



THE JUDICIARY, STATE OF HAWAII

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

House Committee on Judiciary
The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair

Tuesday, February 17, 2009, 2:00 p.m.
State Capitol, Conference Room 325

by

Hawaii Supreme Court Standing Committee on the Rules of Evidence

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 349, 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 (Evidence Committee) urged the adoption of this very amendment in its "Report of the committee's work in 2008," paragraph 4. In its report, the Evidence Committee observed that a similar measure was incorporated in Senate Bill No. 961 (2007), which passed the Senate in 2007. The Evidence Committee supported this measure in 2007, and now renews its support.

This is a "saucе for the goose, saucе 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)



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of this Rule, the door is opened to an attack on the same character trait of the accused . . . 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."

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 Evidence 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 STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

H.B. NO. 349, RELATING TO THE HAWAII RULES OF EVIDENCE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 17, 2009 **TIME:** 2:00 PM

LOCATION: State Capitol, Room 325

TESTIFIER(S): Mark J. Bennett, Attorney General,
or Lance M. Goto, Deputy Attorney General

Dear Chair Karamatsu and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of the bill is to amend the state rules of evidence to permit the prosecution to offer rebuttal evidence of a defendant's aggressiveness, after the defendant has introduced evidence of the victim's aggressiveness in the trial.

Such evidence typically is important in cases involving assaults or homicides, where the question of whether it was the victim or the defendant who provoked a particular incident is raised. As the rules of evidence now stand, if a defendant introduces evidence of a victim's aggressiveness, the prosecution cannot offer counter evidence of the defendant's own aggressiveness. This is because the current rules of evidence prohibit the prosecution from introducing negative evidence about the defendant, unless the defendant tries to put himself in a better light by presenting evidence of his good character. The problem this creates is that a defendant is able to attack a victim on the matter of aggressiveness, while, at the same time, being shielded by the rules of evidence from having similar evidence introduced against him.

This bill attempts to correct that imbalance by allowing the jury to hear the relevant evidence from both sides of the controversy, so

that the jury may reach the appropriate verdict based on the totality of available evidence. This bill is consistent with the rules of evidence in other jurisdictions. For example, Rule 404 of the Federal Rules of Evidence was amended in 2000 to permit the very kind of evidence that this bill will allow, for the very same reason that this bill is being proposed.

If this bill is passed, our state judges will still retain their discretion to determine whether particular evidence or testimony is admissible at trial. This bill does not throw open the doors to all evidence of aggressiveness; courts will still be able to filter out irrelevant evidence. This bill simply keeps open the option of introducing rebuttal evidence against a defendant, if the defendant attacks a victim on the trait of aggressiveness.

We respectfully urge passage of this bill.

**Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary**

February 17, 2009

H.B. No. 349: RELATING TO THE HAWAII RULES OF EVIDENCE

Chair Karamatsu and Members of the Committee:

We oppose the passage of H.B. No. 349 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 H.B. No. 349, 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

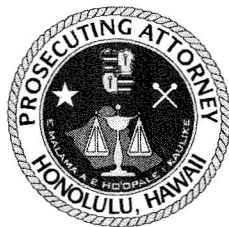
accused acted in self-defense. If the accused went ahead and presented the evidence of the victim's violent character, the prosecution could then inform the jury of the accused's past conviction. The defense then runs the risk of painting the accused in a bad light before the jury and changing the focus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

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THE HONORABLE JON RIKI KARAMATSU, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-fifth State Legislature
Regular Session of 2009
State of Hawai'i

February 17, 2009

RE: H.B. 349; RELATED TO THE HAWAII RULES OF EVIDENCE.

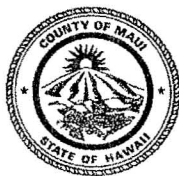
Chair Karamatsu and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony in support of H.B. 349.

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 HB 349 and thank you for this opportunity to testify.

CHARMAINE TAVARES
Mayor



BENJAMIN M. ACOB
Prosecuting Attorney

PETER A. HANANO
First Deputy Prosecuting Attorney

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February 14, 2009

HONORABLE JON RIKI KARAMATSU, CHAIR
HONORABLE KEN ITO, VICE CHAIR
COMMITTEE ON JUDICIARY

HOUSE OF REPRESENTATIVES
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 H.B. NO. 349
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 H.B. 349 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. 349. Thank you for the opportunity to testify.

(S.B. 349, Relating to the Hawaii Rules of Evidence)

karamatsu3-Leanne

From: PBStestimony
Sent: Monday, February 16, 2009 9:33 PM
To: JUDtestimony
Subject: FW: H.B No. 349 Relating to the Hawaii Rules of Evidence

From: Myles Breiner [mbreiner@hawaii.rr.com]
Sent: Monday, February 16, 2009 4:49 PM
To: PBStestimony
Subject: H.B No. 349 Relating to the Hawaii Rules of Evidence

Testimony of Myles S. Breiner, President Hawaii Association of Criminal Defense Lawyers (HACDL)

Chair Karamastu and Members of the Committee

H.B. No. 349 proposes changes to the rules of evidence that would allow for the presentation of evidence of aggression or violence of the defendant if the defendant presents evidence of the aggressiveness or violence of the victim. The Hawaii Association of Criminal Defense Lawyers (HACDL) strongly opposes this amendment because it directly undermines specific constitutional protections guaranteed under the Hawaii State Constitution.

This proposed amendment is another attempt to "federalize" our state system of criminal justice. It falsely purports to suggest that anything less obstructs "the search for truth", as if that were the heart and soul of our system of justice. That is simply wrong, and is tantamount to an attack on the most basic constitutional protections afforded each and every citizen. The sole function of a criminal trial is the determination of guilt beyond a reasonable doubt. It is not the defendant's nor it is not the court's burden - or

the legislatures' responsibility. The burden of proof rests solely on the prosecution. Under current Hawaii law the prosecution is precluded from presenting evidence of aggressive or violent behavior of the defendant unless and until the defendant first presents evidence of his or her peaceful nature.

This proposed amendment will reverse the burden of proof and effectively force each defendant to make a "Hobson's Choice" between testifying in their own defense and having the jury informed of their past misdeeds, or waiving that right and forego the Constitutional guarantee to a fair and impartial trial on the merits.

Thank you for the opportunity to comment on this measure