

**Remarks of Chief Justice Mark E. Recktenwald
American Judges Association
September 24, 2018**

Good morning, and aloha.

On behalf of the Hawai'i Judiciary, I'd like to welcome you all to Hawai'i, and thank the American Judges Association and its president, Judge Catherine Shaffer, for holding its annual meeting here in the Aloha State. I deeply appreciate AJA inviting me to join you here this morning, and thank my good friend President-elect Justice Robert Torres of Guam for helping to facilitate my appearance today.

I'd like to acknowledge Chief Judge Randal Valenciano for welcoming us to Kaua'i, where he is known both as an outstanding jurist and football referee. I'd also like to acknowledge Dean Chemerinsky and all the conference's outstanding speakers, including Larry Okinaga, who is spearheading efforts to re-establish the American Judicature Society as a national voice for judicial independence.

We are fortunate to be here on the island of Kaua'i, which is known for its beautiful scenery, its friendly community, and its proud history. Shortly after Western contact in the islands, King Kamehameha the First set out to unify all the islands in the Hawaiian archipelago, which were previously ruled by many different ali'i or chiefs. Kamehameha and his warriors

conquered Hawai'i Island, and then moved on to Maui and O'ahu, which they conquered through fierce battles.

At the time, Kaua'i and Ni'ihau were both under the rule of the same chief, Kaumuali'i. When Kamehameha set off to invade Kaua'i, his attempts to conquer this small island failed. Twice Kamehameha gathered forces to conquer the island, and twice he was met with failure -- first due to a storm and rough seas, and the next due to an epidemic which crippled his forces.

As a result, the islands of Kaua'i and Ni'ihau can proudly boast that they were the only islands in the Hawaiian archipelago that were not conquered by Kamehameha. Instead, Kauai's chief engaged in a more diplomatic resolution -- he struck a deal with Kamehameha that permitted him to continue to rule over Kaua'i as tributary while also ceding the island to Kamehameha; thus, helping Kamehameha to realize his dream of unifying all the Hawaiian islands while also ending the threat of war.

Although Kamehameha was renowned as a great warrior and military leader, I'd like to focus on another one of his lasting achievements. While he was King, Kamehameha proclaimed what is known as the "Law of the Splintered Paddle." This decree established the rights of all people to travel freely and equally throughout the Kingdom, and provided:

**Respect alike [the rights of] men great and humble;
See to it that our aged, our women, and our children
Lie down to sleep by the roadside
Without fear of harm.**

The principles embodied in this short passage resonate today just as they did more than 200 years ago, when Kamehameha adopted the decree. The phrase "equal justice under law" is engraved on the Supreme Court building in Washington D.C., and it is a noble ideal that informs all of what we do as judges. But it takes hard work to make sure that ideal is a reality for every person, whatever their background or economic condition. That's where the leadership of the bar and the judiciary is so important, and why the work of the AJA in supporting the administration of justice, and in fostering judicial excellence and independence, is so essential.

I'd like to talk to you about three people from Hawai'i whose lives illustrate the impact that one person, working with a group of like-minded individuals, can have in effectuating change and realizing our nation's promise of justice for all. And then I'd like to share with you how we can address one of the modern day challenges to that promise -- the lack of effective access to our civil justice system.

Chief Justice William S. Richardson

The first person is one of my predecessors as chief justice of Hawai'i, William S. Richardson. CJ Richardson, as he

was fondly known, achieved many great things throughout his life, from unifying our judicial system to leading the effort more than 40 years ago to establish our state's only law school, which now bears his name. You will be hearing from several outstanding professors from that school later today. But I'd like to acknowledge one particularly extraordinary thing that CJ Richardson did, which was to re-establish a place for Hawaiian values, tradition and custom in our legal system. The history of contact between western nations and the indigenous people of Hawai'i was catastrophic in many ways, through the effects of disease which wiped out almost 90% of the Hawaiian population in the 1800s to the loss of land, as western concepts of ownership were introduced and ultimately to the loss of political sovereignty through the overthrow of the Kingdom of Hawai'i in 1893 – an event that, 100 years later, Congress acknowledged occurred with the complicity of the United States. Through all of that, Native Hawaiians survived as a people, and experienced a strong renaissance of cultural identity and pride beginning in the 1960s and 70s.

CJ Richardson, who was part Hawaiian, was at the forefront of that renaissance. He grew up in humble surroundings in Honolulu -- his father built their house from scrap lumber, and CJ didn't own his first pair of shoes until he was in sixth grade -- and never forgot the injustice he felt

when, as a young boy, he was not allowed onto the private beach area in front of the Royal Hawaiian Hotel. Years later, after he became Chief Justice in 1966, the court issued a series of landmark decisions which drew upon traditional Hawaiian concepts of land and water use. In a nutshell, the court held that the waters and beaches of the state were not subject to private ownership, but rather were public assets to be protected by the government for the benefit of all citizens.

Although CJ Richardson's decisions were considered by some to be revolutionary, they were always written respectfully and with impeccable judicial craftsmanship and care. He was a warm, caring person who lived his life with aloha. By so doing, he helped modern Hawai'i reconnect with the wisdom of its ancestors.

Daniel Inouye

The second person I'd like to mention to you today is the late Senator Daniel K. Inouye, perhaps the most famous member of the generation of Japanese Americans who came of age during World War II. The Senator served in the legendary 442nd Regimental Combat Team, which was organized during the height of the hysteria that resulted from the attack on Pearl Harbor -- an era when more than 100,000 Japanese Americans were imprisoned in internment camps simply because of their race. Yet despite all that, thousands of young Japanese American

men lined up to serve their country in the 442nd, when they were finally given that opportunity in 1943. They served with valor and honor, suffering horrific casualties on the battlefield in Europe and returning to the United States as the most decorated unit, for its size and length of service, in American military history. For his bravery, Senator Inouye received the Distinguished Service Cross, later upgraded to the Medal of Honor.

The Hawai'i that these veterans returned to was in many ways the same place they had left -- a highly stratified, plantation-based economy. But the Japanese American vets didn't want to return to the old ways, and they set about changing them. For some, that meant using the GI bill to go to college and then law school, and then using that education to create a more just and equal society. In 1954, many of them -- including Senator Inouye, and George Ariyoshi, who later became Governor -- successfully ran for the state legislature. In the years that followed, the members of that generation changed our law and politics.

After Senator Inouye passed away in 2012, his widow Irene visited me and shared a very special gift that in many ways symbolizes the political revolution that I just described to you. It was the Senator's 1953 certificate of

admission to the Hawai'i bar. It is now on display in our Judiciary History Center in Honolulu -- a fitting reminder of the potential for finding justice that a law license held for Senator Inouye and many of his fellow vets. The members of that generation who became lawyers knew that even though the legal system had failed Japanese Americans so profoundly during World War II, it nevertheless represented their best opportunity to effectuate change.

Daniel Foley

The last person I'd like to mention is not as widely known as the first two. He is Daniel Foley, whom I served with as a member of our state's Intermediate Court of Appeals. But it's not his service as a judge that I want to discuss with you, but rather his work that preceded it, when he had a solo practice as a civil rights attorney. In 1991, Dan was contacted by three couples who had applied for marriage licenses, but had been turned down because they were of the same sex. They wanted to file suit against the state, but could not find a lawyer to assist them.

No court anywhere had ever held that same sex couples had a right to marry. Dan took the case anyway, and he did it pro bono. The complaint he filed in Baehr v. Lewin was dismissed by the trial court. In 1993, however, first by a plurality, and later by a majority, the Hawai'i Supreme Court

held that the denial of the right to marry was sex discrimination under our state constitution, and that the state would have to show a compelling interest in order to justify it. The case went back for a two-week trial in 1996, where Dan prevailed after the trial court found that the state had failed to meet its burden.

Although Hawai'i voters later approved a constitutional amendment that allowed the state to reserve marriage to opposite sex couples, the impact of the case, and Dan's work, has continued.

Indeed, Justice Kennedy's majority opinion in the Obergefell case cited prominently to Baehr as the first time a state high court had ruled that excluding same-sex couples from marriage is unlawful discrimination.

The story of Dan's work on the Baehr case provides a fitting introduction to one of the greatest current challenges facing us as a profession. If Dan didn't take that case, perhaps no one would have, and the plaintiffs' side of the story might have remained unheard. That is an all-too common phenomenon in our judicial system today, where the number of unrepresented parties has skyrocketed. Like all of your jurisdictions, Hawai'i has huge numbers of litigants coming into our civil judicial system who are

unable to afford an attorney. In Hawai'i, 97% of summary possession cases and 94% of divorce cases involve at least one party without an attorney. And in divorce cases, both parties appear pro se in an astonishing 62% of all cases. For most of these folks, the judicial system is difficult to navigate, with procedures and terminology that is not intuitively obvious.

Significantly, these challenges come at a time of other profound changes that are sweeping the legal profession worldwide. In England, corporations can now engage in the practice of law, and you can buy stock in law firms. England recently adopted sweeping changes that will authorize people without formal legal education to become solicitors, and here in the United States several states (Washington and Utah) have adopted or are considering "Triple L-T" rules that allow limited practice by paralegals.

Technology is also changing the practice of law. Legal Zoom now operates in every state, and has successfully resolved legal challenges to its business model in a number of jurisdictions. There are multiple new entries in the online legal market, including attorney ratings services, services that pair up clients with lawyers, and my personal favorite, services that predict how judges will rule.

And then there is Artificial Intelligence, or AI. Companies such as Ross Intelligence are marketing AI-based legal research and memo-writing services, and a 2017 New York Times article quoted a study by McKinsey Global Institute that suggested that 23% of legal work could be automated using AI.

Finally, there is the role of the courts. For years, many observers have decried decreases in the number of jury trials in civil cases. A survey of several thousand members of the American College of Trial Lawyers in 2008 concluded that the civil justice system "is in serious need of repair . . . it takes too long and costs too much." At the same time, alternatives to litigation have sprung up. Amazon and eBay offer online dispute resolution, and eBay's ODR platform resolves over 60 million disputes a year, 90% of which are resolved without human intervention.

So, we have several significant trends underway: rapid growth in self-represented parties, along with technological and structural changes, that are challenging the way we practice law. We truly are at a crossroad: are we going to be overwhelmed by these challenges, and go the way of entities such as Blockbuster that failed effectively to respond to rapid change? Or, are we going to be "disruptive innovators" who use technology to solve the seeming paradox of having "too many

lawyers" at the same time that our courthouses are filled with self-represented parties?

I believe there is a path forward that brings together the potential of technology such as AI, and the efforts that are taking place to improve the civil justice system and address the needs of self-represented litigants.

Civil Justice Improvement

I'd like to first discuss briefly the efforts to make our civil justice system more efficient, cost-effective and faster. A number of states and the federal courts have been innovating with ideas such as proportionality in discovery, and the Conference of Chief Justices created a Civil Justice Improvements Committee that reviewed data from more than a million actual civil cases from different jurisdictions across the nation.

The Committee found that the landscape of civil litigation had changed dramatically in recent years. Nearly 2/3 of the million cases involved contract claims, of which the vast majority were debt collection, landlord/tenant, and mortgage foreclosure cases. Only seven percent were tort cases and the report noted that the comparative percentage of tort cases has dropped so significantly over a twenty year period as to have "largely evaporated."

The committee concluded that "[i]f our civil courts do

not change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and customer expectations -- but never adequately replaced."

It observed that private entities and individuals are already filling the void left by the failure of courts to provide a cost-effective and convenient forum for resolving disputes. However, there are profound costs to our democracy when the role of courts is reduced, including reduced opportunities to develop the law and the loss of the transparency that is the hallmark of our judicial system.

One of the ideas central to the committee's recommendations is that a triage process should be conducted when each civil case is filed so that their handling will be "right sized" by allocating the appropriate resources to match the needs of the case.

These principles are being considered across the country. For example, Utah adopted new rules that include comprehensive initial disclosures, a requirement that discovery be proportional, and a limit on expert testimony. In addition, Utah tiered its discovery based on the amount in controversy and adopted an expedited process for resolving discovery disputes. An article published in AJA's "Court Review" earlier this year noted that Utah's discovery

reforms resulted in cases being disposed of more quickly and settled more frequently than before, with corresponding reductions in litigation costs.

Other states, such as Arizona, under the leadership of Chief Justice Scott Bales, have also implemented significant changes. Here in Hawai'i, we are undergoing a comprehensive review of our civil justice system to determine ways to make it more accessible to the public and responsive to the realities of the practice of law.

Access to Justice

Another critical component of ensuring that we meet the evolving needs of the public is through efforts to increase access to the civil justice system. The Access to Justice movement has grown dramatically in recent years: there are now approximately 44 ATJ commissions or similar entities that have been created across the nation. These commissions have achieved extraordinary results. In Hawai'i, our commission spearheaded an effort to open self-help centers in our courthouses, where attorneys volunteer their time to provide legal information or limited scope legal advice to pro se litigants. We opened the first center right here on Kaua'i in 2011, and now have centers operating in every circuit in the state and have helped more than 21,000

people, at almost no cost to the public.

Our commission and community partners have also led efforts to increase funding for our civil legal services providers, to create on-line resources, such as self-filling forms and an online pro bono system, to develop partnerships with our state public libraries to make the on-line resources more accessible to the community, and, most recently, to train community navigators -- trusted leaders who might be a coach, pastor, union representative, or elder in the community -- about the ATJ resources that are available, so we can reach farther into the community.

As ATJ efforts have gained momentum across the country, my colleagues at the Conference of Chief Justices adopted a resolution in 2015 that established the goal of 100 percent access to effective assistance for essential civil legal needs. The vision is to provide a continuum of appropriate services and resources. For example, some folks facing legal challenges will be able to navigate them with on-line resources alone, such as interactive software (indeed, some may prefer such resources); others will need full representation from either a legal services attorney or a pro bono attorney; and many will be somewhere in between, and will need to at least consult with an attorney at a self-help center or walk-in clinic to get their bearings.

It will take many people coming together to accomplish this goal of 100 percent access, but if we continue to work together, and are open to the potential of new technology to make services available to those who are otherwise being left out, then I am confident that we can do so. To give you some idea of how technology can help, there are two initiatives that are particularly promising.

One involves the development of an online legal services portal that will provide information and resources to people who face problems (such as eviction, unpaid debts, loss of public benefits) that may have a legal component.

The Microsoft Corporation, in partnership with Legal Services Corporation and Pro Bono Net, has dedicated \$1,000,000 worth of resources to develop such a portal in Hawai'i and Alaska. This portal will use artificial intelligence to help people identify legal problems, and then access resources to address both their legal issues and related needs such as social services or housing. Because of the portal's use of AI, as time goes on, it will grow more accurate and better equipped to identify the specific issues being raised and resources that could potentially help. The goal is to have a soft-roll out of this portal system by the end of the year, and then to facilitate its replication in other states across the country.

Another initiative involves the development of on-line dispute resolution systems, or ODR. These systems could, for example, enable civil litigants in small claims cases to have their claims mediated on-line, before they are presented to a judge; if on-line mediation is unsuccessful, then the parties could, by agreement, have the judge resolve the case based on documents and other materials submitted on line.

A court in Salt Lake, Utah (West Valley City Justice Court) is piloting an "ODR" system for small claims, and Hawai'i along with other states are exploring these systems as well. They are not appropriate for every case or every litigant, but for some people, the possibility of being able to resolve their dispute without having to come into a brick-and-mortar courthouse will be very appealing.

Significantly, these initiatives are attracting a commitment of resources from the Pew Charitable Trust, which recently announced a "Civil Justice Innovation Project." As part of this project, Pew is evaluating the use of portals and ODR to assist self-represented litigants and improve state court efficiency.

Conclusion

In sum, there is a path forward for our civil justice system that brings together the work being done on civil

justice reform, access to justice, and the use of technology in the legal profession. We need to consider sensible innovations to the civil justice system that will ensure the "just, speedy and inexpensive determination" of civil cases, as set forth in rule 1 of the Rules of Civil Procedure. We must use technology to make the system more efficient and accessible, and responsive to the expectations of the public. And we need to re-dedicate ourselves to ensuring there is meaningful access for those parties who are navigating the civil legal system without counsel.

The AJA has been leading the conversation about many of the issues that I have spoken about today, from civil justice reform to promoting procedural fairness in our courts. I thank you for all that you have done, and respectfully urge you to continue your efforts to ensure that the the courts fulfill their commitment of providing justice for all, in a rapidly changing world.

Once again, thank you to AJA for the honor of joining you here today. I hope that you and your families have a wonderful stay here in Hawai'i.

Aloha and mahalo.