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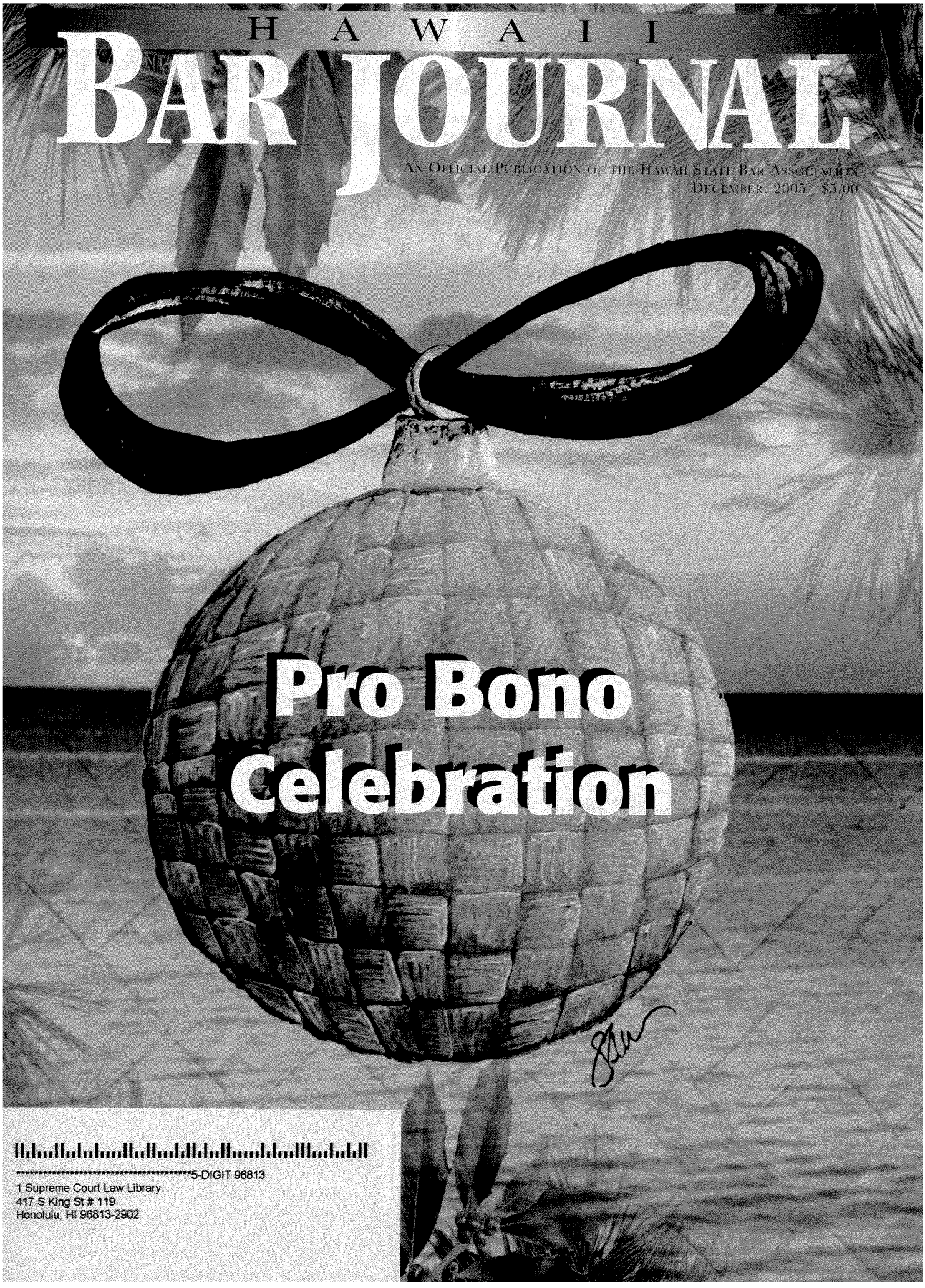

Pro Bono Celebration

Privacy and Confidentiality in MEDIATION

by Elizabeth Kent

Television commercials and the law about mediation communications may have more in common than you think! There is a television commercial promoting travel to Las Vegas with the tag line "What happens in Las Vegas stays in Las Vegas." That phrase is an effective summary of the Uniform Mediation Act (UMA) and its treatment of mediation communications in court proceedings. However, there are significant qualifiers:

(1) If the participants and the mediator agree to share information about mediation communications, they may;

(2) If the participants and the mediator wish to prevent disclosure of their mediation communications, they may; and

(3) Although the general rule of the UMA is that mediation communications are private, there are specific exceptions to the privilege against disclosure.

In Hawaii, Rule 408 of the Hawaii Rules of Evidence governs disclosure of mediation communications. Generally, Rule 408 prohibits the admissibility of mediation communications in court actions. In promoting mediation, Hawaii's courts have broadly interpreted Rule 408 to protect and keep the mediation process separate from court proceedings. There have been few problems with that approach, and indeed, one criticism that has arisen in discussions comparing Rule 408 and the UMA is whether there is actually any need for change. After all, "if it ain't broke, why fix it?"

The language of Rule 408, however, may actually support a more limited protection of the mediation process. This becomes particularly important in courts of other states and in other forums such as arbitration. Proponents of the UMA suggest that it is appropriate to consider its adoption at this time.

The UMA takes a different approach to preserving the sanctity of the mediation process. Rule 408 applies only to court proceedings. The UMA, in contrast, establishes certain relationships between parties involved in the mediation as privileged. Therefore, communications between the parties are protected from admissibility in court proceedings. The protection also extends to discovery and attempts to impeach a witness based solely on events occurring during the mediation. Mediation parties, the mediator, and non-party participants may exercise the privilege and may prevent one another from disclosing their mediation communications. On the other hand, these people may also waive the privilege. The UMA provides exceptions to the privilege so that some communications, historically not protected, are not protected under the UMA either. This includes mediation communications that are:

•threats or statements about plans to hurt someone or commit a violent crime,

•intentionally used to plan or conceal a crime or ongoing criminal activity, or

•used to prove or disprove a malpractice case filed against a mediator.

Because the UMA is specifically designed to govern the entire mediation process, it addresses issues beyond the discoverability and admissibility of mediation communications covered under Rule 408. For instance:

•Section 7 of UMA (a controversial section in Hawaii) limits communication between the mediator and the judge who may rule on the case. The parties, of course, may all agree to waive this provision. Because Rule 408 is a rule of evidence, the communication between judge and mediator is not within its purview.

•Section 9 of the UMA requires the mediator to make conflict of interest disclosures before accepting mediation. This disclosure rule is a continuing obligation.

•Section 10 protects parties and permits them to bring an attorney or other

What is the Best Way to Protect It?

individual with them to participate in mediation. Waivers of this right given before a mediation may be rescinded.

In short, although there appear to be numerous differences between the UMA and current Hawaii law, they are not mutually exclusive. While Rule 408 is well established in Hawaii, enactment of the UMA will provide greater protection to participants in the mediation process. Both attempt to do the same thing-protect parties and the mediation process and preserve private negotiations during the settlement process. This encourages settlement and exploring settlement options. The UMA approach is more formal and focused on the entire mediation process, while Hawaii law hinges upon a single statute that is arguably more restrictive in terms of what aspects of the mediation process it protects. For example, mediation communication in Hawaii is open to discovery and may be admissible in evidence in another state.

What matches our climate best? Will the addition of the UMA help protect Hawaii's mediation practices or will it simply add yet another confusing law? Clearly there is a level of comfort with Rule 408, which we already know and use.

In early November, a series of forums were held on Hawaii Island, Kauai, Maui, Molokai, and Oahu to talk about confidentiality in mediation. The purpose of the mediation confidentiality forums was to start a public discussion about the process that will best promote and encourage use of mediation in Hawaii, provide the most certainty, and will be best for Hawaii. These are the issues that Hawaii's mediators and mediation users need to talk about and discuss. If you have comments, questions, suggestions, or a preference, please contact Elizabeth.R.Kent@courts.state.hi.us.

Elizabeth Kent is the Director of the Hawaii Judiciary's Center for Alternative Dispute Resolution. She is one of Hawaii's Uniform Law Commissioners and was a member of the UMA drafting committee.