; the Legal Aid Society of Hawaii; the Hawaii Academy of Plaintiffs Attorneys, Inc.; and the Hawaii Defense Lawyers Association.

16. We received official materials from the Honolulu and Hawaii County prosecutors (the Maui prosecutors joined in Honolulu's response), the Honolulu and Hawaii County corporation counsels' offices, the Hawaii County Bar Association, the Office of the Public Defender, the Legal Aid Society of Hawaii, the Department of the Attorney General, and the Hawaii Academy of Plaintiffs' Attorneys, Inc. We received unofficial, personal responses from personnel in the Maui Corporation Counsel office and a deputy public defender in Hawaii county. The Hawaii State Bar Association and the Maui County Bar Association also responded, but only to state that due to lack of interest or inability to agree, the organizations had no official position.

17. Letter from William M. McKeon, immediate past president, Maui County Bar Association, dated September 4, 1991, to Susan Jaworowski, Researcher, Legislative Reference Bureau.

18. See "Kapolei: Is Family Court a Good Move?" Honolulu Advertiser editorial, June 10, 1991, at A-6.

19. A cited example was Hawaii's "unique stigmatization by the United States Supreme court a decade ago. ('it is difficult to determine precisely the tort liability rules for local government in Hawaii.' Owen v. City of Independence, 100 S.Ct. 1398, 1431, n.27, 445 U.S. 621, 683, n.27. J. Powell, concurring. In the ensuing ten years, we still have not remedied this peculiarly unique status."

20. Presently, the Chief Justice appoints the per diem judges. The chief justice also appoints the district court judges from lists of candidates prepared by the Judicial Selection Commission. The governor selects the circuit court judges from lists of candidates prepared by the Judicial Selection Commission, with the advice and consent of the Senate. Article VI, §3, Hawaii State Constitution

21. The North and South Hilo District Court meets Mondays, Wednesdays, and Fridays; Puna meets on Tuesdays; Ka'u meets on the second and fifth Wednesdays, North and South Kona meets on Mondays and Thursdays, North Kohala meets the fourth Friday, South Kohala meets the first, third, and fourth Wednesday, and Hamakua meets the second Tuesday.

22. See, e.g., Jean Guccione, "Selling Justice," 11 California Lawyer, no. 10 (October 1991) at 32.

CHAPTER 5

JUDICIAL OPINIONS ON TRIAL COURT CONSOLIDATION

Judges would be the group most affected by a trial court consolidation. During research on other states' attempts at trial court consolidation, it was noted that their judges often had very strong opinions on consolidation, especially the judges in the upper level trial court.[1] To ascertain the opinions of the trial court judges in the State, Bureau researchers contacted every circuit court judge in the State. Due to time constraints, the researchers were not able to meet personally with the district court judges, and instead a questionnaire was sent to those judges, eighty-eight percent of whom responded.

Circuit Court Judges

The researchers met personally with each circuit court judge in the Honolulu circuit, with the exception of one judge who transmitted a personal letter. Each neighbor island circuit judge was contacted by telephone, for a total 100 per cent response rate. Each judge was assured of confidentiality for his or her comments. The following is a summary of their backgrounds and positions on major issues relating to trial court consolidation. Not all responses total twenty-three, as not every judge answered every question.

Most of the circuit court judges used district court as a stepping stone to circuit court. Only six did not, coming straight from private practice or governmental work to circuit court. Most found that private or government practice adequately prepared them for their judicial positions, but five did not. Even though most of them felt that their background as attorneys served as adequate preparation for the bench, the majority of respondents to this question - thirteen - felt that additional training would have been helpful. The actual training they received when they started on the bench varied widely. Some were sent to the Judicial College in Reno, Nevada right away, while others made do with training manuals and observing more experienced judges. Nine said that they received no training at all when they started. All who responded to this question indicated that they received subsequent training, although again this varied widely. Some judges were quite vocal about the need for better training, stating that the lack of training, for judges and especially staff, has been "intolerable," or that the present training policy is "arbitrary and capricious," and another "urged" that "formalized, long-term, and continual training" for judges be instituted.

Differences Between Circuit and District Court Work

When asked about the differences they perceived between circuit and district court duties, half of the judges took the position that circuit court work was more demanding in time, workload, and responsibility, specifying the following factors: the greater degree of responsibility due to the greater possible results and penalties available at the circuit level;

the more complex issues at the circuit level, both substantive and procedural, such as dealing with a jury and with settlement conferences; the better trained and experienced attorneys at circuit level (causing more complex and highly contested hearings, motions, and trials); and the large volume of paperwork not found at the district court level. These judges tended to characterize district court work as easier, handling "throw-away" cases, a job a judge could do with his or her "eyes half open" after the judge gets used to it. One judge compared handling traffic cases to the kind of routine processing done by supermarket check-out clerks.

Three judges, however, considered district court work more demanding than circuit court (there was a particular mention of family law work); first, because of the huge volume of cases (for the 1989-90 fiscal year, the circuit courts handled approximately 16,000 cases while the district courts handled almost 950,000),[2] and second, because of the district courts' position as the "people's court," having much greater contact with the general public, especially with pro se litigants (those who represent themselves without an attorney). One judge commented that a district court judge can handle a circuit court judge's workload more easily than a circuit court judge can handle that of a district court judge.

The remainder of the comments were mixed, with judges citing the differences between the courts as being "volume" versus "complexity."

Court Consolidation

The judges were asked four primary questions about a proposed court consolidation. When asked if the district court judges would need additional training were they to assume the consolidated court bench, eight said yes, five said no, two said that it depends on the judge, and one said that candidates for the bench should have more trial experience as attorneys. When asked what the qualifications for the consolidated bench should be, the majority stated that all judges should have ten years of licensure, and five of those also added that they should go through the Senate confirmation process. Only four said that the current division of five and ten years should still apply. A few others mentioned "considerable" trial experience as a desideratum; one commented that "holding political office does not prepare someone to become a judge."

When asked their opinions on court consolidation, only two judges fully supported the concept. Nine opposed it totally, even vehemently. A few of the judges flatly stated that they and others would quit if forced to do district court work. Others pointed to the need for a district court, a traditional "people's court," especially created to hear a high volume of minor matters. They stated that the district court atmosphere is more relaxed while at the same time handling many more pro se litigants, who might be scared away from the more formal circuit court setting.

Some cited the need for district court as a training ground, where judges can gain experience and "test the waters" for a potential future position at circuit court. A number also said that consolidating the court -- and raising the qualifications for all judges to ten years

-- would decrease the opportunities for women and minorities currently underrepresented at the bench to become judges. Some were concerned that the district court assignments would be used punitively, i.e., that judges not in favor with the administration would be assigned to those cases.

Another point highlighted is the need for more specialization, not less, among the judges. One judge noted that most attorneys specialize and do not try to handle every kind of case, and that judges should also specialize, rather than being "jacks of all trades and masters of none". Another stated that the backlog would increase if judges were expected to juggle every type of case, and that efficiency would increase and the backlog decrease the more that the judges were allowed to become specialists. The suggestion was made that divisions, similar to the current land court, tax appeal, and probate divisions, be instituted for such complex matters as medical malpractice, asbestos cases, products liability, and construction litigation.

The thought was also voiced that if judges were forced to handle cases in which they had no interest, the quality and quantity of their work would decrease. Some judges also thought that the "extreme" flexibility of consolidation was not needed, as the chief justice already may freely assign district court judges up to the circuit court through administrative orders.

Other judges stated that giving the chief justice the ability to move judges around freely is not a good use of judicial resources. Treating all judges as "fungibles" (i.e., freely interchangeable units), would be a less efficient use of the system because judges are not equal in qualities and abilities. To the extent that a family court judge has specialized knowledge about child custody laws and is used to handling matters in a more conciliatory manner, went one example, that judge would be misplaced handling criminal trials, as would a criminal circuit judge with no family law background in the family court judge's place. One judge suggested that if free rotation of judges was a criterion of a superior court system, then all positions should be fully interchangeable, including assignment of judges at the supreme court and intermediate court of appeals to circuit and district court work.

In addition, it was alleged that the uncertainty arising from a consolidated system in which any judge can be transferred to fill any vacancy would lead to a decrease in morale among existing circuit judges, and a decrease in the pool of candidates for judicial office.

One question raised was why flexibility is needed to rotate circuit court judges down into district court positions, especially if part of the plan is to have the traffic cases, which constitute about ninety-one percent of the district court workload, be decriminalized and handled administratively.

In addition to the nine judges opposed to the concept, seven others have a mixed reaction, mostly negative. These judges generally took the position that consolidation might be a good idea if it improved the workload, but that they did not see any guarantee that it

would and that it would cause a myriad of other problems, such as: loss of district court as a training ground, loss of a more representative pool of judges (i.e., fewer women and certain minorities in the pool),[3] encouragement of older judges to take "semi-retirement" on the district court bench, and discouragement of potential judges who do not want to handle certain aspects (family law, small claims, etc.) of a consolidated trial court system. Many also cited a personal desire not to do district court-type work.

Four judges felt that they did not have enough information about the system to make an informed decision about trial court consolidation.

Stumbling Blocks to Consolidation

The judges were also asked what they saw as the greatest stumbling blocks to consolidating the court system. Unsurprisingly, given the high level of opposition to the idea, many problems were cited: resistance by attorneys, judges, clerical staff, and the public; the difficulty of passing a constitutional amendment; questions relating to design of the system and cost; administrative inertia; questions concerning the ability of a unified court to attract qualified judges to the bench; transfer of traffic and small claims by administrative proceedings; and increases in staffing.

District Court Judges

A questionnaire was sent out to all thirty-four district court judges on the issue of consolidation, and thirty responses were received, for a response rate of 88 per cent. A copy of the questionnaire is included as Appendix C.

Sixteen of the judges identified themselves as regular district court judges, twelve as family court judges, and two as both. This breakdown was important as certain responses varied significantly between the two types of district judges. As a whole, the family court judges seemed to experience more pride in their positions, and a certain esprit de corps that was not as evident in the other group's responses. Family court is generally seen by all judges as a distinctly different type of practice. In addition to the differences in subject matter, family court differs from the other courts in that there are statutory provisions establishing family court at both the circuit and district court levels. Chapter 571, Hawaii Revised Statutes, the family court law, states in section 571-3 that "[t]he family courts shall be divisions of the circuit courts of the State[.]" (emphasis added) However, section 571-8 states that "[i]n addition to the district courts established under section 604-1, there may be established in each of the judicial circuits of the State a district family court." (emphasis added) As a practical matter, the two types of family court co-exist in a hybrid state, as a division of circuit court staffed by district level judges. Each county has one circuit court family judge. However, the vast majority of family law cases are handled by the district family court judges, who are part of the district court system and are paid and staffed in the same

manner as regular family court judges.[4] As both regular and district family judges would face displacement if consolidation occurs, their responses are handled together.

As the work of a district family court judge is much closer in nature to that of the circuit family court judge than the work of regular district court judges is to that of regular circuit court judges, and as family court work is so demanding, it may be that unifying the family court would be particularly appropriate. It would also be comparatively easy, as a constitutional amendment would not be necessary.

The pertinent results of the questionnaires are given below. Not every response adds up to thirty, as some judges did not complete all questions and others selected more than one option.

Training

Almost two-thirds (nineteen out of thirty) of the district court judges received no training before starting their first terms as judges. While all of them report receiving subsequent training, the scope of training varies widely. Only twenty-two of the judges cited received training at the National Judicial College in Reno, Nevada. Other types of training cited range from in-house training by the family court and by the Judiciary administration, seminars held by the Hawaii Institute for Continuing Legal Education (HICLE), the National Council of Juvenile and Family Court judges, and the Association of Family and Conciliation Courts, and unspecified seminars and training sessions. A few respondents noted that they had attended seminars at their own expense. One judge stated that the judge had asked for additional training from sources other than the National Judicial College and the National Council of Juvenile and Family Court Judges, and that that request had been ignored.

All who responded indicated that the training was positive. On a five point scale, where a "1" indicated that the training was extremely helpful, a "3" indicated that it was adequate, and a "5" indicated that it was of no benefit, five judges rated the training a "1", sixteen rated it a "2", and seven rated it a "3". None rated the training lower than a "3".

When asked what type of training would be optimal for district court judges, a range of answers was received. The wide array of responses may be due to the individual judges' backgrounds and training. The range included more practical experience (mentor program, more hands-on training, more time initially spent watching trials with an experienced judge, on-the-job training with critiquing by an experienced colleague, sharing experiences with peers throughout the State), courses in substantive and procedural areas experienced in district court (rules of evidence, civil, family court, and criminal procedure, constitutional law, sentencing guidelines, updates on changes in the caselaw and statutory law), courses in substantive and procedural areas experienced in circuit court (law relating to felony cases, complex civil litigation, jury selection, settling jury instructions, handling settlement conferences, judicial writing), and training in courtroom management (how to handle a calendar, delay reduction, how to control a courtroom, trial management skills). Other

training deemed desirable were courses at the National Judicial College at Reno, an overall view of the Judiciary including information on what programs are available, and, for family court judges, information on non-legal areas that relate to the family, such as family dysfunction and the availability of community resources.

Experience at Circuit Court

Over three-quarters of the district court judges reported spending some time at the circuit court level. The periods of rotation range from two days to estimates of 33-35 per cent of the time. Given that so many of the judges do spend time at the circuit court level, their desire described above for training in circuit court issues (felony law, complex civil litigation, jury issues) becomes understandable.

Of the seven who have not been rotated up to circuit court, five are family court judges. In previous years the Chief Justice had not rotated any district family judges up to circuit court, but in recent years that policy has been changed so that district family judges will be included in that rotation.

It is notable that, when asked whether he or she would need additional training if unification were to take place and the judge would have to handle a circuit court type-workload, over a third of the judges (11 out of 30) indicated that they would need more training.

Perception of Job Differences

A split in opinion was observed between regular district and district family judges on the question of the similarity between their jobs and circuit court positions. A third (five respondents) of the regular district court respondents felt that their job was not very similar to that of a circuit court judge, while nine felt it was similar and one felt it was very similar. In contrast, most of the family court judges felt it was similar (nine) or very similar (one), and one felt it was not very similar, and another felt it was very different. Another judge specified that the work load was not similar in types of cases, but was similar in trial and evidence issues.

Again, the comments to these questions on the differences between their present positions and circuit court positions were illuminating. Of the eight regular family court judges who made comments, five couched their answers in terms describing elements that circuit court had that were lacking at district court, such as jury trials, complex civil litigation, more lawyers, longer trials, more complex discovery, and the fact that the issues are briefed at circuit court. Only three phrased their answers in terms expressing elements that the district court had that were not apparent at the circuit court level. These elements were a high volume of cases requiring different methods and techniques in hearing than circuit court cases, and the existence of more pro se parties. The general impression from these comments is that most of the regular district court judges feel that circuit court work is more difficult that their current workload.

Of the six district family court judges who offered comments, only one cited jury trials as the difference; the other five made comments indicating that work at the family court level is as or more complex and demanding than circuit court work. Sample comments were: "[family court has an] overwhelming volume and diversity of cases," "[family court is different due to the] frequency of making decisions, volume of work, intensity, and pressure," "Issues in domestic and juvenile [cases] are more complex than in most circuit court civil cases. The quantity of workload and degree of stress due to importance [of the cases] to the community are much greater than circuit court, civil or criminal." (emphasis in original) One stated simply, "many [other judges] do not like the emotional intensity of family court." The observation that family court work is unusually grueling was supported by statements made by various circuit court judges during their interviews in which the judges were adamantly opposed to a merger in which they had to handle any family court work.

Future Options

When asked what presently available option they would prefer for the future, twenty-four said to move up to circuit court, two said that they would leave the court and seek other career options, and eight said that they would prefer to remain at district court (although one of the respondents stated that that was because of "constitutional age limits"). The eight who preferred to remain at district court were evenly split between the two types of judges.

Opinion on Consolidation

When asked their opinions on trial consolidation, most respondents were positive. Sixteen strongly favor it, eleven favor it, and two did not care. No one was opposed. However, when queried about specific consolidation options, the answers changed slightly. When asked their positions on consolidation if their caseloads were to remain the same, twenty-five favored the idea, but three opposed it. When asked how they would like a plan in which they handle both district and circuit court cases, twenty-nine favored it, and one judge opposed it (some of the family court judges specified that they would choose this option only if they continued to do family district, and not regular district, work). When asked whether they would favor a change if their caseload were to consist of wholly circuit court type work, only twenty-one favored it, and five opposed it.

The written comments on unification highlight the reasons for the judges' basically positive responses. Seven of the regular district court judges cited greater efficiency as a benefit of consolidation. Two simply stated that there was no need for two trial court systems. One cited abolishment of the unfair pay differential between the two classes of judges,[5] and another indicated a desire for a greater variety of assignments.

Three of the family court judges cited reasons of efficiency for the consolidation. Two favored it because it would provide equity for the court staff, who would receive equal pay for the same or harder work. One cited simplification of administration and clerical staff as a

benefit. One judge did not find any reason to have two trial court systems. Another thought that the quality of the legal profession and cases coming into the system would improve tremendously under consolidation. Four judges took the position that the work of the circuit and family courts is of equal importance, complexity, and impact, and that the abilities required of the judges are the same. One stated bluntly that circuit court work, as compared to family court, "is easier, [the] pay is better, [the job] is less dangerous -- [we should] spread the good and bad around more evenly." One added, perhaps relating to the fact that district court judges are frequently rotated into circuit court positions, "We do it all anyway." Another judge stated that while the judge would support consolidation in general, the judge noticed that "experience in other jurisdictions shows that consolidation is very bad for family court. Judges get rotated in who can't do the work and/or hate the docket and/or don't care. I would hope that any consolidation plan would work to prevent this undesired effect." This judge recommends that there be a strong commitment to training before consolidation to help alleviate this problem.

Senate Confirmation

When asked whether they would apply for a position on the unified court if they would have to go through a Senate confirmation process (presently limited to circuit court and appellate judges), twenty-four said that they would apply and only one replied in the negative.

Opinion of the Judicial Selection Commission on Trial Court Consolidation

The current chairperson of the Judicial Selection Commission[6] was contacted for information on how consolidation would affect the judicial selection process if the judges would have to be capable of handling a full range of cases, and the qualifications for all judges was raised to ten years licensure. At present, the Constitution of the State of Hawaii requires that all justices and judges be residents and citizens of the State and the United States and be licensed to practice by the supreme court. The Constitution further provides that a justice of the supreme court, a judge of the intermediate appellate court, and a judge of the circuit court must be licensed for a period of not less than ten years preceding nomination. In contrast, a judge of the district court must be licensed for a period of not less than five years preceding nomination.

The constitutionally required minimum periods of licensure thus divides the bar into three groups for the purpose of determining eligibility for judicial office: (1) less than five years of licensure; (2) five or more years of licensure, but less than ten years of licensure; and (3) ten years or more of licensure. The first group is ineligible for judicial office. The second group is eligible for a judicial office in the district courts of the State, but not eligible for any other judicial office. The third group is eligible for all judicial offices in the State.

This constitutional framework is the foundation for the Judicial Selection Commission's review of the applications submitted by candidates for judicial office. The commission cannot

consider an applicant for judicial office who fails to meet any of the constitutionally mandated qualifications for appointment.

So candidates for judicial office in Hawaii are drawn from two pools, one for circuit and one for district court. An examination of the judicial selection process is necessary to ascertain:

(1) Whether the circuit court pool alone could adequately support the need for all, rather than half, the judicial candidates;

(2) Whether the composition and diversity of the circuit court pool is different from that of the district court pool and attorneys in general;

(3) What the judicial selection committee perceives as the differences, if any, between the qualifications for district, circuit, and family court judges; and

(4) Whether the public would be best served by one unified type of judge rather than separate district, circuit, and family court judges.

According to the chair of the Judicial Selection Commission, the pools of judicial candidates, taken as a whole, fairly represent the current gender and ethnic diversity of the bar. However, while the circuit court pool alone contains an adequate number of candidates for a unified system, by itself it appears to lack the representative quality of the pools considered together. The circuit court pool is the only group that satisfies the constitutional requirement of ten years of licensure. This has important consequences, therefore, if the ten-year pool differs in significant characteristics compared to the second group of the bar comprised of attorneys with more than five years but less than ten years of licensure.

The Hawaii bar's licensed attorneys appear to be more diverse using racial, gender, national origin, and ethnic criteria in the under ten-year group than it is in the ten year and more licensure group. According to the chair, while "the empirical data to support this observation needs to be refined, it seems to be sufficiently valid to form an appropriate working hypothesis." If this is a correct hypothesis, then a consolidated trial court system which utilizes the ten-year constitutional requirement would tend to underrepresent and not reflect the diversity of the bar until the passage of time modified the current demographics of the ten years or more group of license holders. The circuit court pool contains a disproportionate number of men and of those of Japanese and Caucasian ancestry. Women and ethnic minorities such as Hawaiians and part-Hawaiians, Filipinos, Pacific Islanders, and Vietnamese and other recent immigrant groups are underrepresented in the circuit court pool. Thus current ethnic and gender diversity demonstrated by candidates for the district court bench would be substantially limited if the criteria were to be changed at this point in time to a ten-year minimum. However, the chair believes that this underrepresentation will fade over the next three to five years as more of the members of these groups reach the ten-year licensure requirement.

The chair was asked whether the commission selected district court judges because of their perceived ability to perform district court tasks, or because of their perceived potential as future circuit court judges. The response was that the judges are chosen for their ability to do the work for the specific court - district, family, or circuit - for which the vacancy occurs.

The chair was next asked what he perceived the differences to be between the judicial jobs. The district court was characterized as a lay-oriented "people's court," in which a successful judge would be a "communicator" who is able to successfully convey the law to the diverse elements of our society in a fair, even-handed manner and who could handle a voluminous workload while retaining patience and understanding to educate the vast number of laypeople[7] who use the district court system. There are basically two types of people seeking district court appointments: younger attorneys who wanted to make a career in the Judiciary and wanted to start at the bottom and work up to the top, and older attorneys who wanted to share their expertise and knowledge with laypeople.

Family court was described as the most difficult court to serve in, with a large volume of taxing cases in an emotionally charged atmosphere. Special characteristics for a family court judge are a love of the family and a sensitivity to situations of abuse. The chair felt that, of all the judges, family court judges needed the most specialized talents. A number of the traits, skills, and interests that mark successful judges at each of the three individual types of courts do not necessarily overlap with each other. It may be that a circuit court judge, despite more years in practice and Senate confirmation, who does not have the skills germane to district or family court will not function as effectively in the other two courts as would a district court judge who does possess these skills.

The chair concluded that the judicial functions as presently set up are too diverse to call for unification. Especially as the alternative dispute resolution is removing the easier cases from the court caseload, leaving the more complex cases to be tried in court, more specialized, rather than more generalized, judges would be needed. He also noted that circuit court judges in general would face severe morale problems if asked to handle a district court caseload, and while some district court judges want to move up the circuit court, others are happy in district court and would not want to move up.

It may be that in Honolulu specialized divisions could be established so that judges could continue to specialize in areas of work, but on the neighbor islands where the pool of judges is small,[8] the chair stated that you would need a "Renaissance man or woman" to handle all three roles well.

Last, the chair stated that earlier, more, and increased frequency of educational and training sessions for all judges is a theme that the Commission frequently hears in its meetings and discussions with judges.

Summary

The majority of circuit court judges oppose trial court consolidation, either totally or with specific reservations. Only two are fully in favor of it. The opposition does not seem to center on raising the district court judges up as much as it has to do with moving circuit court judges "down" (most clearly perceive district court work as less challenging than circuit court work) by requiring them to handle traffic, small claims, and family law matters. Some judges cite the need for more specialization, not less, to aid the court system in functioning most efficiently. Also, to the extent consolidation is portrayed as having a negative impact on their current perquisites, such as having to pool some staff or share courtrooms, consolidation is disfavored.

The vast majority of district court judges responding to the questionnaire favor consolidation, even if they would have to go through the Senate confirmation process rather than being automatically transferred to a unified bench. Almost all of the family court judges' responses indicated a distinct pride and esprit de corps which was reflected in a general attitude that their work is at least as demanding as circuit court. Many of them would like to continue handling family matters even in a unified system. One judge who wants to continue hearing family matters commented that all of the judges in a unified system should be allowed to specialize according to their inclinations and abilities.

If unification were to occur, it appears that additional training would be in order. Even among the circuit court judges who state that their practice as an attorney adequately prepared them for the bench, many note the need for additional training, both for themselves and for district court judges if they are elevated to a consolidated court. Over one-third of the district court judges think it would be a good idea for themselves, and given the wide range of existing training, including on the job training while being rotated to circuit court, it may well be appropriate for almost everyone. Indeed, even if the system remains as it is, given the frequent rotation of district court judges to circuit court, additional training on circuit court matters may be appropriate for all district judges even if consolidation does not occur.

If full unification is not seen as a viable option, unification may still be appropriate for the family court system. The district family workload is very similar to the circuit family workload, much closer than that of the regular district judges to the circuit level work. Additionally, it could be accomplished by statutory change without the need for constitutional amendment.

ENDNOTES

1. For example, in Florida, 67.5 per cent of the upper level trial court opposed consolidation, while 84.9 per cent of the lower court judges supported it. Florida, Committee on Judiciary, "Oversight Report: Conversation to Single-tier Trial Court System," (Tallahassee, Florida House of Representatives, October 27, 1982) at 11.

2. These figures are derived from The Judiciary, State of Hawaii, 1990 Annual Report Statistical Supplement, tables 7, 17, 22. It is not possible to obtain a more exact figure as the Judiciary lumps all family court matters together, without breaking them down into cases handled by circuit and cases handled by district court judges. Since the district court judges are much more numerous, one can assume that most of the cases are resolved by them.

3. See chapter 6 for a further discussion of this issue.

4. Phone interview with Dr. Irwin Tanaka, Court Administrator, on August 30, 1991.

5. As of July 1, 1991, that pay differential was $5,000.

6. The information in this section was obtained through an interview with C. Michael Hare, Chairperson of the Judicial Selection Committee with the researcher and Charlotte Carter-Yamauchi on July 17, 1991.

7. As of 1989-1990, there were approximately 14,000 cases filed in circuit court throughout the State, while there were over 900,000 cases filed in district and district family courts.

8. While there are 41 judicial positions in Honolulu, there are only 8 on Maui, 8 on Hawaii, and 3 on Kauai.

CHAPTER 6

THE FEASIBILITY OF TRIAL COURT CONSOLIDATION IN HAWAII

The issue of feasibility merely embraces the mechanics of accomplishing a given goal. It does not answer more fundamental questions, such as what the goal of consolidation is, or should be; what form the court consolidation should take; or whether the proposed form of consolidation will accomplish the stated goals. These issues must be touched on, at least elliptically, before the question of feasibility can be addressed.

What are the Goals?

What is the goal of court consolidation? House Resolution No. 68 (1991) makes two statements that might be termed goals: the first is ensuring that all litigants have the right to a competent judge. The resolution then states as a corollary to this point that qualification requirements for judges for all levels of cases should be the same. The second is the statement that two levels of trial court lead to duplicative administrative functions which some observers view as inefficient and wasteful.

Chief Justice Herman Lum, who has been an advocate of trial court consolidation for a number of years, lists a number of goals of trial court consolidation: the benefit of economies of scale, more organization and efficiency through the location of all administrative matters in one place, the increased ease of rotating judges to fill temporary vacancies, the ability to attract a greater number of qualified attorneys to the bench, the easing of filing of documents for attorneys by having one set of rules of court procedure instead of two, and cost-cutting through the pooling of judicial staff.[1] The Judiciary submitted testimony in favor of H.R. No. 68, in which it was also stated that causes originating in district and family district court are becoming increasingly complex, becoming comparable to issues faced by circuit court judges, and that "it may be prudent" to establish one level of trial court to allow for reassignment of judges as needed.[2]

What Form Should the Proposed Consolidation Take?

Authorities in the field are split over whether a one tier system or a two tier system, like Hawaii's current system, is the best. Among those states that have opted for the single tier system, only one also uses a single class of judges; the rest have two or three levels of *judges that are not fully interchangeable. Even the ABA model proposes the use of* "parajudges" or "judicial officers" to handle the more minor matters.

The resolution does not specify the type of unified system to be examined. The Chief Justice proposes a single tier, single class of judge model, with all judges capable of handling all types of matters. Judges would be routinely rotated between all types of cases, except family judges, who, if they wanted to stay in the family law area, would be rotated less frequently. It also appears that judges could be used to fill in temporary vacancies on a short-notice basis. The Chief Justice also proposes to have traffic offenses decriminalized and handled administratively by hearings officers, which would drastically reduce the vast bulk of district court cases (approximately ninety-one percent of the district court cases are traffic offenses), leaving the more challenging matters for judicial handling.

Would This Structure Fulfill the Stated Goals of Court Consolidation?

The two goals listed in the resolution would not necessarily be met through court consolidation. Judicial competency is a function of ability and training, not court consolidation. To the extent that a judge's competency has been called into question, a more direct approach would be to require mandatory, thorough, consistent, and regular training for all trial court judges, and by instituting some type of regular and objective evaluation of each judge. To the extent that some have mentioned lack of trial court experience as a handicap to a proper grasp of judicial function, the Judicial Selection Commission and the Chief Justice could be requested or required to weigh that type of experience more highly in selecting the judges. Merely consolidating the court, especially if all current judges are retained, will not improve competency.

The stated corollary that the qualifications for all trial court levels should be the same does not necessarily follow logically. There is no magic in the ten years of licensure currently required of circuit court judges, as opposed to the minimum of five years currently required for district court judges.[3] There seems to be no firm basis for the ten- and five-year requirements. The only rationales given for the ten-year requirement at the 1978 Constitutional Convention were that the committee "feels that the minimum practice requirement is necessary to assure that justices and judges are sufficiently knowledgeable and experienced to carry out the laws of this State fairly and efficiently."[4] The five-year requirement, it was hoped, "would encourage younger attorneys to consider careers on the bench."[5] In addition to encouraging younger attorneys to apply for the bench, many judges and attorneys have noted that the district court has a different function than the circuit court. It may be that different demands of the job make different qualifications appropriate.

It is interesting to note that of the current district court judges,[6] just under two-thirds were appointed for the first time after they had achieved ten years licensure, and as of January 1992 all but one of the sitting district court judges will have ten years of licensure. Of the per diem judges, over two-thirds had been appointed for the first time after they had achieved ten years of licensure, and as of January 1992, only one per diem judge will have less than ten years. These figures demonstrate that, although district and per diem judges can be appointed when they have less than ten years of licensure, as a practical matter, the

majority are appointed when they have ten years or more, just as the circuit court judges are.[7] Almost all of them will have passed the ten-year mark as of January 1992. So to the extent that the district court and per diem judges' abilities are questioned, it is unlikely that criticism has any direct relation to their years of licensure, as for all intents and purposes, they have already met them. In fact, at least in the case of the per diem judges, lack of training appears to be the culprit, as prior to this year the per diem judges received no formal training at all.

To the extent that making qualifications the same for both district and circuit court judges is still considered desirable, there is still no need to consolidate the court system. An amendment to Article VI, section 3, of the State Constitution could require the district judges to have ten years of licensure, and even to pass through the Senate confirmation process, if that is also considered necessary, without the need to consolidate the whole system.

The goals stated by the Chief Justice are more complex. Certain administrative goals, such as administrative consolidation and improved efficiency, cost-cutting through pooling of the judges' staff, and consolidating the two rules of court procedure into one, can be accomplished by consolidating the trial court administration without formal consolidation of the courts themselves. Administrative consolidation is one of the Judiciary's goals, which has been addressed, initially, by consolidating their information systems.

The goal of the free assignability of judges could be accomplished without consolidation by amending Article VI section 2, of the State Constitution which currently permits a judge of the district court to serve temporarily on the circuit court, but is silent as to the reverse possibility. Yet this would probably not be the best way to accomplish this goal, due to the adverse effect on the circuit judges' morale at what would be perceived as being a temporary demotion. The interviews with the circuit court judges revealed that many vehemently oppose court consolidation on the ground that they do not want to handle family and district court matters in a consolidated court. The distaste would grow even more marked if selected judges would actually be rotated down to an inferior court to handle these cases. For this goal, court consolidation would probably be the more palatable choice. (It should be noted that some judges and attorneys challenge this goal because they feel that the underlying benefit to free assignability -- more efficient and expeditious handling of cases -- would not occur and that more, not less, specialization, is needed.)

Another goal of consolidation is to attract more qualified attorneys to the bench. The thought behind this statement appears to be that many attorneys are not interested in handling strictly district court matters and would be more attracted to a position in which they could handle more challenging cases. Again, some judges point out that perhaps the opposite would occur; that fewer attorneys would be interested in a position where they would have to handle all types of cases, rather than being able to specialize, for example, in family court, or be guaranteed a higher level of interest and complexity through handling only circuit court type cases. These judges and others point out that often an attorney can afford to take a pay cut from a lucrative job after five years or so of practice to become a judge, but by the time they have been practicing for ten years (a time in which many private attorneys have

become partners in law firms), the disparity in pay is so great, and family obligations so compelling, that attorneys are less likely, no matter how intellectually attracted to the idea, to apply for a judicial position.

The goal of cost-cutting is also uncertain in a consolidated court. The Judiciary representatives conceded that, given the governmental unions, they would not be able to terminate any clerical or staff employees, but said that overall cost-savings would be made as the rate of hire for new employees would decrease. The Chief Justice also mentioned that the district court judges would undergo some type of "grandfathering" in, so that the number of judges would not be reduced. The Judiciary also mentioned possible pooling of judicial staff, and possibly sharing courtrooms. The Judiciary did mention that the district courthouses would probably have to be renovated to handle jury trials and additional judicial staffing. Judges to whom these concepts were mentioned opposed them, some adding that there was a need for additional staff for each judge. Given that there are currently thirty-four district court judges, if all were grandfathered in, staffing requirements would probably increase, not decrease. However, cost-cutting is not the only or even the best criteria by which to judge court consolidation. The serious backlog of cases needs to be addressed, and will not go away without additional money spent, be it on increased judicial staff, more judges, or more use of Hawaii's alternative dispute resolution and mediation services, which shifts, but does not do away with, the budgetary burden.

One goal that consolidation may help meet is to help clear the backlog of cases. This is a very serious issue for the Judiciary and the million-plus people and businesses who use the court system every year. Other methods of easing the backlog have also been mentioned, such as decriminalizing traffic offenses and hiring more judges, but to the extent that court consolidation has been touted as a way to not only clear out the backlog but to continue to keep it clear in the future, it is worth serious consideration.

The Feasibility of Trial Court Consolidation in Hawaii

Given the confusion surrounding this issue, as evidenced by the inability of the Hawaii State Bar Association, other attorney groups, and some judges to evaluate the proposition, the first step needs to be a detailed, documented plan of consolidation. Important questions that need to be resolved include:

> Would the system consist only of one level of judges, or would parajudges be instituted to handled some lesser matters?
>
> Would the court system be better served by a system in which each judge would rotate into every type of case on a routine basis, and be transferred into positions on an emergency basis, or would it be better served by a system in which many judges were allowed to specialize in areas such as family court, medical malpractice, construction litigation, products liability, white

collar crime, sexual assault, and drug-related crimes in which they would not rotate out except at their request?

How would the situation on the neighbor island be handled? With their small number of judges, a system in which each judge is supposed to handle everything could leave individual judges too bogged down to handle longer or more complex matters.

Would all judges be required to meet the ten years of licensure requirement? How will the concerns of women and minorities concerning underrepresentation be addressed?

What would happen to the current district court judges upon consolidation? Would they be grandfathered in automatically? Would they have to go through the whole judicial selection process? Only the Senate confirmation? What about the judges who do not have ten years of experience?

What type of training should be instituted to prepare the district court judges for the consolidated system? What kind of ongoing training should there be for all judges?

How would judicial staffing be handled?

How would a joint administration be implemented?

Would circuit court judges be allowed to elect to work on circuit court-type cases only, even in a consolidated system? If so, for how long? The length of their tenure on the bench? Until their next reappointment? For a set number of years?

How would the administrative situation be set up to handle traffic cases administratively? What would the qualifications be for the hearings officers? Where would the processing be located? In light of the Judiciary's recent experience in implementing the transfer of DUI cases to an administrative setting, what would be the "lead time" and logistics required to make the same transition for the hundreds of thousands of traffic cases handled each year?

Should parajudges be used?

Should the use of per diem judges be decreased or eliminated entirely?

Over what time period should this transition be accomplished?

Does it make sense to plan to send all family court judges, staff, and support personnel to Kapolei if the goal of the system is to be able to freely rotate judges? (Rotating judges in and out of family court would then send judges and staff back and forth between Kapolei and downtown Honolulu.) Would it be a

better use of resources to implement a smaller, full-service court in Kapolei?

These questions should be answered by the Judiciary, or by the Judiciary working in conjunction with the Legislature[8] and a professional consultant such as the National Center for State Courts. Judges, attorneys, clerical staff, support staff such as social workers, police officers, and other personnel from agencies outside the Judiciary who would be affected should have input into these decisions.

Once a plan is finalized, education is the next step. The majority of circuit court judges oppose consolidation and the majority of attorneys has not yet voiced an opinion, although some have cited opinions, both pro and con, to the concept. The public also needs to be educated on the benefits of consolidation. The circuit court judges need to be listened to so that their concerns can be addressed. Most of the district court judges favor consolidation, but they should also be fully informed on the impact it will have on their positions and careers.

Once the educational process has been completed, the Legislature would have to pass a proposed constitutional amendment to Article VI, sections 1, 2, and 3, which would then be presented to the electorate at the next election. Assuming that this passes, there will need to be appropriate statutory amendments to the substantive and procedural laws, as well as any change to budgetary requirements. This will then trigger the administrative and functional changes to the trial court system. A number of jurisdictions phased in the transition period over a period of years, both to ease the administrative burden and to enable all the entities involved to become comfortable with the concept.

Potential Hindrances to Court Consolidation

One major stumbling block may be the opposition of the judges to the consolidation. Many of the circuit court judges oppose the idea of consolidation, for reasons varying from a personal distaste at the thought of doing district court work to a belief that a unified system will be less, not more, efficient. The full range of judicial comments on consolidation is contained in chapter 5. Some of the district and family court judges may also voice some opposition, as they want to continue the type of work they are doing now. However, most district judges approved of consolidation, so the bulk of the opposition would probably come from the circuit bench.

One possible solution to some judicial concerns is to allow judges who feel strongly about doing a certain type of work to be permitted to perform only the type of work that they are currently doing. This is similar to the position taken in Minnesota in response to opposition to consolidation by that state's judges of general jurisdiction. In Minnesota, the judges gradually adjusted to handling all types of cases and now only the judges in one judicial district still exercise this prerogative.

Another solution might be to create a range of specialized divisions within the court for cases of a technical nature, as well as establishing a large pool of judges available for any type of case. Some circuit judges, district family court judges, and attorneys supported this concept, remarking that specialization would increase the judge's familiarity with the particular rules of evidence and substantive law in the specialty, so that motions, hearings, and trials would run more smoothly and effectively. Several specialties suggested are medical malpractice, construction litigation, asbestos cases, products liability, and several criminal law areas. The large pool of judges could be freely assigned to a rotation or to the specialized divisions in event of a temporary vacancy.

Another stumbling block would be public education on consolidation, with respect to the problem, the proposed solution, and the expected benefits. In 1990 the electorate refused to ratify a proposed constitutional amendment to raise the years of licensure for district court judges from five years to ten. Information on the benefits of consolidation, a far more radical and conceptually more complicated change, would have to be broadly disseminated if an attempt to change the law is to succeed. In addition, both judges and attorneys have commented on the current role of district court as a people's court, where the proceedings are more informal. They caution that the public may not be willing to give up that court in exchange for the more formal and structured circuit court type of hearing. Whether this is true remains to be seen.

Neighbor island judges and attorneys may oppose the idea on the ground that it is more suitable to Honolulu, with its plethora of judges, and not their more limited judicial community. Whereas Honolulu has sufficient judges to divide into civil, criminal, and family court divisions, and within those first two divisions assign motions judges and trial judges, on the neighbor islands each judge handles everything. The Chief Justice acknowledged that there was some kind of opposition on the neighbor islands. Perhaps all that needs to be done is to allow the courts on the neighbor islands to set up divisions so that each judge is not required to handle every type of case that exists. More input is needed from the neighbor islands on this issue.

To the extent that the government unions will attempt to preserve jobs for their members, consolidation may be delayed while negotiations are conducted. The Judiciary admitted that they could probably reorganize, but not terminate, people. Whether this is a major or minor stumbling block will likely depend on the willingness of the entities involved to negotiate.

One issue raised by a number of attorney groups was the issue of exclusion from the pool of judges a representative quantity of women and certain minorities. The chairperson of the Judicial Selection Commission stated that while the combined pool of candidates for district and circuit judicial positions adequately reflects the ethnic and gender makeup of the bar, the pool of candidates for circuit court considered alone is not representative. As discussed in the previous chapter, the current circuit court pool contains a disproportionate

number of men and of those of Japanese and Caucasian ancestry. Women and ethnic minorities such as Hawaiians and part-Hawaiians, Filipinos, Pacific Islanders, and Vietnamese and other recent immigrant groups are underrepresented in the circuit court pool. Thus current ethnic and gender diversity demonstrated by candidates for the district court bench would be substantially limited if the criteria were to be changed at this point in time to a ten-year minimum.

One very clear example of that is an examination of the female district court judges. Seven of the nine female district court judges were appointed before they had reached ten years of licensure. Women are still underrepresented on the bench: out of thirty-five district court positions, only nine, or twenty-five percent, are women. If ten years had been the current minimum requirement for the district court, women would be even further behind. The probability of this underrepresentation is confirmed by an examination of women at the circuit court level: of the twenty-five circuit court positions, only two, or eight percent, are occupied by women.[9] The commission expects that the underrepresentation of women and minority groups would "fade away," and the pool become representative, within three to five years. However, if consolidation were to be implemented before that time, opposition could be expected by attorneys, including women's organizations, to a policy that would make the pool of judicial candidates less than representative of the bar and the public.

On other issues, while some attorney groups and individuals took definite positions, others failed to submit official responses because their members could not agree on a position. It remains to be seen how the bar would react to a definite proposal.

Objections may occur to the costs of consolidation. While consolidation may have long-term cost-savings potential, implementing the consolidation would be costly. Additional costs would include: the establishing of an administrative procedure and staff to hear decriminalized traffic offenses (to date, DUI cases are the only traffic cases that have been transferred to an administrative setting), increasing the district judges salaries, increasing judicial staff, and improvements to physical facilities such as the addition of jury boxes, deliberation rooms, and room for judicial staff to allow a full range of cases to be heard at each of the district courthouses.

Summary

Trial court consolidation, like almost any proposal from universal health care to the A+ program to mass transit, is feasible if the Legislature and the Judiciary are willing to support it with sufficient planning and resources. The next step in consolidation would be for the Judiciary to research its options and present a comprehensive and detailed plan to accomplish the change, along with a statement of purpose and list of goals to be accomplished by such a change. Input from all those who use the court system, as well as advice from an independent source such as the National Center for State Courts, should be considered. To the extent that the Judiciary has first-hand knowledge of the problems it will

face in attempting consolidation, the Legislature should defer to its concerns and solutions. The Legislature and Judiciary should help educate the judges, the attorneys, the staff, and the public on the reasons for the changes and the details of the structure that would replace the current one.

Even if the public does not approve a constitutional amendment to formally consolidate the courts, many benefits can be obtained through other methods. The Judiciary is free to consolidate the trial court administrations to reap the benefits of more efficient functioning and lower costs. Since the chief justice selects the district court judges (from a slate presented by the Judicial Selection Commission), the chief justice can select judges with more years of licensure so that these judges can be more readily assigned to fill vacancies on the circuit court bench. The Legislature can approve funding to equalize the salaries of the judges (now only $5,000 apart) and can decriminalize traffic offenses to decrease the burden on the Judiciary.

ENDNOTES

1. Interview with Chief Justice Herman Lum, with researcher and Charlotte Carter-Yamauchi, on June 21, 1991.

2. Testimony to Representative Carol Fukunaga, Chairwoman, House Committee on Legislative Management, by Clyde W. Namuo, Deputy Administrative Director of the Courts (undated).

3. The only difference in qualifications is years of licensure. Senate confirmation is not a qualification for a circuit court candidate; it is part of the selection system.

4. Proceedings of the Constitutional Convention of Hawaii of 1978, vol. I at 622.

5. Id.

6. The statistics in this paragraph refer to judges sitting as of July 1991.

7. But there is validity to having judges appointed at an earlier point in their careers; see discussion concerning representation of women and certain minorities below.

8. In some circumstances, it might be necessary to contemplate whether a balance of powers question exists. However, since the Chief Justice supports court consolidation, there does not appear to be a conflict to explore.

9. There are no women currently in judicial positions at the appellate levels. Only one woman in Hawaii history, Rhoda Lewis, has been appointed to the appellate bench. Service at the circuit court level has generally been a prerequisite for an appellate appointment.

CHAPTER 7

FINDINGS AND RECOMMENDATIONS

Findings

1. Prior to 1840, the judicial system in the Kingdom of Hawaii was feudal in nature, with a court system that gradually developed consisting of a supreme court headed by the King, an island or superior court headed by the island governors, and two classes of district or inferior courts, one headed by the underchiefs and the other by the tax officers.

2. This three-tier system was codified by the Constitution of 1840. The inferior courts led by the "common judges" had trial jurisdiction over cases where the amount in controversy was less than $100, and the tax officers had jurisdiction over the tax and landlord-tenant matters. However, trials were held by all the courts, including the governor's and supreme courts.

3. In 1847, police justices with powers very similar to that of the district judges were created. The name of the governor's court was changed to circuit court, and circuit courts were given original trial jurisdiction over the cases of greater magnitude and appellate jurisdiction on cases appealed from the inferior courts.

4. Between 1847 and 1892, the tax officers were abolished, the police justices and district judges merged to become district magistrates, and original trial jurisdiction was restricted to two courts, the circuit and district courts. Per diem judges were also authorized.

5. During the Territorial period, the district courts were made the responsibility of the counties, the five circuits reduced to four by consolidating the two in Hawaii County, and the circuit court divisions of juvenile court and land court were established.

6. In 1965, the district courts were transferred to the State, and juvenile court became family court. In 1967, the tax appeal division of the circuit court was added.

7. In 1970 the district courts were consolidated and reorganized along county boundaries and the magistrates given the title of district judge. The temporary district magistrates became per diem judges.

8. In 1973, the family court referees who had been assisting the family circuit judges became district family judges.

9. The trial court system today is composed of two tiers. The district court level is the court of limited jurisdiction consisting of regular district judges who handle misdemeanors, small claims, landlord-tenant disputes, and civil cases with limited amounts in controversy,

and district family judges who handle the bulk of family court cases. There are twenty-three district court judges in Honolulu (fourteen regular district judges, and nine family district judges), five each on Maui and Hawaii (two regular, three family), and two on Kauai. The circuit courts are courts of general jurisdiction and hear felonies and the more major civil cases. There are eighteen circuit judges in Honolulu, three each on Maui and Hawaii, and one on Kauai. This two tier system has basically been in place since 1892 and its roots go back to the courts established by the Constitution of 1840.

10. Trial court unification has been a topic of discussion by attorneys, judges, law professors, and other scholars ever since Dean Roscoe Pound's seminal speech in 1906. The need for a simplified system arose because many American judicial systems were in chaos, with a multiplicity of trial courts of confusing and overlapping jurisdiction. At that time, Dean Pound recommended a one tier trial court system, although in 1940 he changed his mind and recommended a two tier system, with a lower court to handle the more minor matters and an upper court to handle the more serious cases.

11. Authorities are still divided over whether a one tier or two tier system is better for a consolidated trial court system, although the more recent tendency is to favor a one tier system. Hawaii currently has a two tier system.

12. Merely combining the functions of the trial courts is not the only factor in a unified trial court system. Although the authorities are not agreed on these other factors, one researcher states that four other factors, centralized management, centralized rule-making, centralized budgeting, and state financing, are also a part of the system. Using these criteria, Hawaii is already very unified. One 1978 study using these criteria (prior to Hawaii's enactment of the Intermediate Court of Appeals) found that Hawaii's court system was the most highly unified in the nation.

13. A review of ten states generally referred to as unified reveals that only one, Massachusetts, actually has a single tier, single class of judge system, which is the model proposed by Chief Justice Herman Lum. Five others have single tier systems with two or three classes of judges, not all of whom are interchangeable. Three others have a structure like Hawaii's -- a two tier system where the lower court hears the more minor matters and the higher court hears the rest. One other court has four different trial courts. The unified Massachusetts system is currently facing many difficulties because of its half-hearted implementation.

14. There is a duplication of administrative functions between the circuit and district courts. The judicial administration is slowly working on ways to consolidate at least part of the system. However, the trial court functions do not need to be combined in order to consolidate the administrations.

15. There is a substantial backlog of cases, in all courts, in all circuits. Some courts are able to handle more cases than the number of new cases that they received, whereas

others, notably the Honolulu circuit court criminal division, receive more new cases than it can dispose of.

16. The response rate from attorneys was low with respect to how the system is currently functioning. Some specific comments on how the system needs to be improved concerned an increase in the Judiciary's budget, creation of more judicial positions, use of fewer per diem judges, the need in Honolulu for more helpful clerical staff, physical overcrowding in the courts, and the backlog of cases.

17. Attorney responses were mixed on the desirability of consolidation. In Honolulu, reasons given against consolidation included the loss of the "people's court" aspect of district court and the waste of using trained circuit judges to handle more mundane matters. The need for more specialization of circuit court judges in both criminal and civil matters was also mentioned. The response was more muted on the neighbor island. The Hawaii county groups said that they were indifferent or unable to decide as the goals of consolidation were unclear, and stated that the real problems they perceived with the system could be dealt with in other ways. There were too few responses from Maui and Kauai to draw many conclusions about attorney responses.

18. Three of the four former members of the Judicial Selection Committee consulted for this study disapproved of the idea of consolidation for reasons ranging from decrease in the pool of interested applicants to the loss of district court as a training ground for judges.

19. Most sitting circuit court judges spent time at district court before being appointed to the circuit court. Half of the circuit court judges think that the circuit court workload is more demanding in terms of time, workload, and responsibility. Three judges take the position that the district court workload is more difficult, and the rest acknowledge a difference between the courts but do not specify which is harder.

20. Only two circuit court judges fully support trial court consolidation. Nine firmly oppose consolidation, seven others have mixed opinions but are mainly negative, and four state that they do not have enough information to form an opinion.

21. Some concerns cited by opponents of consolidation are: the need for more specialization of judges, not less; the fact that the Chief Justice already has the power to move district court judges up to circuit court; the lack of desire of the circuit court judges to hear district or family court cases; the loss of district court as a training ground for younger judges; the inefficiency of a system in which all judges are fungible and the negative effect on morale; and the difficulty of attracting qualified judges to a mixed pool of cases.

22. Family court occupies a unique position in the Judiciary; it is composed of a mandatory circuit family court and a permitted district family court. As a practical matter, the majority of cases are heard by the district family judges and are quite similar to the cases heard by the circuit family judge.

23. Training has been inconsistent for both the circuit and district court benches.

24. Over three-quarters of all district court judges have sat on the circuit court. Twenty-four of the thirty respondents would like to move up to circuit court eventually, and eight would prefer to remain where they are.

25. Almost all of the district court judges favor trial court consolidation. Sixteen strongly favor it, eleven favor it, and two do not care.

26. According to the Judicial Selection Commission, at present the pool of circuit court-qualified applicants is not representative of the bar population. It contains too many white and Japanese males, and too few women and minorities such as Hawaiians, part-Hawaiians, and Filipinos. The commission expects this disparity to "fade away" over the next three to five years as more women and minority attorneys attain ten years of licensure.

27. The Commission selects judges on the basis of their qualifications for the particular court for which they are seeking appointment, not on their overall qualifications to hear any type of case. The Commission concluded that the judicial functions, as presently set up, are too diverse to call for unification.

28. The issue of feasibility is one of mechanics. But before the mechanics can truly be addressed, preliminary issues need to be addressed. Those issues are: what are the goals of consolidation, what is the form of consolidation, and would the proposed form of consolidation meet the goals?

29. House Resolution No. 68 (1991) states two objectives: that every person has a right to a qualified judge, and that some court observers view the duplication of administrative functions and practices as wasteful. There is no proposed form of consolidation.

30. The Chief Justice sees consolidation as giving the Judiciary the benefits of economies of scale, more organization and administrative efficiency, an increased ability to rotate judges, attracting a greater number of qualified attorneys to the bench, easing procedures for attorneys by having only one set of court rules, and cost-cutting through the pooling of judicial staff. The form suggested by the Chief Justice is a single tier, single class of judge system where each judge is regularly rotated to each type of assignment (except family judges, who would be rotated less frequently.)

31. Assuming that the structure suggested by the Chief Justice is used, it is unclear whether consolidation will have much impact on the goals. Most of the goals can be more directly addressed through other methods: a judge can be made more qualified by more training, and organizational efficiency increased by administrative consolidation without court consolidation. Some goals may be adversely affected by consolidation: judicial candidates

may be less, not more, attracted to a "merged" caseload rather than a more definite area of practice.

32. Steps to be taken to consolidate the court, if that is desired, are: an assessment of the goals sought by consolidation, an evaluation of the format to be used, education of judges, attorneys, and the public on these benefits and format, then a constitutional amendment, statutory conformance, and a transition period.

33. Stumbling blocks to consolidation might be: opposition by judges (mainly circuit court judges); opposition by the public, which defeated a 1990 proposed constitutional amendment to raise the qualifications for district court judges from five years to ten years; opposition by neighbor island attorneys and judges, based on the impact of consolidation on their smaller number of judges; government unions; attorneys who oppose the raising of the qualifications from five years to ten; and the short-term costs of consolidation.

Recommendations

1. The Judiciary should be requested to determine whether further consolidation of Hawaii's court system is necessary. If it is, the Judiciary should devise a full-fledged plan of consolidation. The plan should contain substantial input from the following groups: district court judges, including district family judges, circuit court judges, and attorneys. Representatives should be contacted in all counties. A neutral, experienced agency such as the National Center for State Courts should also be consulted on the advisability of further court consolidation in Hawaii, the format of, and timetable for, the consolidation.

2. If consolidation is not deemed necessary, the Judiciary should consider other methods of improving the court system and submit proposed legislation necessary to accomplish these goals.

3. Consolidation of the circuit and district family courts into one circuit level family court should be considered separately by the Judiciary.

4. If consolidation is deemed necessary, the Legislature should work with the Judiciary in implementing the legislation. The Legislature should aid the Judiciary in educating the public as to the need for court consolidation.

5. The proposed move of the family court to Kapolei should be reconsidered by the Judiciary. The benefits of moving a full-scale facility including circuit, district, and family courts should also be considered.

BIBLIOGRAPHY

This is a listing of all articles consulted in the preparation of this study, regardless of whether they were cited in the finished study. There have been so many articles on the various issues associated with all phases of court consolidation that a complete bibliography of all other sources is not possible. Additional sources can be found in Susan Carbon and Larry Berkson, Literature on Court Unification: an Annotated Bibliography, (National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, 1978) 38 pp., which in addition to citing dozens of sources contains a listing of nineteen other bibliographies.

American Bar Association, Judicial Administration Division, Standards Relating to Court Organization, 1990 Edition.

Berkson, Larry and Susan Carbon, Court Unification: History, Politics and Implementation, (U.S. National Institute of Law Enforcement and Criminal Justice: August 1978).

Berkson, Larry C., "The emerging ideal of court unification," 60 Judicature No. 8 at 372 (March 1977).

Berkson, Larry C., Steven W. Hays, and Susan J. Carbon, Managing the State Courts: Text and Readings (West Publishing Co.: 1977)

Berkson, Larry, Susan Carbon, and Judith Rosenbaum, "Organizing the State Courts: Is *Structured Consolidation Justified?*" 45 *Brooklyn Law Review 1 (Fall 1978).*

Bloustein, Marc, "A Short History of the New York State Court System," (University of the State of New York, Reprint No. 66: September 1987)

Broder, Josef M., John F. Porter, and Webb M. Smathers, "The Hidden Consequences of Court Unification," 65 Judicature 10 (June-July 1981).

Carbon, Susan, Larry Berkson, Judy Rosenbaum, "Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy," 27 Emory Law Journal 559 (Summer 1978).

Carter Gobel Associates, Inc., State of Hawaii Judicial System: An Operational Analysis of the First Circuit Family Court (February 1989)

Commission on the Courts, Report of the Task Force on Court Organization and Administration (Arizona Supreme Court: April 1989)

Conference of State Court Administrators and the National Center for State Courts, State Court Organization 1987 (1988)

The Court Statistics Project, State Court Caseload Statistics: Annual Report 1989, National Center for State Courts in cooperation with the Conference of State Court Administrators (Williamsburg, Va: 1991).

Flango, Victor Eugene, "Is Court Unification a Unidimensional Construct?", 6 The Justice System Journal 254 (Spring 1981)

Florida, Committee on Judiciary, "Oversight Report: Conversion to a Single-Tier Trial Court System," (Tallahassee, House of Representatives: October 27, 1982).

Frear, Walter, "The Evolution of the Hawaiian Judiciary," Papers of the Hawaiian Historical Society, No. 7 (June 1894)

Gazell, James A., "An Anatomy of an Advanced Revolution: Analyzing the Progress in American Judicial Administration," 8 Glendale Law Review 67 (1986-87).

Henderson, Thomas, and Cornelius M. Kerwin, "The Changing Character of Court Organization," 7 The Justice System Journal 449 (Winter 1982)

Henderson, Thomas, The Significance of Judicial Structure: the Effect of Unification on Trial Court Operations (National Institute of Justice: March 1984)

Henderson, Thomas A., and Cornelius Kerwin, Structuring Justice: the Implications of Court Unification Reforms, (U.S. Dept. of Justice, National Institute of Justice: March 1984).

Hiatt, Jerry, "An Interview with Judge Yim," Parts I and II, in the Hawaii Bar News, August and September 1991.

Hosticka, Carl J., and Kathleen Murphy, "Local Control over Court Consolidation: the Oregon Experience," 6 The Justice System Journal 218 (Summer 1981)

The Judiciary, State of Hawaii, 1990 Annual Report (July 1, 1989 to June 30, 1990).

The Judiciary, State of Hawaii, 1990 Annual Report Statistical Supplement (July 1, 1989 to June 30, 1990).

Kleps, Ralph N., "Reorganization and Simplification of Court Structure," in Fannie J. Klein, editor, The Improvement of Justice, (the American Bar Association Judicial Administrative Division Handbook: sixth edition 1981).

Knab, Karen Markle, editor, Courts of Limited Jurisdiction: A National Survey (National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice: 1977).

Kugisaki, Craig, "Article V: The Judiciary," part of the Hawaii Constitutional Convention Studies 1978 (Legislative Reference Bureau: May 1978).

Lawson, Harry O., "State Court System Unification," 31 American Univ. Law Review 273 (Winter 1982)

National Center for State Courts, Kalamazoo County District Court Consolidation Feasibility Study, (St. Paul, MN: March 1980)

Philip L. Rice, Chief Justice, Supreme Court, "The Judiciary of Hawaii," typed pamphlet, undated, 34 pp.

Judith Rosenbaum, Larry Berkson, Susan Carbon, "Implementing Court Unification: A Map for Reform," 17 Duquesne Law Review 419 (1978-79).

Jane L. Silverman, "Imposition of a Western Judicial System in the Hawaiian Monarchy," 16 The Hawaiian Journal of History 48 (1982).

Dales Sipes, project director, "Managing the Hawaii Judiciary: An Era of Accomplishment, 1966-1982, Executive Summary," (National Center for State Courts: December 1982)

Ohio State Bar Association Report, "Report of the Special Committee on Court Organization and Funding," (October 24, 1988).

The Unified Court and Elected Officials Work Group, "Proposal for the Implementation of a Unified Trial Court in Maricopa and Pima Counties," (Arizona Supreme Court: February 1991)

U.S. Dept. of Justice, Bureau of Justice Assistance, "Court Unification: Information Guide for the Judiciary, Court Administrators, Concerned Legislators and other Public Officials, Citizen Court Improvement Organizations and Concerned Criminal Justice Personnel," (April 1988).

Rob Wolf and Ted Guthrie, "Are Two Courts Too Many?" Oregon State Bar Bulletin (January 1981).

HOUSE OF REPRESENTATIVES
SIXTEENTH LEGISLATURE, 1991
STATE OF HAWAII

H.R. NO. 68

HOUSE RESOLUTION

REQUESTING A STUDY OF THE TRIAL COURT SYSTEM IN HAWAII.

WHEREAS, trial courts have traditionally been viewed as the initial public forum for resolving disputes brought before the judiciary and that the number and organization of the trial courts generally indicate the amount of cases the judiciary disposes of in a given time period; and

WHEREAS, the trial court system in Hawaii is composed of Circuit Court, which was provided for by the Hawaii State Constitution, and District Court, which was established by the Legislature; and

WHEREAS, currently the qualification requirements for judges at the district court level and the circuit court level differ considerably, i.e., years of licensure as an attorney and confirmation of the Senate; and

WHEREAS, all litigants have a right to a competent judge and that the qualification requirements should be the same of all trial court judges regardless of the court level, the amount in controversy, and the subject matter jurisdiction; and

WHEREAS, the two trial court levels also appear to duplicate judicial administrative functions and practices and that some court observers view this as an inefficient and wasteful use of Hawaii's limited resources; now, therefore,

BE IT RESOLVED by the House of Representatives of the Sixteenth Legislature of the State of Hawaii, Regular Session of 1991, that the Legislative Reference Bureau is requested to study the feasibility of merging Hawaii's two trial court system and that the study include, but not be limited to, an examination of the following issues:

(1) The history and rationale behind establishing two trial court levels;

(2) An evaluation of the Hawaii trial court system as it functions presently and whether Hawaii's trial court system meets the rationale and objectives of its origination;

H.R. NO. 68

(3) An evaluation of the present judicial administration and whether there is a duplication of practices and functions; and

(4) The rationale behind the differing job requirements and qualifications for judges at the district and circuit court levels and the feasibility of establishing the same job requirements and qualifications for all judges at the trial court level;

and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau submit a report with findings and recommendations to the Legislature twenty days before the convening of the 1992 Regular Session; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the Legislative Reference Bureau and the Administrative Director of the Courts.

OFFERED BY:

MAR 6 1991

Appendix B

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
808) 586-1500

October 30, 1991

Ms. Susan E. Jaworowski
Researcher
Legislative Reference Bureau
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Ms. Jaworowski:

This is in response to your letter of August 27, 1991, requesting our comments on two questions related to your office's study of court unification. The questions and our comments are set forth below.

(1) How well is the current trial court system functioning?

The responses of our deputies to this question seem to vary according to the nature of their practice.

The civil litigation attorneys, who mainly practice in the circuit courts, feel that the current trial system is generally adequate except in the area of trial setting and settlement. Securing a firm trial date under the current "floating calendar system" presents definite problems for the litigator. Under the floating calendar system, several trials are set for the same day, since judges expect that the majority of cases will settle before trial. Whether a case settles, however, often depends on the quality of the judge who is assigned to the case. Further, trying to schedule witnesses, especially out-of-state witnesses who need to make plane and hotel reservations, for an uncertain trial date is difficult; it also contributes to the high cost of litigation, since the State incurs penalty charges if a case does not go to trial and a witness' plane reservations must be cancelled at the last minute.

The criminal litigation attorneys, who practice both in the district and circuit courts, feel that both sets of courts are overwhelmed by cases. This is especially true in the circuit courts, where some of the cases are not heard for several weeks, or even months, after the scheduled trial date. This makes it extremely difficult for the attorneys to schedule witnessess for trial, especially when out-of-state witnesses are involved.

The attorneys who practice in the Family Court have serious concerns about the conditions under which Family Court proceedings take place. The Family Court is definitely a high-volume court, and more members of the public are probably processed through the Family Court than any other court. The type of cases handled in the Family Court involves sensitive, confidential matters that encompass the interaction of the law with the dynamics of human behavior and the influences of culture, life experience, and social values on the family unit. However, the Family Court setting is far less dignified than other circuit and district court settings. Attorneys and their clients are forced to meet in a large, noisy waiting room where there is no privacy and there are many distractions. Additional resources, including adequate office and courtroom space and more support staff, are sorely needed in the Family Court, which is often perceived as a "stepchild" of the Judiciary. A more dignified and humane setting would inspire more confidence in the public that their cases are being given fair and full consideration.

Additionally, the Family Court administrative procedure of rotating the judges every few months does not permit the judges to maintain an in-depth knowledge of the case. Consequently, many cases move slowly through the system because a new judge has to learn a case from the beginning every few months, thus delaying a decision. Family Court judges routinely make decisions that have long-reaching effects on the lives of Hawaii's children and families. It is imperative that this court have the resources needed to safeguard the wellbeing of Hawaii's families and the respect due to the individuals who appear before it.

(2) What is your opinion on consolidation of the trial courts?

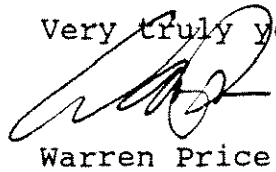
The general consensus in our department is that consolidation of the trial courts will not have much impact on the overall efficiency of the courts. District court and circuit court practice are totally different and it makes

practical sense to have two levels of courts that have different jurisdictional requirements. It also may be an administrative burden to consolidate all of the court administrative tasks under one roof.

There is a concern, however, that the district and circuit courts in the different circuits all operate under different rules and court procedures, not all of which are communicated to the public and the bar. Adopting a uniform set of rules and procedures would definitely be welcomed, at least by this office.

We hope the above responds to your letter satisfactorily. Please feel free to call if you have any questions on the above.

Very truly yours,



Warren Price, III
Attorney General

WP/WFF:imm
0558Q

Appendix C

QUESTIONNAIRE ON COURT UNIFICATION

The House of Representatives has requested the Legislative Reference Bureau to study the feasibility of consolidating the district and circuit courts into a unified system. In carrying out this study, we are soliciting the responses of the district court judges to the proposal. We would appreciate your responses to this questionnaire. You need not identify yourself in completing this questionnaire, and all responses will remain anonymous in the report. Please feel free to supplement your responses on the back of the questionnaire or with a separate attachment.

1. How long have you served as a district court judge?

   _____

2. Are you a:

   _____ regular district judge?

   _____ family district

3. Did you receive any training from the Judiciary when you began your first term as judge?

   _____ Yes _____ No

4. Have you received training since?

   _____ Yes _____ No

   If so, please describe: _____

   _____

   _____

5. Please evaluate the helpfulness of the training you received:

   Extremely helpful Okay Of no benefit

   1 2 3 4 5

6. What type of training would be optimal for district court judges? _____

   _____

   _____

7. Have you been rotated up to circuit court?

   _____ Yes _____ No

   If so, what is the total time you have spent up at circuit court? _____

8. Which presently available career option would you prefer for the future under the present court system?

   a. Move up to circuit court _____

   b. Remain at district court _____

   c. Leave the court and seek other career options _____

9. How similar do you consider your job to be to that of a circuit court position? Please circle one.

   Very similar Similar Not very similar Very different

   If not similar, how does it differ? _____

   _____

   _____

10. Do you think you would need additional training if unification were to take place and you would have to handle a circuit court-type workload?

    _____ Yes _____ No

11. What is your opinion on trial court consolidation in general?

    Strongly favor Favor Don't care Opposed Strongly opposed

    Why? _____

    _____

12. Would you favor or oppose consolidation of the courts if, after consolidation, your caseload was:

    a. The same as it is now? Favor Oppose

    b. A mixture of circuit and district court work? Favor Oppose

    c. Wholly circuit court-type work? Favor Oppose

13. If the current district court judges would not automatically be transferred to a unified court, would you apply for the unified court if you had to go through the Senate confirmation process?

    _____ Yes _____ No

Please return the questionnaire in the enclosed envelope by August 15.
Thank you for your cooperation.