

SB2899



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Wednesday, February 22, 2012, 9:45 a.m.
State Capitol, Conference Room 016

by
Professor Addison Bowman
Supreme Court Standing Committee on the Rules of Evidence

Bill No. and Title: Senate Bill No. 2899, Relating to the Hawaii Rules of Evidence

Purpose: Provides that if evidence of an alleged victim's trait of character for aggressiveness is offered by an accused and admitted under rule 404(a)(2), then 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 substance of this amendment has already been adopted in California, Colorado, Delaware, Kentucky, Michigan, North Dakota, Pennsylvania, Utah, and Vermont.

The 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 2006," and reiterated its support in subsequent reports in 2007, 2008, 2009, and 2010. The proposed amendment to rule 404(a) is explained in a comprehensive report by Committee member Charlene Iboshi dated October 25, 2005, a copy of which is attached to this testimony.

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 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."



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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.

Thank you for the opportunity to testify on Senate Bill No. 2899.

To: Chairperson, Judge Marks, and Members of the Hawaii Rules of Evidence Committee

From: Charlene Y. Iboshi, First Deputy, Hawaii County Prosecutor's Office

Re: October 28th Meeting: HRE Rule 404(a)(1), Proposed Rule Change: FRE 404(a)(1) Research, Character Evidence (a rule of fairness)

Date: October 25, 2005

I did the requested research on FRE 404(a)(1)'s amendment. Here is what I have found:

- 1) There were no federal cases citing the new amendment.
- 2) I could not locate any scholarly articles involving the new rule. I did find the following references: the commentary to the Amendment itself; A Gap Report to the proposed rule; a Practical Litigator reference; a ALI-ABA reference; historical reference about public comment to narrow the rebuttal evidence to the "trait of character" offered by the accused, rather than "pertinent trait" of character of the alleged victim offered by the accused. The materials are attached. 3) How do the federal district attorneys use the new rule? I asked our US Assistant District Attorney Larry Butrick about the use of FRE 404(a)(1)'s 2000 Amendment. Apparently, they do not use this rule routinely, because violent crime cases, which would involve this rule, are infrequently prosecuted federally in Hawaii. He thought that the practical application of the rule would involve the issue of "who was the first aggressor."
- 4) I found that Colorado adopted a modified federal rule. Their rule narrows the scope to "if evidence of the alleged victim's character for aggressiveness or violence is offered by the an accused and admitted under Rule 404(a)(2)," then "evidence of the same trait of character of the accused offered by the prosecution" may be allowed. Colorado limits the evidence to assault and self-defense cases. Here is the rule in its entirety with relevant commentary.
- 5) The ultimate protection is the courts retain the authority under Rule 403, HRE, to exclude relevant evidence on grounds of prejudice, confusion,

or waste of time. Hawaii Courts have recognized this authority, if not at the trial level, then on appeal.

Members, I hope the materials provided give an adequate background for our discussions on Friday. See you at the meeting. If you have any questions, feel free to call me at 934-3304, or e-mail me at cyi96720@yahoo.com.

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.

12 NO. 1 Prac. Litigator 7, *17

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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The committee's May 1, 1999 memorandum explains further:

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule

therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner. The Evidence Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

MDEV-STFED § 404:14

22 Colo. Prac., Handbook On Evidence ER 404 (2005 ed.)—COLORADO'S Modified Rule

Handbook On Evidence
Stephen A. Hess, FNa , Sheila K. Hyatt FNb

Chapter 2. Colorado Rules Of Evidence With Authors' Commentary
Article IV. Relevancy And Its Limits

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

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

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence 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; (emphasis added)

(2) *Character of alleged victim.* 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 13-90-101.

(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 that he acted 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.

Note: The Authors' comments on Rule 404(b) are set out separately following the Authors' Comments on Rule 404(a).

AUTHORS' COMMENTS--RULE 404(a)

(1) **Scope and purpose of Rule 404(a).** Rule 404(a) governs the admissibility of character evidence--evidence of a person's general disposition or tendencies. The term *character* is not defined anywhere in the rules, but is normally thought of as a trait that reflects an aggregate of behaviors, and which then might have some predictive effect regarding behavior on a specific occasion. The traits typically associated with character evidence are honesty, violent disposition, peacefulness, recklessness, temperance, etc., but there can be many more.... {deleted general purpose of the rule with Colorado's cases, etc}

(2) **Comparison with federal rule.** Federal Rule of Evidence 404 was amended in 2000 by adding new provisions to subdivision (a)(1), permitting character evidence to be offered against the accused when the accused offers character evidence against a victim. The Colorado rule was similarly changed with a modification limiting this evidence to assault/self defense cases. In all other respects, Rule 404(a) is substantially the same as the corresponding federal rule.

(3) **Relation to other rules.** Rule 404(a) governs (and excludes most) character evidence only when it is being offered to prove conduct in conformity with the character trait. Governed separately is a witness's character for (un)truthfulness, which may be used to impeach a witness. This use of character evidence is treated somewhat differently under Rules 608 and West's CRSA § 13-90-101 (the Colorado version of Federal Rule 609).

The **prior acts** of a person, governed by **Rule 404(b)**, may also be thought of as a kind of character evidence in the following sense: when the proponent offers the prior acts of a person as demonstrating that the person has a propensity to engage in such acts, that evidence is being used much like character evidence, and is also generally prohibited. Rule 404(b) provides that prior acts can be admissible in the proper circumstances for a relevant purpose other than propensity.

When character is an "**essential element**" of a claim or a defense, Rule 405(b) governs, rather than this rule. **Rule 405(b)** permits character evidence to be offered in any form. See discussion under that rule, *infra*.

The admissibility of character evidence of the victim may be introduced under an exception to this rule, but in sexual assault cases, the character of the victim is now governed by West's CRSA § 18-3-407 (rape shield statute).

It is sometimes difficult to distinguish character from **habit**, which is provable under **Rule 406** to demonstrate that a person acted in accordance with a habit. Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation. Strong et al., McCormick on Evidence § 195 (5th ed. 1999).

(4) **Civil cases.** According to the text of this rule, character evidence is not admissible in civil cases as circumstantial evidence of conduct, *i.e.*, as proof that a person was likely to have acted in a particular way on a specific occasion. The only rule-based exception to this general prohibition (aside from impeachment) is found in the relatively unusual situation in which a person's character is "in issue," *i.e.*, when character itself is an element of a claim or defense under Rule 405(b), such as when a plaintiff is called a "cheat," and the defendant seeks to demonstrate the truth of the statement as a defense to the defamation claim. See the discussion below, under Rule 405. Counsel seeking to introduce character evidence in a civil case should be prepared to argue that the evidence fits within this category.

(a) **Application of exceptions to civil cases.** The exceptions in Rule 404(a)(1) and (a)(2) apply by the terms "accused" and "prosecution" only to criminal cases, and the Federal Advisory Committee's notes indicate that the intent was to limit the exceptions to criminal cases. Some courts, however, have extended the availability of these exceptions in civil litigation in which the central issue appears criminal in nature, such as a tort claim for assault. The Colorado Supreme Court has not expressed an opinion on this issue. See *Lombardi v. Graham*, 794 P.2d 610 (Colo.1990).

Example--Admissible. In *Knowles v. Board of Education*, 857 P.2d 553 (Colo.App.1993), the Court of Appeals simply assumed, without analysis, that a teacher facing dismissal for misconduct in an administrative proceeding was an "accused," and should have been permitted to present evidence of his good character. See also *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir.1986).

(b) **Using character evidence to impeach a witness.** The last exception to the general prohibition against character evidence in civil cases is found in Rule 404(a)(3). Any witness in either a civil or criminal case who testifies may be attacked with evidence of the witness's bad character trait of untruthfulness or dishonesty. This use of character evidence is governed primarily by Rule 608, and is limited to this one character trait. See discussion under that rule.

(5) **Criminal cases--Defendant's evidence of his/her own good character.** Rule 404(a)(1) permits the accused to introduce "evidence of a **pertinent trait** of character." The character trait must be pertinent to the offense charged, so that in a typical assault or homicide case, the defendant's trait of peacefulness or nonviolence would be relevant, but honesty and truthfulness would not. By contrast, in a prosecution for drunk driving, the defendant's reputation for nonviolence would ordinarily be irrelevant.

Example--Inadmissible. *People v. Goldfuss*, 2004 WL 963891 (Colo.App.2004) (a defendant's law abiding character is a pertinent trait in any criminal prosecution, but evidence that he has never been convicted of a crime is not).

Example--Inadmissible. In *People v. Miller*, 890 P.2d 84 (Colo.1995), the defendant was charged with selling cocaine. Reversing a court of appeals decision, the Colorado Supreme Court held that defendant's character trait of "truthfulness" was not pertinent to that charge. While general traits such as being "law-abiding" might be relevant to any charge, a defendant may introduce evidence under Rule 404(a)(1) only if there is "some nexus between the proffered character trait and the crime charged." Truthfulness is a pertinent trait for admission of evidence of defendant's character only if it is involved in offense charged, or if the defendant testifies and the evidence is offered after the defendant's character has been attacked, as provided in Rule 608.

Example--Inadmissible. While a defendant may introduce evidence of his good character if confined to particular traits involved in the offense charged, the evidence cannot be too remote in time. Thus, it was within the trial court's discretion to exclude evidence of the defendant's good reputation in a different town 4 or 5 years prior to the crime charged. *Lutz v. People*, 133 Colo. 229, 293 P.2d 646 (1956).

(6) Defendant's character--when has the defendant opened the door to cross examination and rebuttal by the state? Rule 404(a)(1) permits the prosecution to offer evidence to rebut the defendant's evidence of good character (or certain character evidence about the victim--see discussion in section 9 below). The prosecution is not allowed to do this unless and until the defendant has actually introduced evidence of good character, but once the defendant "opens the door," the prosecution may cross examine the defendant or other witnesses about their knowledge of defendant's prior convictions, bad acts and other matters that would otherwise be inadmissible. Because of these dire consequences, defendants must use extreme caution in "opening the door" to character evidence, and should avoid its use unless the defendant has led an exemplary life. Note that under this rule, substantive rebuttal proof, using specific instances of misconduct, is permitted. Compare Rule 405(a), which further permits inquiry into specific instances during cross examination of character witnesses.

Example--Rebuttal permissible. In *People v. Garcia*, 964 P.2d 619 (Colo.App.1998) *rev'd on other grounds*, 997 P.2d 1, defense counsel on cross examination of a prosecution witness had elicited testimony that the defendant (charged with child abuse) was gentle to her children and had never lost her temper in front of the witness. The prosecution was then permitted to call a witness on rebuttal who described a prior episode of defendant's anger. See also West's CRS § 16-10-301(3): if the defendant accused of a sexual offense puts on evidence of good character, the prosecutor may rebut by offering evidence of all prior sexual crimes.

Example--Cross examination permissible. In *People v. Pennese*, 830 P.2d 1085 (Colo.App.1991), the defendant's girlfriend testified for the prosecution, but on cross examination, defense counsel elicited from her that defendant's aggressive behavior was unusual; she had never witnessed this type of aggression before, and the defendant was an "easy-going person." The trial court correctly ruled that the defendant had opened the door to cross examination questions put to this witness as to her awareness of defendant's previous offenses.

Example--Cross examination/rebuttal permissible. *People v. Mershon*, 844 P.2d 1240 (Colo.App.1992), *aff'd in part, rev'd in part on other grounds* 874 P.2d 1025 (Colo.1994). Defendant's first witness was asked whether, in the witness's opinion, the defendant had "any predisposition to selling narcotic drugs," and the witness testified that this would be "totally out of character for him." The court held that this testimony constituted good character evidence offered by the defendant and opened the door to questions by the prosecutor on cross examination as to the witness's awareness of defendant's prior drug-related felony convictions. Here, the trial court correctly ruled that defendant opened the door to these inquiries.

Example--Cross examination not permissible. A defendant does not put his character in issue by testifying to basic biographical details. Nor may a prosecutor "challenge" or bait a defendant to give testimony about his good character so that the prosecutor may then cross examine. See *Martin v. People*, 114 Colo. 120, 162 P.2d 597 (1945).

Example--Cross examination permissible. In *People v. Dembry*, 2003 WL 22965069 (Colo.App.2003), the trial court was correct in ruling that if the defendant called his sister to provide good character evidence about him, the prosecution could cross examine her by asking about certain admissions the defendant had made during an earlier suppression hearing.

(7) Victim's character offered by the accused--generally. Evidence of the victim's character is generally admissible only in assault cases in which the defense is self-defense or suicide. In most other situations the victim's character is irrelevant. The character of the victim in sexual assault cases is now governed by West's CRSA § 18-3-407, since a victim's prior sexual conduct is presumed to be irrelevant, with some exceptions as provided in that statute. See discussion under Rule 412.

When the defendant presents evidence of self-defense, it is likely that one issue will be whether the defendant or the victim was the first aggressor. In this situation, Rule 404(a)(2) allows the defendant to show the victim's reputation for quarrelsome or violent disposition. When used for this purpose, the victim's character need not have been known to the defendant to be admissible on the issue of who was the first aggressor, and the form in which the evidence is offered is limited to opinion and reputation testimony as provided by Rule 405(a). *People v. Jones*, 675 P.2d 9 (Colo.1984). There are serious door-opening consequences when a defendant offers evidence of the character of a victim. See the discussion in sections 9 and 10 below.

However, when the defendant seeks to prove that he or she had a reasonable apprehension of danger (and therefore may have been justified in striking first, or using deadly force), the victim's character for violence and aggression are admissible, but *only* if the defendant knew about the victim's character or past acts at the relevant time. See *People v. Ferguson*, 43 P.3d 705 (Colo.App.2001) and cases cited therein. This use of the reputation or prior acts of the victim is not really character evidence at all, since it is not offered to show that the victim acted in conformity with the character trait; it is offered only to shed light on the defendant's state of mind and the reasonableness of the defendant's conduct.

Example--Specific acts inadmissible. In *People v. Jones*, 675 P.2d 9 (Colo.1984), the Colorado Supreme Court held that a defendant asserting self defense cannot introduce specific violent acts previously committed by the victim in the absence of proof that the defendant had knowledge of these acts. When attempting to prove the victim was the first aggressor, the defendant may use only opinion and reputation testimony pursuant to Rule 405. When attempting to prove whether the defendant acted reasonably, his knowledge of the victim's reputation and his knowledge of specific violent acts believed by the defendant to have been committed by the victim are admissible.

(8) Victim's character--homicide cases. Rule 404(a)(2) contains still another variation on the use of character evidence of a victim. As discussed above, in assault cases not resulting in death, the defendant can attack the character of the victim, with the consequence that the prosecutor may then present rebuttal evidence that the victim has a peaceful character. In homicide cases, the prosecution may present evidence of the victim's peaceable character as long as the defendant has presented *any* kind of evidence (such as the defendant's own testimony) that the victim was the first aggressor. Since the victim's version of the events is silenced by death, this provision is thought to provide a necessary opportunity for prosecution rebuttal.

(9) **Victim's character--rebuttal by prosecution, generally.** The prosecution is entitled to rebut the defendant's evidence relating to the victim's character. The prosecution, however, may not introduce evidence of the victim's character until the defendant has attacked the victim's character. See *People v. Baca*, 852 P.2d 1302 (Colo.App.1992).

(10) **Door-opening consequences when accused offers evidence of victim's character.** Under a recently enacted amendment to Rule 404(a)(1), a defendant who offers character evidence of a victim is subject to rebuttal in which the prosecution is permitted to offer character evidence about the same trait of character *of the accused*. Thus, the defendant who introduces evidence of the victim's character (usually to show the victim was the first aggressor) has put his own character for aggression in issue. This is a serious new consequence, so defense counsel should use extreme caution before offering character evidence about a victim.

This amendment was enacted in response to a similar amendment adopted in the federal rules. While it is difficult to imagine cases other than assault-type cases in which a victim's character might be pertinent, the Colorado amendment, unlike the federal amendment, expressly limits its operation to the character trait of aggressiveness or violence.

Example--In a domestic violence prosecution, a defendant husband, in order to prove that he acted in self defense, and that the victim wife was the first aggressor, might consider calling a witness under Rule 404(a)(2) to testify that in the witness's opinion, the victim wife was combative and assaultive, or had a reputation for being so. Before this amendment, the prosecution could rebut this testimony with other witnesses who could only testify that the wife was a peaceful person. This amendment, by contrast, permits the prosecution to rebut with witnesses who can testify that the *defendant* has a violent disposition. Under Rule 405(a), this type of rebuttal must also take the form of opinion or reputation testimony about the defendant. It is unclear whether the prosecutor would be able to cross examine the witness offered by the defendant (who is testifying about the victim's character) by asking questions about the defendant's character. There are no Colorado cases yet decided under this rule.

(11) **Victim's character--sexual assault victims.** The admissibility of a rape victim's character is governed in detail by statute, West's CRSA § 18-3-407. The statute is discussed under Rule 412, below.

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

February 22, 2009

S.B. No. 2899: RELATING TO THE HAWAII RULES OF EVIDENCE

Chair Hee and Members of the Committee:

We oppose the passage of S.B. No. 2899 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. 2899, 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.