

THE JUDICIARY, STATE OF HAWAII

Testimony to the Twenty-Fifth Legislature, Regular Session of 2009

Senate Committee on Judiciary and Government Operations

The Honorable Brian T. Taniguchi, Chair

The Honorable Dwight Y. Takamine, Vice Chair

Tuesday, February 10, 2009, 9:00 a.m.

State Capitol, Conference Room 016

by

Professor Addison Bowman

Hawaii Supreme Court Standing Committee on the Rules of Evidence

Bill No. and Title: Senate Bill No. 65, Relating to the Hawaii Rules of Evidence

Purpose: Provides that if evidence of an alleged victim's character for aggressiveness is offered by an accused and admitted under paragraph (2), evidence of the same trait of character of the accused offered by the prosecution may be admissible.

Judiciary's Position:

The Judiciary supports this measure. If enacted into law, it will conform Hawaii Rule of Evidence 404(a) to its federal counterpart, Federal Rule of Evidence 404(a), which received a similar amendment in 2000.

The Hawaii Supreme Court's Standing Committee on the Rules of Evidence urged the adoption of this very amendment in its "Report of the committee's work in 2008," paragraph 4. In its report, the Standing Committee observed that a similar measure was incorporated in Senate Bill No. 961 (2007), which passed the Senate in 2007. The Standing Committee supported this measure in 2007, and now renews its support.

This is a "sauce for the goose, sauce for the gander" modification of the character evidence rule. As the commentary to FRE 404 points out: "Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused . . . The



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amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused."

The situation contemplated is a homicide or assault case in which the defense asserts self defense. The question typically presented is whether the accused or the victim was the first aggressor. If the accused seizes the initiative under Rule 404(a)(2) and offers evidence of the violent character of the victim, then this amendment will allow the prosecution to offer similar evidence of the same character trait of the accused.

Chief Justice Ronald Moon created the Standing Committee on the Rules of Evidence in 1993 with a mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence." The Standing Committee is pleased to assist the Legislature in its evaluation of new evidence proposals and to enable the Judiciary to fulfill its constitutional responsibility to assert primacy in matters "relating to process, practice, procedure and appeals."

Thank you for the opportunity to testify on this measure.

**Testimony of the Office of the Public Defender
State of Hawaii
to the Senate Committee on Judiciary and Government Operations**

February 10, 2009

S.B. No. 65: RELATING TO THE HAWAII RULES OF EVIDENCE

Chair Taniguchi and Members of the Committee:

We oppose the passage of S.B. No. 65 on the basis that it would have a chilling effect on a criminal defendant's right to present evidence in his or her defense. Under S.B. No. 65, if the accused presents evidence of the aggressiveness or violence of the victim which is relevant to the case, the prosecution could then present evidence of aggressiveness or violence of the accused. Currently, under the Hawaii rule, the prosecution is prohibited from presenting evidence of violent character of the accused unless the accused first presents evidence of the accused's peaceful nature.

It is important to understand the nature of a criminal trial. The point of the trial is not, as some have said, to find the truth. A jury in a criminal case doesn't have investigative powers or the right to subpoena witnesses. In fact, we often learn through juror questions during trial or jury communications during deliberation that the jury wonders why certain forensic testing wasn't done or specified persons were not called as witnesses.

The only point of a criminal trial is for the jury to determine if the government has proven beyond a reasonable doubt that the defendant committed the crime charged or an included crime on which the judge instructs the jury. The focus is entirely on the facts of the case, not on whether the defendant is a good or bad person. The reason for this important distinction is clear. A "good" person who commits a crime should not be acquitted because the jury was judging their life as a whole. On the other side, a "bad" person who did not commit a crime should not be found guilty because the jury was judging their life as a whole.

That is the reason for the very important protections regarding evidence of a defendant's past. There are specified exceptions that allow such evidence to come before the jury, such as past crimes of dishonesty. Also, if a defendant has "opened the door" by testifying to the effect that "I've never been in trouble before", the government is allowed to bring in evidence of past convictions to attack the defendant's credibility. Indeed, the danger of "opening" the door to past criminal convictions is taken so seriously by defense attorneys, this it is often a critical factor in making the decision of whether a defendant will testify.

The problem with this bill is that it departs from the carefully constructed rules of evidence we currently have in such a way that it will have a chilling effect on the defendant's right to present evidence in his or her own defense. In a case where the victim was a violent person who threatened harm to the accused, the accused may be forced to elect to forego presenting evidence regarding the victim's violent character if the accused had a past conviction for assault or terroristic threatening, no matter how irrelevant that past conviction might be to the current determination as to whether the

accused acted in self-defense. If the accused went ahead and presented the evidence of the victim's violent character, the prosecution could then inform the jury of the accused's past conviction. The defense then runs the risk of painting the accused in a bad light before the jury and changing the focus from the facts of the trial.

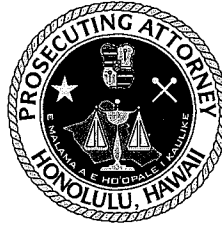
The Hawaii rule currently protects an accused from making this type of election and assures that relevant evidence will be given to the jury. The U.S. and Hawaii Constitutions do not state that the prosecution and the accused must stand as equals. Indeed the Bill of Rights exists to protect the individual against the tremendous power of the government particularly in the area of criminal procedure. The current Hawaii rule should remain.

Thank for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET, HONOLULU, HAWAII 96813
AREA CODE 808 • 527-6494

PETER B. CARLISLE
PROSECUTING ATTORNEY



DOUGLAS S. CHIN
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE BRIAN TANIGUCHI, CHAIR
SENATE JUDICIARY AND GOVERNMENT OPERATIONS COMMITTEE
Twenty-fifth State Legislature
Regular Session of 2009
State of Hawai'i

February 10, 2009

RE: S.B. 65; RELATED TO THE HAWAII RULES OF EVIDENCE.

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, the Department of the Prosecuting Attorney submits the following testimony in support of S.B. 65.

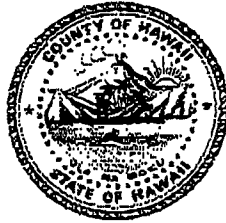
The purpose of this bill is to amend Rule 404(a) of the Hawaii Rules of Evidence (HRE) to specifically provide that if the defendant offers evidence of the alleged victim's character for aggressiveness, then the prosecution may offer evidence of the same trait of character of the defendant.

Under the current state of the law, a defendant who attacks a victim's character by introducing evidence of aggressiveness as a trait of the victim's character does not open the door to a similar attack on his or her own character. This amendment proposes a more fairly balanced rule that permits the prosecution to introduce evidence of a defendant's character for aggressiveness or violence only after the defendant has attacked the victim's character for the same traits. We believe that this amendment will permit a more balanced presentation to the trier of fact. We also note that under HRE Rule 403, the court still retains the power to exclude any evidence, including relevant evidence, when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or if it is a waste of time.

For this reason, we support the passage of SB 65 and thank you for this opportunity to testify.

JAY T. KIMURA
PROSECUTING ATTORNEY

CHARLENE Y. IBOSHI
FIRST DEPUTY
PROSECUTING ATTORNEY



34 RAINBOW DRIVE
HILO, HAWAII 96720
PH: 961-0488
FAX: 961-8908
934-3403
934-3503

WEST HAWAII UNIT
81-880 HALEKI'I ST, SUITE 150
KEALAKEKUA, HAWAII 96750
PH: 322-2552
FAX: 322-6584

OFFICE OF THE PROSECUTING ATTORNEY

February 7, 2009

Honorable Brian Taniguchi
Chair, Judiciary Committee
Hawaii State Senate

Dear Chair Taniguchi and Committee Members:

Re: SB 65, Relating to The Hawaii Rules of Evidence

SB 65 reflects the 2008 work of the Standing Committee on Rules of Evidence, which was established by the Chief Justice in 1993. The purpose of the bill is to provide a balanced presentation of character evidence when an accused decides to attack the character of the alleged victim.

A bill similar to SB 65 was introduced in 2007, with the support of the same Judiciary Standing Committee (SB961), and passed the Senate unanimously, but did not have a hearing in the House.

Rule 404 (a) (1), Federal Rules of Evidence, was amended in 2000 to provide the balance we seek here, and a copy of Rule 404 is attached for your easy reference. As you will see, the federal rule is broader than SB 65, in that the federal rule allows evidence about any trait of character of the accused, when that specific trait of character of the alleged victim is raised by the accused. SB 65 has a narrower focus, in that we are asking only that evidence be allowed when the alleged victim's trait of character *for aggressiveness* is raised as an issue by the accused.

This amendment is necessary because current state law does not allow the government to introduce negative character evidence as to the accused, unless the accused introduces evidence of good character. If the accused does not try to prove his own good character, but nevertheless goes after the character of the alleged victim, the government's hands are tied. This imbalance is unfair. SB 65 would correct this, making clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait (*aggressiveness*) of the accused.

Considerable background on this issue is contained in the 2008 Report of the Standing Committee on the Rules of Evidence to Chief Justice Moon, and a portion of the relevant commentary is attached for your easy reference. If we can provide you any additional information, or a full copy of the Committee's report, please feel free to have your staff contact Charlene Iboshi, member of the Committee and First Deputy, Office of the Prosecuting Attorney, County of Hawaii.

Thank you for this opportunity to testify.

Respectfully submitted,

Charlene Iboshi
First Deputy

Rule 403

FEDERAL RULES OF EVIDENCE

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Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

Rule 405. Methods of Proving Character

(a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Federal Rules of Evidence Rule 404, 28 U.S.C.A.**2000 Amendments (commentary)**

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434-5 (D.C. Cir. 1972)

(evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report--Proposed Amendment to Rule 404(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character," in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.
2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.
3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

RULE 404(a)(1): EVIDENCE OF ACCUSED'S CHARACTER . The amendment to Rule 404(a)(1) applies only in criminal cases, furnishing a new exception for prosecutors to the general rule prohibiting the introduction of character evidence. It provides that, "if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution" is not excluded by Rule 404(a). This amendment was prompted by a flurry of bills in Congress that sought to do something similar but raised numerous drafting and other issues.

Caution About a New Approach

The amendatory language is different from that which was put out for public comment by the Advisory Committee in 1998. The exception as adopted is limited to evidence "of the same trait of character" of the victim. The Advisory Committee originally proposed a broader exception--for evidence of any "pertinent" trait of the victim's character. Since this amendment reverses centuries' worth of precedent, it was deemed prudent to limit its scope, and avoid opening a floodgate of litigation on difficult questions of "pertinence."

Tactical Issue for the Defense

The amendment seeks to strike an evenhanded balance. Unless the accused raises the issue of the victim's character under Rule 404(a)(2), then this new avenue of admissibility is not available to the prosecutor. That raises an important tactical issue for the defense.

In most cases, the defense has no need to raise the issue of the victim's character in such a way as to trigger this prosecutorial right—i. e., has no need to offer evidence of the character of the victim to prove that the victim acted in conformance therewith. If the defense merely puts in evidence as to the defendant's state of mind concerning the victim's aggressiveness, and does not offer the evidence to show that the defendant acted in conformity with that character at the time of the incident at issue, that can circumvent operation of this amendment.

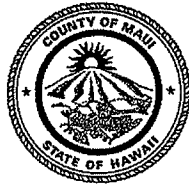
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B. Rule 404(a)(1): Evidence of Accused's Character

The amendment to Rule 404(a)(1) applies only in criminal cases, furnishing a new exception for prosecutors to the general rule prohibiting the introduction of character evidence. It provides that, "if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the *192 prosecution" is not excluded by Rule 404(a). This amendment was prompted by a flurry of bills in Congress which sought to do something similar but raised numerous drafting and other issues.

The amendatory language is different from that which was put out for public comment by the Advisory Committee in 1998. The exception as adopted is limited to "evidence of the same trait of character" of the victim. The Advisory Committee originally proposed a broader exception — for evidence of any "pertinent" trait of the victim's character. Since this amendment reverses centuries' worth of precedent, it was deemed prudent to limit its scope, and avoid opening a floodgate of litigation on difficult questions of "pertinence." The amendment seeks to strike an even-handed balance. Unless the accused raises the issue of the victim's character under Rule 404(a)(2), then this new avenue of admissibility is not available to the prosecutor. That raises an important tactical issue for the defense. In most cases, the defense has no need to raise the issue of the victim's character in such a way as to trigger this prosecutorial right -- i. e., has no need to offer evidence of the character of the victim to prove that the victim acted in conformance therewith. If the defense merely puts in evidence as to the defendant's state of mind concerning the victim's aggressiveness, and does not offer the evidence to show that the defendant acted in conformity with that *193 character at the time of the incident at issue, that can circumvent operation of this amendment.

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DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
150 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
PHONE (808) 270-7777 • FAX (808) 270-7625

February 9, 2009

HONORABLE BRIAN T. TANIGUCHI, CHAIR
HONORABLE DWIGHT Y. TAKAMINE, VICE CHAIR
COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

THE SENATE
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009
STATE OF HAWAII

TESTIMONY OF BENJAMIN M. ACOB,
PROSECUTING ATTORNEY FOR THE COUNTY OF MAUI,
IN SUPPORT OF S.B. NO. 65
RELATING TO THE HAWAII RULES OF EVIDENCE

The Honorable Chairpersons and Committee Members:

The Department of the Prosecuting Attorney for the County of Maui supports S.B. 65 Relating to the Hawaii Rules of Evidence.

This proposed bill seeks to amend the Hawaii Rules of Evidence to allow the prosecution to admit evidence of the accused's character for aggressiveness. However, this type of evidence will only be permitted if the same is offered by an accused against the alleged victim first. This proposal is consistent with the present Federal Rules of Evidence, Rule 404(a)(1).

We fully support this proposal as it will assist the fact finder (judge or jury) in its search for the truth. Under the current rule, only evidence of the alleged victim's character for aggressiveness may be admitted at trial. As a result, the fact finder's ability to seek the truth is compromised.

Accordingly, for the reasons discussed above, our Department supports S.B. 65. Thank you for the opportunity to testify.

(S.B. 65, Relating to the Hawaii Rules of Evidence)