"**CHAPTER 626**
HAWAII RULES OF EVIDENCE

Section
626-1 Enactment

ARTICLE I. GENERAL PROVISIONS

Rule
100 Title and citation
101 Scope
102 Purpose and construction
102.1 Effect of commentary
103 Rulings on evidence
104 Preliminary questions
105 Limited admissibility
106 Remainder of or related writings or recorded statements

ARTICLE II. JUDICIAL NOTICE

Rule
201 Judicial notice of adjudicative facts
202 Judicial notice of law

ARTICLE III. PRESUMPTIONS

Rule
301 Definitions
302 Presumptions in civil proceedings
303 Presumptions imposing burden of producing evidence
304 Presumptions imposing burden of proof
305 Prima facie evidence
306 Presumptions in criminal proceedings

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule
401 Definition of "relevant evidence"
402 Relevant evidence generally admissible; irrelevant evidence inadmissible
403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time
404 Character evidence not admissible to prove conduct; exceptions; other crimes
405 Methods of proving character
406 Habit; routine practice
407 Subsequent remedial measures
408 Compromise, offers to compromise, and mediation proceedings
409 Payment of medical and similar expenses

409.5 Admissibility of expressions of sympathy and condolence
410 Inadmissibility of pleas, plea discussions, and related statements
411 Liability insurance
412 Sexual offense and sexual harassment cases; relevance of victim's past behavior

ARTICLE V. PRIVILEGES

Rule
501 Privileges recognized only as provided
502 Required reports privileged by statute
503 Lawyer-client privilege
504 Physician-patient privilege
504.1 Psychologist-client privilege
505 Spousal privilege
505.5 Victim-counselor privilege
506 Communications to clergy
507 Political vote
508 Trade secrets
509 Privilege against self-incrimination
510 Identity of informer
511 Waiver of privilege by voluntary disclosure
512 Privileged matter disclosed under compulsion or without opportunity to claim privilege
513 Comment upon or inference from claim of privilege; instructions

ARTICLE VI. WITNESSES

Rule
601 General rule of competency
602 Lack of personal knowledge
603 Oath or affirmation
603.1 Disqualifications
604 Interpreters
605 Competency of judge as witness
606 Competency of juror as witness
607 Who may impeach
608 Evidence of character and conduct of witness
609 Impeachment by evidence of conviction of crime
609.1 Evidence of bias, interest, or motive
610 Religious beliefs or opinions
611 Mode and order of interrogation and presentation
612 Writing used to refresh memory
613 Prior statements of witnesses
614 Calling and interrogation of witness by court
615 Exclusion of witnesses
616 Televised testimony of child

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule
701 Opinion testimony by lay witnesses
702 Testimony by experts
702.1 Cross-examination of experts
703 Bases of opinion testimony by experts
704 Opinion on ultimate issue
705 Disclosure of facts or data underlying expert opinion
706 Court-appointed experts

ARTICLE VIII. HEARSAY

Rule
801 Definitions
802 Hearsay rule
802.1 Hearsay exception; prior statements by witnesses
803 Hearsay exceptions; availability of declarant immaterial
804 Hearsay exceptions; declarant unavailable
805 Hearsay within hearsay
806 Attacking and supporting credibility of declarant

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule
901 Requirement of authentication or identification
902 Self-authentication
903 Subscribing witness' testimony unnecessary

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule
1001 Definitions
1002 Requirement of original
1003 Admissibility of duplicates
1004 Admissibility of other evidence of contents
1005 Public records
1006 Summaries
1007 Testimony or written admission of party
1008 Functions of court and jury

ARTICLE XI. MISCELLANEOUS RULES

Rule
1101 Applicability of rules
1102 Jury instructions; comment on evidence prohibited

Section

626-2 Effective date; applicability to future cases and pending cases
626-3 Inconsistent laws

Note

The Commentary in this replacement volume includes the Commentary from the 1993 replacement volume and the subsequent volume 13 supplements up through 2015. The Commentary following each rule of evidence in the 1993 replacement volume 13 and some of the Commentary in the subsequent volume 13 supplements were prepared by Addison M. Bowman, formerly of the University of Hawaii William S. Richardson School of Law. Mr. Bowman served as reporter to the Hawaii Judicial Council Evidence Committee and various rules of evidence committees. As to the effect of the Commentary, see Rule 102.1 of the Hawaii Rules of Evidence.

Law Journals and Reviews

The Hawaii Rules of Evidence. 2 UH L. Rev. 431 (1980-1981).
Chief Justice Moon's Criminal Past. 33 UH L. Rev. 755 (2011).

"HAWAII RULES OF EVIDENCE

ARTICLE I.
GENERAL PROVISIONS

Rule 100 Title and citation. These rules shall be known and cited as the Hawaii Rules of Evidence. Each rule shall be cited by its number. A complete citation to a rule may read as follows: Rule ___, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes. [L 1980, c 164, pt of §1]

RULE 100 COMMENTARY

The purpose of this chapter is to codify the law of evidence, to promote informed judicial rulings on evidence points, and to achieve uniformity in the treatment of evidence among the courts of this State.

" **Rule 101 Scope.** These rules govern proceedings in the courts of the State of Hawaii, to the extent and with the exceptions stated in rule 1101. [L 1980, c 164, pt of §1]

RULE 101 COMMENTARY

This rule differs from Fed. R. Evid. 101 only in that "courts of the State of Hawaii" has been substituted for "courts of the United States and before United States magistrates." Rule 1101

provides greater detail regarding the applicability of the rules in various courts and proceedings.

" **Rule 102 Purpose and construction.** These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. [L 1980, c 164, pt of §1]

RULE 102 COMMENTARY

This rule is identical with Fed. R. Evid. 102. It parallels similar provisions in the Hawaii Rules of Court, see HRCrP 2, HRCP 1, and HFCR 1. Except for Articles III and V, these rules have as their model the Federal Rules of Evidence (Fed. R. Evid.), 28 U.S.C. app., at 539 (1976), as amended, 28 U.S.C.A. Fed. R. Evid. (Supp. 1979). Accordingly, the commentary to each rule (except in Articles III and V) indicates whether the rule is identical with or differs from the counterpart federal rule. The intent is to make applicable, as an aid in construction, the federal decisional law construing identical or similar Fed. R. Evid. provisions. Other sources for these rules, noted from time to time in the commentaries, are the Uniform Rule of Evidence and the Cal. Evid. Code (especially for Article III).

" **Rule 102.1 Effect of commentary.** The commentary to these rules when published may be used as an aid in understanding the rules, but not as evidence of legislative intent. [L 1980, c 164, pt of §1]

RULE 102.1 COMMENTARY

This rule has no Fed. R. Evid. counterpart. It closely resembles Hawaii Rev. Stat. §701-105 (1976), which limits the effect of the penal code commentary because, as the commentary to that section points out, "of the strong judicial deference given legislative committee reports and other evidence of legislative intent authored by the Legislature or its staff." See State v. Aiu, 59 H. 92, 98, 576 P.2d 1044, 1049 (1978); State v. Anderson, 58 H. 479, 483, 572 P.2d 159, 162 (1977); State v. Alo, 57 H. 418, 426-27, 558 P.2d 1012, 1017 (1976); State v. Nobriga, 56 H. 75, 77, 527 P.2d 1269, 1273 (1974).

" **Rule 103 Rulings on evidence.** (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court. [L 1980, c 164, pt of §1; am L 2006, c 73, §1]

RULE 103 COMMENTARY

This rule is identical with Fed. R. Evid. 103.

Subsection (a): This subsection expresses the principle that a ruling admitting or excluding evidence cannot be assigned as error unless it affects a substantial right and unless the court is clearly apprised of the nature of the claimed error and of the corrective action sought. The objection or motion to strike, addressed to a ruling admitting evidence, and the offer of proof, directed to a ruling excluding evidence, provide the appropriate procedural mechanisms.

The rule restates existing Hawaii law. In Trask v. Kam, 44 H. 10, 22, 352 P.2d 320, 326-27 (1959), the court pointed out that error in admission of testimony is not a basis for reversal

absent "substantial resulting prejudice" to the rights of a party. See Berkson v. Post, 38 H. 436 (1949); HRCP 61.

In State v. Okura, 56 H. 455, 458, 541 P.2d 9, 11 (1975), the court held: "A motion to strike must be specific; it must be directed with precision to the matter sought to be stricken and a general motion to strike all testimony must be overruled if any portion of that testimony is admissible." There is a need for a specific offer of proof, Warshaw v. Rockresorts, 57 H. 645, 651, 562 P.2d 428, 433 (1977), unless the nature of the error is clear, Territory v. Branco, 42 H. 304, 313 (1958).

Subsection (b): This subsection generally restates relevant provisions of HRCP 43(c). The intent is to provide the appellate court with a record adequate for final disposition of an evidentiary point. The provision is discretionary rather than mandatory, leaving determination of adequacy of record to the judgment of the trial court.

Subsection (c): This provision recognizes that an exclusionary ruling may be nullified if the evidence sought to be excluded is brought to the attention of the jury either through an offer of proof or other means. Cf. Bruton v. United States, 391 U.S. 123 (1968); HRCP 43(c).

Subsection (d): This provision resembles HRCrP 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Cf. Lindeman v. Raynor, 43 H. 299, 303 (1959): "[E]ven without objection the court may reject improper evidence."

Rules of Court

Harmless error, see HRCP rule 61; HRPP rule 52(a); DCRCP rule 61.

Plain error, see HRPP rule 52(b).

Record of excluded evidence, see HRCP rule 43(c); DCRCP rule 43(c).

Case Notes

Chemist's testimony regarding net weight of cocaine improperly admitted where prosecution failed to lay proper foundation that balance was in proper working order such that weight measured by balance could be relied upon as substantive fact. 80 H. 382, 910 P.2d 695 (1996).

Where objection to officer's testimony regarding gross weight of cocaine did not challenge accuracy of certified gram scale, issue of accuracy of scale waived. 80 H. 382, 910 P.2d 695 (1996).

Where trial court erroneously ruled on whether complainant's review of complainant's statement would refresh complainant's recollection by sustaining prosecution's objection on the basis that the complainant had answered defendant's question, this erroneous ruling inhibited defendant from confronting the complainant with a potential prior inconsistent statement under HRE rule 613(b), adversely affected defendant's substantial right to confrontation, and was reversible error. 118 H. 493, 193 P.3d 409 (2008).

Where plaintiffs' counsel did not object to defendant's expert's testimony until after expert had been questioned on direct examination, cross-examination, and redirect examination, and no motion to strike expert's testimony was made until two days later, after defense had already rested its case and the court had already determined the instructions to be submitted to jury, plaintiffs' objection to expert's testimony was untimely and was thus waived for appeal purposes. 77 H. 446 (App.), 887 P.2d 656 (1993).

Discussed: 129 H. 313, 300 P.3d 579 (2013).

Mentioned: 74 H. 1, 837 P.2d 1273 (1992).

" **Rule 104 Preliminary questions.** (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject oneself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 104 COMMENTARY

This rule is identical with Fed. R. Evid. 104.

Subsection (a): Questions of admissibility frequently hinge on determinations of fact. Under Rule 603.1 a witness incapable of understanding the duty to tell the truth is disqualified. Communications may be privileged under Rules 503, 504, 504.1, and 505 if they were intended to be confidential when uttered. The hearsay exceptions in Rule 804(b) require that the declarant be shown to be "unavailable as a witness" as provided in Rule 804(a). McCormick discusses the reasons for entrusting the determination of such preliminary matters to the court:

> If the special question of fact were submitted to the jury when objection was made, cumbersome and awkward problems about unanimity would be raised. If the judge admitted the evidence ... to the jury and directed them to disregard it unless they found that the disputed fact existed, the aim of the exclusionary rule would likely be frustrated....

McCormick, Evidence §53 (2d ed. 1972) [hereinafter cited as McCormick].

This subsection addresses also the issue of applicability of the evidence rules during such preliminary determinations of admissibility. As the Advisory Committee's Note to Fed. R. Evid. 104(a) points out:

> If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule [104(a)] provides that the rules of evidence in general do not apply to this process ... and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay. This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence.

Any attempt to extend the rules of evidence to preliminary issues of admissibility would be self-defeating and, in most instances, self-contradictory. The sole exceptions are the rules of privilege, see Article 5 infra. As provided in Rule 1101(c) infra, the rules of privilege apply at all stages of actions or proceedings. This is consistent with the intent of the privilege rules. Most commonly, the status of the communicant rather than the content of the communication determines whether or not the privilege legitimately may be invoked; and compulsory disclosure of the communication, even at a preliminary hearing, might serve to defeat the purpose of the privilege.

Subsection (b): This is the standard rule of conditional relevancy. It governs instances in which the probative value of an item of evidence depends upon the existence, and the proof, of another fact. For example, the relevancy of a written contract would be conditioned upon proof of the authenticity of the signature of the party signing it. See McCormick §53; E. Morgan, Basic Problems of Evidence 45-46 (1962).

Unlike questions of preliminary admissibility, factual issues of conditional relevancy are properly within the province of the jury rather than the court, subject to preliminary determination by the court that sufficient foundation has been laid to support a determination by the jury that the condition has been fulfilled. As with other factual determinations, the proponent may offer evidence in support of the condition, the opponent may offer contrary evidence, and the jury rather than the judge must reconcile the dispute.

Subsection (c): In Jackson v. Denno, 378 U.S. 368, 394 (1964), the Supreme Court held that preliminary hearings on admissibility of confessions must be held outside the jury's hearing. The requirement that preliminary matters be heard out of the jury's presence when the accused is a witness and when he "so requests" was added to Fed. R. Evid. 104(c) by a House subcommittee which felt that "a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters."

No clear-cut rule can be established to determine under what circumstances other preliminary questions should be addressed outside the hearing of the jury. It must be left to the discretion of the court to balance such countervailing factors as danger of prejudice and needless waste of time. This principle of judicial discretion is implied in HRCP 43(c), which provides that the judge may require that an offer of proof be made outside the hearing of the jury.

Subsection (d): Because of the possible breadth of cross-examination under Rule 611(b), this subsection is intended to safeguard the rights of the accused and to encourage his participation in determinations of preliminary matters. Under this restriction, the accused may choose to testify upon any preliminary matter without exposing himself to cross-examination about "other issues in the case"; nor does such testimony constitute a waiver of his right to refuse to testify in the main proceeding. However, he may be cross-examined upon any matter raised during his direct testimony upon a preliminary question.

This subsection does not address itself to the issue of subsequent use of testimony given by the accused at a hearing

upon a preliminary matter. See Simmons v. United States, 390 U.S. 377 (1968); cf. State v. Santiago, 53 H. 254, 492 P.2d 657 (1971).

Subsection (e): This subsection accords generally with similar provisions in other jurisdictions, see, e.g., Cal. Evid. Code §406; Kan. Code Civ. P. §60-408; Uniform Rule of Evidence 104(e).

Rules of Court

Pretrial motions, see HRPP rule 12(b).

Case Notes

As scientific principles and procedures underlying hair and fiber evidence are well-established and of proven reliability, evidence could be treated as "technical knowledge"; independent reliability determination under this rule thus unnecessary. 85 H. 462, 946 P.2d 32 (1997).

Plaintiff's proffer of evidence was sufficient to justify trial court's preliminary determination under this rule and rule 803(a)(2)(C) of the existence of conspiracies and admission of out-of-court statements where statements of other witnesses taken in context with statements of alleged co-conspirators supported allegations of a conspiracy. 89 H. 91, 969 P.2d 1209 (1998).

Where trial court did not make an adequate preliminary determination as to whether defendant had adopted relatives' statements as defendant's own and defendant's nonverbal reaction was so ambiguous that it could not reasonably be deemed sufficient to establish that defendant manifested such an adoption, evidence of statements lacked proper foundation, constituted irrelevant and inadmissible hearsay and were thus erroneously admitted. 92 H. 161, 988 P.2d 1153 (1999).

Whether a defendant has manifested an adoption of or belief in another's statement under rule 803(a)(1)(B) is a preliminary question of fact for the trial judge under subsection (a). 92 H. 161, 988 P.2d 1153 (1999).

When a prosecutor seeks arguably privileged testimony, the prosecutor must either (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue. 97 H. 512, 40 P.3d 914 (2002).

Where defendant sought to introduce a pipe found in the room occupied by the complaining witness, the circuit court should have conducted a hearing under this rule to determine whether there was admissible evidence concerning the complaining witness' alleged drug use and its effect upon the complaining witness' perception. 132 H. 391, 322 P.3d 931 (2014).

Where testifying officer did not have present recollection of field sobriety test, officer's qualifications to testify as witness on that matter should have been decided by the court not the jury. 80 H. 138 (App.), 906 P.2d 624 (1995).

" **Rule 105 Limited admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. [L 1980, c 164, pt of §1]

RULE 105 COMMENTARY

This rule is identical with Fed. R. Evid. 105.

Hawaii has recognized the principle of limited admissibility. Low v. Honolulu Rapid Transit Co., 50 H. 582, 585-586, 445 P.2d 372, 376 (1968): "It is a basic proposition that evidence may be properly admitted for a limited permissible purpose even though it may not be admissible for all purposes." However, the present rule is not designed to provide automatic, uncritical admission in every such instance. As McCormick observes: "[I]n situations ... where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight ... the judge's power to exclude the evidence altogether would be recognized." McCormick §59.

Determination of limited admissibility under this rule, therefore, involves a careful balance between the value of the evidence, in terms of the limited purpose for which it is admissible, and the danger of prejudice occasioned by possible consideration of the evidence by the jury for improper purposes in disregard of the limiting instruction. As the Advisory Committee's Note to Fed. R. Evid. 105 puts it: "A close relationship exists between this rule and Rule 403." The rule recognizes the necessity for discretionary judicial exclusion of such evidence when the danger of prejudice is great. Cf. Bruton v. United States, 391 U.S. 123 (1968).

" **Rule 106 Remainder of or related writings or recorded statements.** When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 106 COMMENTARY

This rule is identical with Fed. R. Evid. 106.

The rule incorporates the common law doctrine of completeness, see McCormick §56. As the Hawaii Supreme Court said in Holstein v. Young, 10 H. 216, 220 (1896), a party cannot "utilize so much of this evidence as will serve his turn and reject the remainder." Cf. HRCP 32(a)(4), which provides: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced."

The Advisory Committee's Note to Fed. R. Evid. 106 points out: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

Rules of Court

Depositions, see HRCP rule 32(a)(4); HRPP rule 15(e); DCRCP rule 32(a)(4).

Case Notes

Remainder of statement; when admissible. 68 H. 358, 714 P.2d 930 (1986).

This rule applies to statements "introduced" at trial by being read to a witness. If a criminal victim's compensation form is used at trial solely to establish that compensation was sought, the claimant's response to the form's request for information is not admissible under this rule as a statement "which ought in fairness to be considered contemporaneously" with that part of the document describing its compensatory purpose. 79 H. 255 (App.), 900 P.2d 1322 (1995).

Evidence admitted under this rule is subject to the authentication requirement under rule 901. 108 H. 89 (App.), 117 P.3d 821 (2005).

As the right of confrontation is not absolute, circuit court properly ruled that defendant was not entitled to introduce

selected portions of witness' statement that were favorable to defendant's defense and at the same time preclude the State from introducing other portions of witness' statement that were necessary to prevent the jury from being misled; thus, circuit court did not abuse its discretion in ruling that the responsive portions of witness' statement offered by the State were admissible under this rule and rule 403. 125 H. 462 (App.), 264 P.3d 40 (2011).

"ARTICLE II.
JUDICIAL NOTICE

Rule 201 Judicial notice of adjudicative facts. (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. [L 1980, c 164, pt of §1]

RULE 201 COMMENTARY

This rule is identical with Fed. R. Evid. 201, except that in subsection (g) the words "action or" are deleted from the federal rule formulation, "civil action or proceeding," as redundant. The process of judicial notice enables a court to

declare as true a relevant fact without receiving evidence or proof. As the Advisory Committee's Note to Fed. R. Evid. 201 puts it: "The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite."

Subsection (a): This subsection, indicating that the rule governs only "adjudicative" facts, implicitly suggests the distinction between adjudicative and "legislative" facts. Adjudicative facts are those relevant to the issues before the court (see Rule 401 infra) and which serve to "explain who did what, when, where, how, and with what motive and intent," McCormick §328. In contrast, judicial notice of legislative facts "occurs when a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or the interpretation of a statute, or the extension or restriction of a common law rule, upon grounds of policy, and the policy is thought to hinge upon social, economic, political, or scientific facts," id. See, e.g., State v. Brighter, 61 H. 99, 595 P.2d 1072 (1979), where the court sustained a criminal presumption (see Rule 306 infra) against a due process challenge by judicially noticing the factual conclusions contained in a report by New York's Temporary Commission to Evaluate the Drug Laws. These rules do not attempt to deal with judicial notice of legislative facts.

Subsection (b): The classification of adjudicative facts into those generally known within the jurisdiction, or capable of being readily determined, is consistent with the overall criterion of indisputability, see McCormick §328. The Hawaii courts have held that a fact is a proper subject for judicial notice if it is common knowledge or is easily verifiable, Almeida v. Correa, 51 H. 594, 465 P.2d 564 (1970), and that the effect of such judicial notice is to render conclusive the fact so noticed, unless it is rebutted, Application of Pioneer Mill Co., 53 H. 496, 497 P.2d 549 (1972). Pua v. Hilo Tribune-Herald, Ltd., 31 H. 65 (1929), established that a judge cannot take judicial notice of facts based solely upon his own personal knowledge unless the facts are also known to the community generally.

More specifically, Hawaii courts have taken judicial notice of the braking distance of a speeding car, State v. Arena, 46 H. 315, 379 P.2d 594 (1963); the exact time of sunrise on a particular day, Territory v. Makaena, 39 H. 270 (1952); the occurrence of a territory-wide sugar strike, Territory v. Kaholokua, 37 H. 625 (1947); the Hawaiian language, Bishop v.

Mahiko, 35 H. 608, 615 (1940); Hapai v. Brown, 21 H. 499 (1913); the date of the King's birthday celebration, Kapiolani v. Mahelona, 9 H. 676 (1895); and the announcement of a political candidate for office, Application of Pioneer Mill Co., 53 H. 496, 497 P.2d 549 (1972).

They have also judicially noticed the fact that banana trees hold water, Territory v. Araujo, 21 H. 56 (1912); that tuberculosis is contagious, Fukuoka v. Dodo, 43 H. 337 (1959); that electricity is dangerous, Honolulu Rapid Transit v. Hawaiian Tramways Co., 13 H. 363 (1901); that the stock market fluctuates, Corstorphine v. Bishop National Bank of Hawaii, 33 H. 315 (1935); that long-term leases are common in Hawaii, Francone v. McClay, 41 H. 72 (1955); that waves will fill a hole dug in the sand on a beach, Klausmeyers v. Makaha Valley Farms, Ltd., 41 H. 287 (1956); that many automobile owners carry insurance, Carr v. Kinney, 41 H. 166 (1955); that the value of Hawaii real estate is increasing, Hawaiian Trust Co. v. Rome, 36 H. 482 (1943); that Hansen's disease does not necessarily cause sterility, Peters and McLean v. Vannatta, 41 H. 252 (1955); and that not everything eaten by a cow is incorporated into the milk, In re Robert Hind, Ltd., 34 H. 40 (1936).

Subsections (c) and (d): The court may take judicial notice of any adjudicative fact solely at its own discretion and upon its own motion, e.g., State v. Lee, 51 H. 516, 465 P.2d 573 (1970), where the court sua sponte took judicial notice of the statistical increase in motorcycle fatalities, despite the absence of a request by a party. Should the court fail to take discretionary judicial notice of an adjudicative fact, however, such notice is mandated upon request of a party, provided the party supplies the court with data consistent with the requirement of subsection (b).

Subsection (e): This subsection establishes the right of any party to address the propriety of taking judicial notice even after the fact. This provision is applicable to either discretionary or mandatory judicial notice.

Subsection (f): Consistent with the view in many jurisdictions, see, e.g., Cal. Evid. Code §459, judicial notice may be taken at any stage in a judicial proceeding, including the appellate level. In Application of Pioneer Mill Co., 53 H. 496, 497 P.2d 549 (1972), the Hawaii Supreme Court held that an appellate court may take judicial notice of a fact despite the failure of the trial court to do so.

Subsection (g): The House Judiciary Committee report on the federal rules supported the rejection of a mandatory instruction in criminal cases "because contrary to the spirit of the Sixth Amendment right to a jury trial."

Law Journals and Reviews

Texts Versus Testimony: Rethinking Legal Uses of Non-Legal Expertise. 35 UH L. Rev. 81 (2013).

Case Notes

Judicial notice of workload of judges in the criminal division and the resultant congestion. 63 H. 405, 629 P.2d 626 (1981).

Mandates court to take judicial notice of its own records. 68 H. 164, 706 P.2d 1300 (1985).

Judicial notice taken of divorce decree. 73 H. 566, 836 P.2d 1081 (1992).

Appellate courts may take judicial notice of venue, provided that requirements of subsection (b) are met. 78 H. 185, 891 P.2d 272 (1995).

For DUI prosecution, court could have taken judicial notice of tax maps to confirm that area "just beyond" Ala Kapuna overpass on Moanalua freeway was within Honolulu district. 80 H. 297, 909 P.2d 1112 (1995).

Testimony of officer supplemented with tax map information which court could have taken judicial notice of pursuant to this rule, constituted substantial evidence supporting facts establishing venue with respect to DUI offense. 80 H. 297, 909 P.2d 1112 (1995).

Trial court did not err in taking judicial notice of residuary legatee's representation of residency as Hawaii as representation was a fact capable of accurate and ready determination by looking at the pleadings in the underlying probate proceedings. 90 H. 443, 979 P.2d 39 (1999).

Although opinions and facts in medical reports were not a proper subject of judicial notice and constituted inadmissible hearsay, where defendant had opportunity under subsection (e) to call physician witnesses at hearing and failed to do so, trial court's judicial notice and admission of medical reports did not constitute plain error. 91 H. 319, 984 P.2d 78 (1999).

Judicial notice of contents of communications between parties was inappropriate because such communications differ from case to case; these are not the types of facts "generally known with certainty by all the reasonably intelligent people in the community or capable of accurate and ready determination by resort to sources of indisputable accuracy". 102 H. 449, 77 P.3d 940 (2003).

Petitioner's apparent assertion that circuit court should have taken judicial notice of grand jury and preliminary hearing transcripts lacked merit where the circuit court was not supplied with the necessary information to take judicial notice

of the content of the grand jury and preliminary hearing transcripts, as petitioner did not include those transcripts in the record. 129 H. 206, 297 P.3d 1062 (2013).

Subsection (b) mentioned with respect to judicial notice of the retail price of cigarettes. 2 H. App. 259, 630 P.2d 126 (1981).

Whether "beam attenuator" was acceptable means of testing intoxilyzer's accuracy was "adjudicative fact" not "generally known" or "capable of accurate and ready determination". 6 H. App. 624, 736 P.2d 70 (1987).

Judicial notice taken that trial, being held in first circuit, was held in proper circuit. 78 H. 422 (App.), 895 P.2d 173 (1995).

Though reliability of the horizontal gaze nystagmus (HGN) test did not constitute an adjudicative fact under this rule or a matter of law that can be judicially noticed under rule 202, district court properly took judicial notice of the validity of the principles underlying HGN testing and the reliability of HGN test results. 90 H. 225 (App.), 978 P.2d 191 (1999).

District court committed plain error in taking judicial notice of its ruling in prior case that the 12-step drug recognition evaluation matrix was a valid test to ascertain drug impairment and that officer was a drug recognition expert, where the validity of the expert's and test's conclusions or accuracy of expert's observations were not the type of facts that were generally known within the territorial jurisdiction of the district court or capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned. 104 H. 193 (App.), 86 P.3d 1002 (2004).

" **Rule 202 Judicial notice of law.** (a) Scope of rule. This rule governs only judicial notice of law.

(b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Hawaii Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State.

(c) Optional judicial notice of law. Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies, (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states, (4) any matter of law which would fall within

the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

(d) Determination by court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury, and the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules. [L 1980, c 164, pt of §1]

RULE 202 COMMENTARY

This rule, which has no counterpart in Fed. R. Evid., generally restates statutory law, Hawaii Rev. Stat. ch. 623 (1976) (repealed 1980) (originally enacted as L 1941, c 110, §§1, 2, 3, 4, 5), and Hawaii Rev. Stat. §622-13(c) (1976) (repealed 1980) (originally enacted as L 1921, c 232, §1; am L 1927, c 165, §1; am L 1945, c 195, §1; am L 1972, c 104, §2(h)). These superseded provisions mandated judicial notice "of the common law and statutes of every state, territory, and other jurisdiction of the United States" and of county ordinances, and provided for judicial determination of foreign and other laws.

Subsection (b): This adds to the mandatory category U.S. Supreme Court and local court rules and is consistent with Schoening v. Miner, 22 H. 196, 202 (1914), where the court said: "[R]ules made by a judge of a circuit court, and approved by this court, should be judicially noticed by this court."

Subsection (c): The early Hawaii case law considered foreign law an issue of fact that required pleading and proof and was subject to determination by the trier of fact. In Board of Immigration v. Estrella, 5 H. 211, 214 (1884), for example, the court said, "A foreign law, relied upon as a defense, must be proved, like any other fact in the case." Hawaii Rev. Stat. §623-3 (1976) (repealed 1980) provided simply that "the law of a [foreign country] shall be an issue for the court, but shall not be subject to ... judicial notice." This rule includes foreign law among those items that may be judicially noticed.

Subsection (d): This provision is based upon the last two sentences of HRCP 44.1, which provides:

> The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as ruling on a question of law.

The subsection extends the provisions of this court rule to every category of law subject to judicial notice under Rule 202.

Case Notes

Courts are duty-bound to take judicial notice of municipal ordinances; therefore, state circuit and district courts must treat ordinances like state statutes, specifically, as not required to be admitted in evidence or to be expressly requested by counsel. 95 H. 22, 18 P.3d 884 (2001).

Where trial court properly took judicial notice of the speed limit, as required by subsection (b), there was sufficient evidence to find motorist guilty of violating §291C-102(a). 95 H. 22, 18 P.3d 884 (2001).

Requires courts to take judicial notice of all duly enacted ordinances. 9 H. App. 73, 823 P.2d 154 (1992).

Though reliability of the horizontal gaze nystagmus (HGN) test did not constitute an adjudicative fact under rule 201 or a matter of law that can be judicially noticed under this rule, district court properly took judicial notice of the validity of the principles underlying HGN testing and the reliability of HGN test results. 90 H. 225 (App.), 978 P.2d 191 (1999).

"ARTICLE III.
PRESUMPTIONS

Rule 301 Definitions. The following definitions apply under this article:

(1) "Presumption" is (A) a rebuttable assumption of fact, (B) that the law requires to be made, (C) from another fact or group of facts found or otherwise established in the action.

(2) The following are not presumptions under this article:

(A) Conclusive presumption. The trier of fact is compelled by law to accept an assumption of fact as conclusive, regardless of the strength of the opposing evidence; or

(B) Inference. The trier of fact may logically and reasonably make an assumption from another fact or group of facts found or otherwise established in the action, but is not required to do so; or

(C) Pre-evidentiary assumption. The trier of fact is compelled by law to accept the assumption as either rebuttable or conclusive without regard to any other fact determination.

(3) "Burden of producing evidence" means the obligation of a party to introduce evidence of the existence or nonexistence of a relevant fact sufficient to avoid an adverse peremptory finding on that fact.

(4) "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a relevant fact in the mind of the trier of fact. The burden of proof may require a party to establish the existence or nonexistence of a fact by a preponderance of the evidence or by clear and convincing proof. [L 1980, c 164, pt of §1]

RULE 301 COMMENTARY

The meaning and scope of "presumption" have historically been subject to considerable uncertainty. One authority observes, "'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof,'" McCormick §342. One commentator has pointed out at least eight different meanings attributed to the term by the courts, Laughlin, In Support of the Thayer Theory of Presumption, 52 Mich. L. Rev. 195 (1953). The purpose of this rule is to define presumptions and related terms. As the first sentence of the rule points out, the definitions of related terms, such as that of "burden of proof," apply only "under this article." The scheme embodied in this article is pragmatic, and the definitions are operational. The model for this entire article is Cal. Evid. Code §§600-669.

Paragraph (1): This definition accords generally with Cal. Evid. Code §600(a), with one major addition. The California code provisions distinguish between "conclusive presumptions" and "rebuttable presumptions"; therefore, the qualification of rebuttability is not incorporated into the California definition. This rule treats conclusive presumptions as nonpresumptions, see comment relating to paragraph (2)(C) infra.

The essential characteristics of a presumption under this rule are: (1) it is rebuttable; (2) it is an assumption; (3) it is legally required to be made; and (4) it derives from a fact or facts found or established in the action. These requirements are conjunctive; in the absence of any one of them, no presumption results within the intent of these rules. This accords generally with the views of leading authorities, see, e.g., McCormick §342. The definition is intended to be read in connection with the operational language of Rules 303(b) and 304(b) infra. That the law "requires" the presumption to be drawn means that, upon establishment of the basic facts (i.e., "another fact or group of facts"), the presumption is mandatory unless contradictory evidence is adduced. The quantum of contradictory evidence necessary to rebut a presumption varies according to the nature of the presumption, see Rules 303(b) and 304(b) infra.

Support for this definition may be found in Hawaii Rev. Stat. §490:1-201(31) (1976), which defines the term in its application to statutes within the compass of the Uniform Commercial Code:

> "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

Operationally, the Rule 301(1) definition applies only in civil cases, see Rules 302, 303, and 304 infra, and against the prosecution in criminal cases, see Rule 306(b). Presumptions against the accused in criminal cases are defined and governed exclusively by Rule 306(a).

Judicial attempts at defining the term, although not inconsistent with this rule, suffer from over-inclusiveness. In The King v. Gibson, 6 H. 310, 313 (1882), the court observed, "A presumption of law dispenses with direct proof of the thing presumed from certain facts." A later decision, In Re Title of Kioloku, 25 H. 357, 365 (1920), essayed a more detailed definition:

> A presumption may be defined as the probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidence of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue it gives rise to a strong presumption as to the existence of the fact to be proved. But if on the other hand the fact shown in evidence only usually accompanies the fact in issue it gives rise merely to a probable presumption of the existence of the fact to be proved.

The distinction drawn by the court between a "strong presumption" and a "probable presumption" appears to correspond to a limited extent with the distinction in this rule between a "presumption" and an "inference," except that the essential, operative difference between the terms as employed here--that presumptions, unless rebutted, must be drawn whereas inferences may be drawn-- is missing in the court's definition. This distinction was recognized in another early case: "[A]ssuming that the defendant adduced sufficient evidence to raise a presumption that the fire was caused by the order of the board of health, the burden or duty was then cast on the plaintiffs to introduce evidence to rebut that presumption...." Kwong Lee Yuen & Co. v. Alliance Co., 16 H. 674, 684 (1905).

Paragraph (2): McCormick observes, "There are rules of law that are often incorrectly called presumptions that should be specifically distinguished from presumptions," McCormick §342. This paragraph is intended to establish these distinctions.

Conclusive presumptions, also termed "irrebuttable presumptions," may be established by statute, see, e.g., Hawaii Rev. Stat. §76-51 (1976), or by common law. The court in In Re Application of Sherretz, 40 H. 366, 371 (1953), noted: "The words 'conclusive presumption' give rise to a legal presumption of law that may not be rebutted. In other words it is a legal conclusion." The legal effect of this characteristic of conclusiveness is to establish the presumed fact as true, irrespective of the actual truth or falsity of the assumption. Conclusive presumptions thus resemble substantive legal rules, and are therefore not treated in these evidence rules.

Although superficially similar to a presumption, an "inference" has several important distinguishing characteristics. First and most important, it is an assumption that is permissible but never compelled. In Soichi Fukuoka v. Dodo, 43 H. 337, 340 (1959), the court pointed out: "There are many classes or kinds of evidence, among which is the permissible deduction the trier of facts may reasonably draw from other established facts before the court, which deduction is usually characterized in the law of evidence as an inference." Another important distinction characterizing an inference is that it does not operate to shift the burden of proof or of producing evidence, see McCormick §342. Therefore, under Rule 1102 infra, inferences are not usually the subject of judicial comment, whereas presumptions must necessarily be explained by the court to the jury.

The Hawaii Supreme Court has also distinguished between presumptions and such doctrinal or standardized inferences as res ipsa loquitur, classified as a presumption by many other jurisdictions, see, e.g., Cal. Evid. Code §646. Although an early court decision, Morgan v. Yamada, 26 H. 17, 24 (1921), defined the doctrine of res ipsa loquitur as a "rebuttable presumption" imposing on the party against whom it is directed the burden of introducing "evidence to meet and offset its effect," accord, Ciacci v. Wooley, 33 H. 247 (1934), later decisions are more exact. In Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 87, 412 P.2d 669, 678 (1966), the court stated: "[A]n instruction covering the doctrine of res ipsa loquitur should permit, but not compel, an inference of negligence." See also Winter v. Scherman, 57 H. 279, 554 P.2d 1137 (1976), which defines the doctrine as merely a rebuttable inference which enables a plaintiff to put his case before the jury.

Pre-evidentiary assumptions, in contrast to conclusive presumptions, are subject to rebuttal. However, these assumptions are assignments of preliminary burden of proof or of production of evidence on the basis of rules of substantive law, not of facts found or established in the action. The most

characteristic examples of such assumptions are the "presumption" of innocence, established in Hawaii by statute, see Hawaii Rev. Stat. §701-114(2) (1976), and the "presumption" of sanity, see, e.g., Territory v. Adiarte, 37 H. 463 (1947). Neither assumption has an inferential basis; neither depends for its establishment on the introduction of facts in the action.

The law establishes pre-evidentiary assumptions for a variety of reasons. The "presumption" of innocence safeguards the constitutional right of due process. The "presumption" of sanity is founded in part on policy. As the court noted in Adiarte, id. at 470:

> If that legal presumption did not exist, the government would be under the necessity of adducing affirmative evidence of sanity in every case, thereby seriously hampering the enforcement of the laws.... Consequently, to relieve the prosecution of that necessity, the law presumes that everyone charged with crime was sane at the time of its commission.... However, this presumption is a rule of evidence and nothing else. It is ... subject to being negatived by slight evidence to the contrary which may be adduced either by the prosecution or defense.

Reasons of law or policy underlie other such pre-evidentiary assumptions, e.g., the assumption of knowledge of the law, Kapena v. Kaleleonalani, 6 H. 579 (1885); and the assumption that parties to a contract are competent to contract, Soares v. Freitas, 38 H. 64 (1948).

Paragraphs (3) and (4): These provisions accord generally with Cal. Evid. Code §§110 and 115, upon which they were modeled. The two definitions serve to contrast the burden of going forward with the evidence (see Rule 303 infra) and the burden of proof (see Rule 304 infra). The distinction is especially useful as it enables the division of presumptions into the two classes established by Rules 303 and 304. The definitions, accordingly, are limited in their application to this article.

" **Rule 302 Presumptions in civil proceedings.** (a) General rule. In all civil proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed either (1) the burden of producing evidence, or (2) the burden of proof.

(b) Inconsistent presumptions. If two presumptions are mutually inconsistent, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight neither presumption applies.

(c) Applicability of federal law. In all civil proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law. [L 1980, c 164, pt of §1]

RULE 302 COMMENTARY

Disagreement over the nature, scope, and effect of legal presumptions has gone on for decades. The position most widely adopted in American jurisdictions is the Thayer view, sometimes termed the "bursting bubble" theory, McCormick §345. The sole effect of a legal presumption, in this view, is to impose upon the party against whom it is directed the requirement of producing evidence adequate to sustain a finding of its nonexistence. If this requirement is met, the presumption disappears. See W. Thayer, Preliminary Treatise on Evidence, 313-352 (1898). This theory is endorsed by Wigmore, see 9 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §2491(2) (3d ed. 1940) [hereinafter cited as Wigmore], with slight modifications, id. at §2498a, and is reflected in Fed. R. Evid. 301.

A contrary hypothesis, espoused by E. Morgan, Some Problems of Proof, 81 (1956), and McCormick §345, is that a presumption should have the more stringent effect of shifting the burden of proof to the party against whom it is directed. This position asserts that a presumption usually reflects an important social or legal policy, which "may need an extra boost in order to insure that that policy is not overlooked," McCormick, id. Under this view, the presumption does not vanish from the case upon presentation of evidence to rebut it. If the party against whom the presumption is directed fails to meet his burden of convincing the trier of fact of the nonexistence of the presumed fact by at least a preponderance of the evidence, the presumption is firmly established. This view is reflected in Uniform Rule of Evidence 301.

Although both positions are reasonable, each is limited. Many legal presumptions are based on serious and compelling policy grounds and, consistent with the views of Morgan and McCormick, should serve to shift the burden of proof to the adverse party. Others, however, reflect no public policy beyond facilitating the determination of the action in which they are introduced. Presumptions of this class derive their force from "a general declaration, the character and operation [of] which common experience has assigned them," Thayer, Preliminary Treatise on Evidence, §326 (1898).

A third approach to the classification of presumptions is reflected in Cal. Evid. Code §§600-669 and is based on a synthesis suggested by Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L. Rev. 307 (1920). Under this approach, the Thayer view applies to presumptions unsupported by extrinsic policy considerations, the Morgan view to those that implement social policies. This article, which incorporates the Bohlen view of presumptions, is modeled generally upon the classification scheme adopted in the Cal. Evid. Code.

Subsection (a): This subsection establishes the two general categories within which all legal presumptions arising in civil actions must be encompassed. Rules 303(a) and 304(a) establish the criteria for determination of the category to which any presumption should be assigned.

Subsection (b): Although infrequent, the introduction of conflicting or inconsistent presumptions into the same action does occur. McCormick §345 points out:

> A conflict between presumptions may arise as follows: W, asserting that she is the widow of H, claims her share of his property, and proves that on a certain day she and H were married. The adversary then proves that three or four years before her marriage to H, the alleged widow married another man. W's proof gives her the benefit of the presumption of the validity of a marriage. The adversary's proof gives rise to the general presumption of the continuance of a status or condition once proved to exist, and a specific presumption of the continuance of a marriage relationship.

Under the general classification scheme of this article, and the specific provision of this subsection, such a dilemma is simple to reconcile. The presumption of validity of a marriage is supported by compelling policy considerations, see Rule 304(c)(6) infra, while the presumption of continuance of a status or condition has no support other than that of probability and procedural convenience, see Rule 303(c)(15) infra. Therefore, the presumption of validity of a marriage would apply, and the contrary presumption would be extinguished.

In a holding consistent with this provision, the Hawaii Supreme Court, in In Re Soriano, 35 H. 756 (1940), held that the presumption of validity of a second marriage and the innocence of the parties to it prevails over the presumption of the continued existence of a former marriage. The rule is consistent also with Hawaii Rev. Stat. §584-4(b) (1976), governing presumption of paternity and providing that in the event of conflicting presumptions with respect to paternity the one supported by "weightier considerations of policy and logic

will prevail." Presumptions of equal weight simply cancel each other out. In such circumstances neither presumption is directed to the trier of fact. See, e.g., City of Montpelier v. Town of Calais, 114 Vt. 5, 39 A.2d 350 (1944), in which conflicting presumptions of regularity of official acts were held to be mutually cancelling.

Subsection (c): This provision is identical with Uniform Rule of Evidence 302. The applicable federal law in this context is Fed. R. Evid. 301, which provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

The effect of this single-theory rule is further elaborated in the legislative reports that accompany Fed. R. Evid. 301.

" **Rule 303 Presumptions imposing burden of producing evidence.** (a) General rule. A presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of producing evidence.

(b) Effect. The effect of a presumption imposing the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction on presumption shall be given and the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this rule shall be construed to prevent the drawing of any inferences.

(c) Presumptions. The following presumptions, and all other presumptions established by law that fall within the criteria of subsection (a) of this rule, are presumptions imposing the burden of producing evidence:

(1) Money delivered by one to another. Money delivered by one to another is presumed to have been due to the latter;

(2) Thing delivered by one to another. A thing delivered by one to another is presumed to have belonged to the latter;

(3) Obligation delivered up to the debtor. An obligation delivered up to the debtor is presumed to have been paid;

(4) Obligation possessed by creditor. An obligation possessed by a creditor is presumed not to have been paid;

(5) Payment of earlier rent or installments. The payment of earlier rent or installments is presumed from a receipt for later rent or installments;

(6) Things possessed. The things that a person possesses are presumed to be owned by the person;

(7) Exercise of act of ownership. A person who exercises acts of ownership over property is presumed to be the owner of it;

(8) Judgment determines, sets forth rights of parties. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined;

(9) Writing. A writing is presumed to have been truly dated;

(10) Letter properly addressed and mailed. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail;

(11) Trustee's conveyance to a particular person. A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed the real property to the person when such presumption is necessary to perfect title of such person or the person's successor in interest;

(12) Ancient document affecting real or personal property interest. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed authentic if:

(A) It is at least twenty years old;

(B) It is in such condition as to create no reasonable suspicion concerning its authenticity;

(C) It was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(D) Persons having an interest in the matter have been generally acting as if it were authentic;

(13) Book or other material purporting to be published by public authority. A book or other material purporting to be printed, published, or posted to an internet

website by public authority is presumed to have been so printed, published, or posted;

(14) Book or internet website purporting to contain reports of adjudged cases. A book or government website purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published or from which the government website is maintained is presumed to contain correct reports of such cases;

(15) Continuation of a fact, condition, or state. A fact, condition, or state of things is presumed to continue; and

(16) Paid bills. A bill for goods or services that has been paid is presumed to be authentic and to embody fair and reasonable charges for the itemized goods or services. [L 1980, c 164, pt of §1; gen ch 1985; am L 2001, c 142, §2; am L 2011, c 47, §1]

RULE 303 COMMENTARY

The criteria established by this rule are modeled upon, and accord generally with, those of Cal. Evid. Code §§630-646, with modifications appropriate to the rules of law of this jurisdiction.

Subsection (a): This provision establishes the general criteria for determination of those presumptions that impose on the adverse party only the burden of producing evidence. Although it is arguable that any assumption which gains the status of a legal presumption finds some support in policy, even if no more than the policy of procedural convenience, such considerations do not meet the standards of "public policy" within the intent of this subsection and Rule 304(a). A "public policy" should be (1) compelling, and (2) extrinsic to the action in which the presumption is offered. The catalogue of presumptions in subsection (c) of this rule, while not exhaustive, is determinative for these presumptions and is illustrative of the class of presumptions appropriately governed by this rule.

Subsection (b): The purpose of the definition of the term "burden of producing evidence" in Rule 301(3) supra, is to clarify the nature of the burden in terms of the obligation imposed on the party against whom it is directed. The purpose of the present provision, in contrast, is to define the effect of a Rule 303 presumption. The degree of proof necessary to support a finding of nonexistence should be, as McCormick suggests, more than a "scintilla," McCormick §338. "To amount to more than a mere scintilla the evidence must be of a

character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury ... in finding from it the fact to establish which the evidence was introduced." Holstein v. Benedict, 22 H. 441, 445 (1915). One federal court suggested that it should be "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions," Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

The last sentence of this subsection is applicable in circumstances in which the burden has been met and the presumption overcome. Although the trier of fact is barred from treating the presumption as established, the facts in evidence which initially created the presumption, balanced against the evidence offered to rebut it, may give rise to a permissible inference, and nothing in this rule should be construed to bar such an inference.

Subsection (c): Although the list of presumptions in this subsection closely parallels the traditional common law presumptions incorporated in Cal. Evid. Code §§631-646, several changes have been effected consistent with Hawaii law. The California provision treating the doctrine of res ipsa loquitur as a presumption, Cal. Evid. Code §646, is omitted, consistent with the Hawaii Supreme Court determination that the doctrine is not a presumption but a permissible inference, see commentary to Rule 301(2) supra. Presumption (15), "Continuation of a fact, condition, or state," is based upon Hawaii Supreme Court decisions.

Presumption (10) finds support in Territory v. Alohikea, 24 H. 570, 571 (1918): "[T]he mailing of a letter, postage prepaid, raises a presumption of receipt by the addressee." In Ahlo v. Tai Lung, 9 H. 272 (1893), the court declined to extend the presumption of receipt of a letter to include a presumption that it had been answered.

Presumption (12), establishing the criteria for the presumption of authenticity of ancient documents, is addressed in detail by the court in Hulihee v. Heirs of Hueu, 57 H. 312, 315, 555 P.2d 495, 498 (1976).

> The customary minimum requirements are that the document must have been in existence for a period of not less than thirty years, that when originally discovered it must have been in some place where it would be natural to find a genuine document of its tenor and it must be unsuspicious in appearance. In the case of deeds of land, a fourth requirement is often stated, to the effect that the party claiming under the instrument or his predecessors must have been in occupation of the land since the time of the

document's purported execution or some other circumstance giving an equivalent inference of genuineness must appear in addition to the required age, custody, and appearance. Under the present rule, the age criterion has been changed to 20 years to comport with Rule 901(b)(8) of these rules and Fed. R. Evid. 901(b)(8).

The criteria for establishing the presumption of authenticity of an ancient document in this rule and the requirements for authentication of an ancient document in Rule 901(b)(8) are similar but not redundant because each serves a discrete evidentiary function. Rule 901(b)(8) is a preliminary admissibility requirement; an ancient document must qualify under the criteria established by that provision before it can even be introduced into evidence. Having surmounted the initial hurdle of admissibility, the document may be offered to the trier of fact as presumptively authentic on the basis of the same criteria, on the condition that the adverse party does not offer evidence in rebuttal sufficient to meet the burden of producing evidence. Should he succeed in doing so, the document remains in evidence, but the party upon whose behalf it has been introduced is not entitled to an instruction on the presumption of its authenticity.

Presumption (15) finds support in a series of Hawaii Supreme Court decisions. In Carey v. Hawaiian Lumber Mills, 21 H. 506, 511 (1913), the court said: "It is a rule of evidence that where the existence of a fact, condition or state of things is once established, the law presumes that such fact, condition, or state of things continues to exist as before, until the contrary is shown, or a different presumption is raised." See also Drummond v. Makaena, 30 H. 116 (1927). In subsequent decisions, the court reaffirmed this general rule with qualification. The presumption can be invoked only for conditions or things which by their nature are continuous rather than transitory, Henry Waterhouse Trust Co. v. Rawlins, 33 H. 876 (1936); and it can be overcome by a contrary presumption, Tropic Builders, Ltd. v. Naval Ammunition Depot, 48 H. 306, 402 P.2d 440 (1965).

RULE 303 SUPPLEMENTAL COMMENTARY

The Act 142, Session Laws 2001 amendment provided that a paid bill for goods or services is presumed to be authentic and to embody fair and reasonable charges for the itemized goods or services.

The Act 47, Session Laws 2011 amendment expanded evidentiary presumptions to include materials and legal opinions that are posted on government websites.

Case Notes

Error to instruct jury that deceased presumed to have exercised due care, where there was evidence deceased was negligent. 6 H. App. 516, 730 P.2d 342 (1986).

" **Rule 304 Presumptions imposing burden of proof.** (a) General rule. A presumption established to implement a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of proof.

(b) Effect. The effect of a presumption imposing the burden of proof is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced sufficient to convince the trier of fact of the nonexistence of the presumed fact. Except as otherwise provided by law or by these rules, proof by a preponderance of the evidence is necessary and sufficient to rebut a presumption established under this rule.

(c) Presumptions. The following presumptions, and all other presumptions established by law that fall within the criteria of subsection (a) of this rule, are presumptions imposing the burden of proof.

(1) Owner of legal title is owner of beneficial title. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

(2) Official duty regularly performed; lawful arrest. It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

(3) Intention of ordinary consequences of voluntary act. A person is presumed to intend the ordinary consequences of the person's voluntary act.

(4) Doing of an unlawful act. An unlawful intent is presumed from the doing of an unlawful act.

(5) Any court, any judge acting as such. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its

jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

(6) Ceremonial marriage. A ceremonial marriage is presumed to be valid.

(7) Death. A person who is absent for a continuous period of five years, during which the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 304 COMMENTARY

The criteria established by this rule are modeled upon, and accord generally with, those of Cal. Evid. Code §§660-669, with modifications appropriate to the rules of law of this jurisdiction.

Subsection (a): This provision is analogous in purpose to Rule 303(a) supra. It establishes the general criteria for determination of those presumptions that impose on the adverse party the burden of proof. The standard of determination of "public policy" in this subsection is identical with that discussed in the comment to Rule 303(a). The catalogue of presumptions in subsection (c) of this rule, although not exhaustive, is determinative for the presumptions listed and is illustrative of the class of presumptions governed by this rule.

Subsection (b): This provision is analogous to Rule 303(b) supra. Its purpose is to define the effect of the presumptions governed by this rule. Since the effect is to shift the ultimate burden of proof, the general requirement is proof by "a preponderance of the evidence." Despite disagreement by some authorities, the most reasonable meaning of this requirement, and the interpretation given it in most jurisdictions, is "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence," McCormick §339.

Subsection (c): The presumptions in this list parallel the traditional common law presumptions incorporated in Cal. Evid. Code §§662-668, with some modifications.

Although presumption (1) apparently has not been litigated at the appellate level in Hawaii, it is a traditional common law presumption supported by a public policy so compelling as to require clear and convincing proof to overcome it.

Presumption (2), that official duty has been regularly performed, has been affirmed by the Hawaii Supreme Court, e.g., DeMello v. Wilson, 28 H. 298 (1925); Nichols v. Wah Chong Sun, 28 H. 395 (1925); State v. Hawaiian Dredging Co., 48 H. 152, 397 P.2d 593 (1964); State v. Midkiff, 49 H. 456, 421 P.2d 550

(1966). The qualification barring extension of the presumption to the lawfulness of arrests or searches conducted without warrants is implicit in search and seizure law, e.g., State v. Barnes, 58 H. 333, 335, 568 P.2d 1207, 1209 (1977): "[A]n arrest without a warrant will be upheld only where there was probable cause for the arrest." In State v. Kaluna, 55 H. 361, 363, 520 P.2d 51, 55 (1974), the court declared:

> [S]ince it was conducted without a warrant, the search carries an initial presumption of unreasonableness.... To overcome this presumption, the State must show that the facts or the case justified the police in searching without a warrant and that the search itself was no broader than necessary to satisfy the need which legitimitized departure from the warrant requirement in the first place.

Presumption (3) finds support in a long line of Hawaii Supreme Court decisions. In Lord v. Lord, 35 H. 26, 39 (1939), the court said: "Where a person does an act he is presumed in doing so to have intended the natural consequences thereof." See also Yuen v. French, 29 H. 625 (1927); Territory v. Palai, 23 H. 133 (1916). However, consistent with the statutory requirement that every element of a crime charged must be proved, Hawaii Rev. Stat. §701-114 (1976), and that state of mind, when designated by the statute, is an element of the crime, Hawaii Rev. Stat. §702-204 (1976), intent may not be established by presumption in criminal actions.

Presumption (5) accords with Hawaii Supreme Court decision. In In Re Kawahara Yasutaro, 15 H. 667, 670 (1904), the court said: "The presumption is in favor of the regularity of the proceedings of courts of record and the burden is placed on one alleging errors therein to show it affirmatively." In a later decision, State v. Villados, 55 H. 394, 397, 520 P.2d 427, 430 (1974), the court addressed the aspect of presumptive jurisdiction:

> [C]ircuit courts are courts of general jurisdiction in this State, and therefore the presumption is in favor of retention rather than divestiture of jurisdiction.... [B]efore a party can claim that an act or statute has the effect of divesting jurisdiction which has regularly and fully vested, the law in favor of such divestment must be clear and unambiguous.

Presumption (6) is established by Hawaii Supreme Court decision. In Estate of Ah Leong, 34 H. 161, 165 (1937), the court said:

> [T]he contention is that upon proof of the celebration of a ceremonial marriage ... followed by an actual living together publicly ... the law will presume, in the absence

> of countervailing proof, that all of the prerequisites to a valid marriage ... were complied with.
>
> The rule of law supporting this contention has been so often judicially announced that it may be considered firmly established.

See also Hawaii Rev. Stat. §572-13(c) (1976), providing that a certified copy of a certificate of marriage is prima facie evidence of the fact of marriage.

Presumption (7) accords with Hawaii Rev. Stat. §560:1-107(3), and modifies the traditional common law presumption of death after a seven-year period of absence.

Case Notes

Jury instruction that deceased presumed to have exercised due care was superfluous, where defendant had burden of proving deceased was negligent. 6 H. App. 516, 730 P.2d 342 (1986).

" **Rule 305 Prima facie evidence.** A statute providing that a fact or a group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this article unless the statute expressly provides that such prima facie evidence is conclusive. [L 1980, c 164, pt of §1]

RULE 305 COMMENTARY

The purpose of this rule is to indicate the construction that should be given to the large number of provisions, scattered throughout the Hawaii Rev. Stat., which state that a fact, or a group of facts, is "prima facie" evidence of another fact. See, e.g., Hawaii Rev. Stat. §560:1-107(1) (1976), making a certified or authenticated copy of a death certificate prima facie evidence of the fact, place, date and time of death and the identity of the decedent; §622-31, making a written finding of "presumed death" prima facie evidence of the death of the person named; §572-13(c), making a certified copy of a certificate of marriage prima facie evidence of the fact of such marriage; §575-2, making the absence of a husband or wife for six continuous months prima facie evidence of desertion; §634-22, making a record or affidavit of process prima facie evidence of all that it contains.

A number of the statutory prima facie evidence provisions contain express language to indicate whether the particular provision affects the burden of proof or only the burden of producing evidence. E.g., Hawaii Rev. Stat. §584-4(b) (1976), which provides that prima facie evidence of paternity may be

overcome only by "clear and convincing evidence"; Hawaii Rev. Stat. §701-117 (1976), which provides that contrary evidence that raises "a reasonable doubt in the mind of the trier of fact" is sufficient. Absent such explicit statutory clarification, judicial determination will be required to determine whether a statutory provision creates a presumption affecting the burden of proof or the burden of producing evidence consistent with the criteria established in Rules 303(a) and 304(a) supra.

A few statutes establish either a conclusive presumption, e.g., Hawaii Rev. Stat. §76-51 (1976), or irrebuttable prima facie evidence, e.g., Hawaii Rev. Stat. §480-22(a) (1976). These are conclusive presumptions as defined in Rule 301(2)(A) and, as such, they are not presumptions within the intent of this article and are expressly excluded from the scope of this rule.

" **Rule 306 Presumptions in criminal proceedings.** (a) Presumptions against the accused.

(1) Scope. Except as otherwise provided by statute, in criminal proceedings, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this subsection.

(2) Submission to jury. When a presumed fact establishes an element of the offense or negatives a defense, the court may submit the presumption to the jury only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find the presumed fact beyond a reasonable doubt.

(3) Instructing the jury. The court may not direct the jury to find a presumed fact against the accused. Whenever a presumption against the accused is submitted to the jury, the court shall instruct the jury that, if it finds the basic facts beyond a reasonable doubt, it may infer the presumed fact but is not required to do so. In addition, if the presumed fact establishes an element of the offense or negatives a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

(b) Presumptions against the State. Except as otherwise provided by statute, in criminal proceedings, presumptions against the State, recognized at common law or created by

statute, impose on the State either (1) the burden of producing evidence, or (2) the burden of proof.

(c) Inconsistent presumptions. If two presumptions are mutually inconsistent, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight, neither presumption applies. [L 1980, c 164, pt of §1]

RULE 306 COMMENTARY

This rule is similar to Uniform Rule of Evidence 303 and the U.S. Supreme Court proposal for Fed. R. Evid. 303, which was not enacted, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), with the addition of subsection (b), which provides for presumptions against the state, and subsection (c), which makes provision for inconsistent presumptions.

The operation of presumptions against the accused in criminal cases is hedged about by constitutional limitations because, as the Supreme Court pointed out in County Court v. Allen, 442 U.S. 140 (1979), of the tendency of presumptions to "undermine the factfinder's responsibility at trial ... to find the ultimate facts beyond a reasonable doubt." 442 U.S. at 156. To facilitate analysis on this point, Mr. Justice Stevens, writing for the Allen court, attempted a distinction between the "entirely permissive inference or presumption," e.g., Barnes v. United States, 412 U.S. 837 (1973) (inference of guilty knowledge from fact of possession of recently stolen property), and the "more troublesome" mandatory presumption, e.g., United States v. Romano, 382 U.S. 136 (1965), which "tells the trier that he or they must find the elemental [ultimate] fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts," 442 U.S. at 157.

Regarding the permissive inference or presumption, the Allen court suggested that, because the trier of fact is free to draw or to reject the inference, this device potentially trenches on the beyond-a-reasonable-doubt burden "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Id. The Allen presumption was a permissive one, involving a New York statute making the presence of a firearm in an auto presumptive evidence of illegal possession of the weapon by all occupants of the vehicle. Since the trial judge told the jury that the presumption was entirely permissive and could be ignored even in the absence of rebutting evidence, the Allen court held: "The

application of the statutory presumption in this case therefore comports with the standard laid down in Tot v. United States, 319 U.S. 463, 467, and restated in Leary v. United States, 395 U.S. at 36. For there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." 442 U.S. at 165.

Rejecting an argument that the necessary "connection" between basic and presumed facts should satisfy the more stringent reasonable-doubt standard, the Allen court stated:

> [T]he prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the [more-likely-than-not] test described in Leary. [442 U.S. at 167.]

In the context of the facts in Allen, the court held that this test was met.

The Allen dissent, authored by Justice Powell and joined by Justices Brennan, Marshall, and Stewart, disagreed not with the more-likely-than-not standard for testing the connection between basic and presumed facts but with the Allen majority's application of that standard:

> As I understand it, the Court today does not contend that in general those who are present in automobiles are more likely than not to possess any gun contained within their vehicles. It argues, however, that the nature of the presumption here involved requires that we look not only to the immediate facts upon which the jury was encouraged to base its inference, but to the other facts "proved" by the prosecution as well.... The possibility that the jury disbelieved all of this evidence, and relied on the presumption, is simply ignored. [442 U.S. at 174-75.]

The problem with this approach, according to the dissenters, is that, since the jury was told that it could convict on the presumption alone, it may have done just that. "Under the Court's analysis, whenever it is determined that an inference is 'permissive,' the only question is whether, in light of all of the evidence adduced at trial, the inference recommended to the jury is a reasonable one. The court has never suggested that the inquiry into the rational basis of a permissible inference may be circumvented in this manner." 442 U.S. at 176.

In dicta, the Allen majority said that mandatory presumptions, because of their significant impact on the factfinder, must be examined facially "to determine the extent to which the basic and elemental facts coincide." 442 U.S. at 158. This is so because this device tends to force the factfinder to draw the inference irrespective of other facts in the case. Hence, "the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases." Id. Regarding the nature of the required connection for mandatory presumptions, the court merely said that the prosecution "may not rest its case entirely on a presumption unless the fact proved is sufficient [on facial examination] to support the inference of guilt beyond a reasonable doubt." 442 U.S. at 167.

In State v. Brighter, 61 H. 99, 595 P.2d 1072 (1979), the Hawaii Supreme Court examined the "prima facie evidence" provision of Hawaii Rev. Stat. §712-1251 (1976): "[T]he presence of a dangerous drug, harmful drug, or detrimental drug in a motor vehicle, other than a public omnibus, is prima facie evidence of knowing possession thereof by each and every person in the vehicle at the time the drug was found." Appellant Brighter was convicted of knowing possession of marijuana, and the supreme court noted that the prosecution relied "entirely" on the prima facie evidence device, 61 H. at 102, 595 P.2d at 1074.

Although the trial court instructed the jury that "the presence of a detrimental drug in a motor vehicle ... is prima facie evidence of knowing possession," the supreme court labeled the device a permissive inference which authorized, but did not compel, the inference of guilt. The court then analyzed the U.S. Supreme Court decisions on criminal presumptions (except County Court v. Allen, supra, not yet then decided), and decided that the particular inference authorized in Brighter passed the "rational connection," "more likely than not," and "reasonable doubt" tests; therefore, the court had "no need to resolve the question whether an inference satisfying the 'more likely than not' requirement must also comply with the criminal reasonable doubt standard." 61 H. at 109, 595 P.2d at 1078. The court reversed Brighter's conviction, however, because, taking judicial notice of legislative facts (see the commentary to Rule 201 supra), the court held that the statutory inference of knowing possession is constitutionally valid under the various tests only as applied to "dealership quantities" of drugs, a limitation not imposed by the trial court: "Therefore, we would require that the prosecution establish beyond a reasonable doubt that the quantity of drug involved is clearly greater than a quantity which may be possessed for personal use.... Absent

such a determination, a jury would not be justified in concluding that the statutory inference should be applied." 61 H. at 109-110, 595 P.2d at 1079.

Several principles emerge from the Allen and Brighter decisions. To begin with, the Allen dicta strongly suggests that, in a case such as Brighter where the inference or presumption is the only evidence of guilt, the connection between basic and ultimate facts must satisfy the reasonable doubt standard. Indeed, such a conclusion is virtually inescapable where the final determination of guilt rests solely on the permitted inference. Brighter thus appears to embody the reasonable-doubt exception to the Allen more-likely-than-not standard for permissive inferences or presumptions. For the same reason, the Brighter court appears to have been correct in assessing the facial validity of the inference. Whether or not a facial analysis would be required in a case (such as Allen) where the prosecution relies on a presumption plus other evidence of guilt will depend upon analysis of the Allen opinions by the Hawaii Supreme Court in subsequent cases.

A more difficult problem, suggested by the alternative holding in Brighter, concerns the distinction between permissive and mandatory criminal presumptions. Although the Brighter device was classified by the court as a permissive inference, the trial court had delivered the following additional instruction to the jury:

> Prima facie evidence of a fact is evidence which if accepted in its entirety by the trier of fact, is sufficient to prove the fact, provided that no evidence negativing the fact, which raises a reasonable doubt in the mind of the trier of fact, is introduced.

This instruction, concluded the Brighter court, "served to shift the burden of proof to appellant" and thus raised the possibility that the jury could "have been misled into thinking that they were required to find the element of knowing possession." The court accordingly held that in the absence of a clarifying instruction that the jury "could--but was not required to--find the element of knowing possession upon proof of the underlying facts," 61 H. at 110-111, 595 P.2d at 1080, the burden of proof had been impermissibly shifted to the defendant. Accord, State v. Pimentel, 61 H. 318, 603 P.2d 141 (1979).

A close reading of County Court v. Allen, supra, 442 U.S. at 157-159 n.16, suggests the difficulty of categorizing criminal presumptions, which process necessarily depends upon the content of the jury instructions. The Allen court's example of a "mandatory" presumption was the one litigated in United States v. Romano, supra, where the court told the jury that presence at

a still "shall be deemed sufficient evidence to authorize conviction" for possession of an illegal distillery. Since Brighter and Pimentel, supra, suggest strongly that mandatory criminal presumptions are not permissible in Hawaii, trial judges are well advised to exercise great care in drafting suitable jury instructions in these cases. This is all the more so in light of Rule 1102 infra, which prohibits the court from commenting upon the evidence. In the absence of comment by the judge on the other evidence in the case, the presumption instruction, no matter how carefully couched, will be spotlighted in the jury charge, thereby focusing the factfinder's attention on the device and maximizing the coercive impact.

Subsection (a): Presumptions against the accused, including "prima facie" evidence provisions (see Rule 305 supra) are governed exclusively by this subsection. Subsection (a)(2) addresses the typical case, see State v. Brighter, supra, where the presumption establishes or tends to establish one or more of the ultimate elements of the offense. In such a case the evidence as a whole, including the basic facts giving rise to the presumption, must be of such quality and quantity that a reasonable juror could find the presumed fact beyond a reasonable doubt. The requisite connection between basic facts, standing alone, and the presumed fact is not addressed. If the basic fact is the only evidence of the presumed fact, the reasonable doubt standard necessarily applies, see the foregoing analysis of Brighter. If, on the other hand, there is other evidence of the presumed fact in addition to the basic fact or facts, the more-likely-than-not standard of Allen comports with the U.S. Supreme Court's minimum due process requirement. This is a question that is directed to the court, and was left open in Brighter.

Subsection (a)(3) codifies the Brighter holding that the basic facts must be established beyond a reasonable doubt for the presumption to be operative. In addition, the factfinder must be instructed carefully and emphatically that the presumption is permissive. State v. Pimentel, supra. In other words, the effect of a presumption against the accused is to create an inference.

The Hawaii Supreme Court addressed this issue directly in State v. Cuevas, 53 H. 110, 113, 488 P.2d 322, 324 (1971), holding unconstitutional a statute that provided: "When the act of killing another is proved, malice aforethought shall be presumed, and the burden shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor." The court said:

> Under the language of the statute, the burden imposed upon the accused is not merely a burden of going forward with the evidence or of raising a reasonable doubt, but is a burden of persuasion of the nonexistence of an essential element of the crime of murder.... We hold that the statute is invalid. Under our legal system, the burden is always upon the prosecution to establish every element of crime by proof beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element.

Consistent with this position, under the present rule a presumption imposes no burden upon the accused. He may, if he chooses, introduce evidence to rebut the presumption. Ultimate burden always rests with the State.

Subsection (b): The constitutional limitations that require the special rules in subsection (a) do not apply to presumptions against the State. Presumptions against the State, therefore, are governed by the civil presumption standards of Rules 301 through 305.

Subsection (c): This provision is identical in form and intent with Rule 302(b) supra.

Case Notes

Rule 306(a) presumptions against the accused, discussed. 78 H. 262, 892 P.2d 455 (1995).

Because court instructed jury regarding "presumptions" within the meaning of this rule, and notwithstanding that court advised jurors that they might, but were not required to, conclude the existence of the assumed fact, court erred in failing to instruct jury, pursuant to subsection (a)(3), that jury was required to find "the basic facts beyond a reasonable doubt". 88 H. 296, 966 P.2d 608 (1998).

Due process right violated where circuit court's instruction to jury regarding the statutory presumption created by §708-801(4) failed to further instruct jury pursuant to subsection (a) that the presumption is merely a permissible inference of fact and that in order to apply the presumption, the jury must find that the presumed fact exists beyond a reasonable doubt. 88 H. 216 (App.), 965 P.2d 149 (1998).

"ARTICLE IV.
RELEVANCY AND ITS LIMITS

Rule 401 Definition of "relevant evidence". "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. [L 1980, c 164, pt of §1]

RULE 401 COMMENTARY

This rule is identical with Fed. R. Evid. 401. The rule draws upon the traditional common law definition of "relevancy," that is, "[T]he tendency of the evidence to establish a material proposition," McCormick §185; however, it is formulated to eliminate the lexically ambiguous requirement that a proposition be "material," which has been variously construed to mean "important," "necessary," "substantial," and "essential," as well as simply related to an issue in the action, see 26A Words and Phrases 212-14, 218-19 (1953). The rule actually encompasses the old materiality requirement by specifying that the "fact" to which the evidence is directed be "of consequence to the determination of the action." For this reason, the words "material" and "materiality" do not appear in these rules.

This rule restates existing Hawaii law. In State v. Smith, 59 H. 565, 567, 583 P.2d 347, 349 (1978), the court defined the concept of relevance: "Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable." The court in Smith also relied upon the holding in State v. Irebaria, 55 H. 353, 356, 519 P.2d 1246, 1248-49 (1974), for the distinction between relevance and sufficiency of the evidence:

> The concept of relevance, however, does not encompass standards of sufficiency. Appellant's contention that evidence which, standing alone, is insufficient to establish a controverted fact, should be inadmissible is totally without basis in the law. It is often said that "[a] brick is not a wall." ...Appellant through a "sufficiency" standard would take away the building blocks of a prima facie case. The sufficiency standard should apply only when all the bricks of individually insufficient evidence are in place and the wall itself is tested.

This rule preserves the Irebaria distinction between relevance and sufficiency by establishing, as the requisite standard of probability, that the consequential fact be rendered "more probable or less probable than it would be without the evidence." As the Advisory Committee's Note to Fed. R. Evid. 401 put it: "Any more stringent requirement is unworkable and unrealistic.... Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence."

Case Notes

Clothing found in trash, although not identified as being in defendant's possession, admissible as part of State's circumstantial evidence. 67 H. 581, 698 P.2d 293 (1985).

Evidence of driver's drinking prior to accident relevant to establish driver's negligence; evidence of prior accidents at same location should have been admitted to show notice of potentially dangerous condition. 68 H. 447, 719 P.2d 387 (1986).

Trial court did not err in ruling that evidence of motorcyclist's nonuse of helmet was not relevant under this rule, and thus, not admissible under rule 402. 74 H. 308, 844 P.2d 670 (1993).

Trial court did not err under rules 401 and 403 in admitting evidence that indicated that plaintiff's symptoms may have been linked to drug use and not solely to exposure to silicone. 78 H. 287, 893 P.2d 138 (1995).

"Legitimate tendency" test regarding admission of evidence regarding a third person's motive to commit the crime charged, comports with the relevancy test set forth in this rule. 79 H. 347, 903 P.2d 43 (1995).

No abuse of discretion in admitting school nurse's testimony as testimony was relevant because it was of "consequence to the determination" as to whether the complainant was sexually assaulted. 80 H. 107, 905 P.2d 613 (1995).

Expert medical testimony that "permanent, serious disfigurement" would have resulted absent medical attention irrelevant where that result was an element of the charged offense. 80 H. 126, 906 P.2d 612 (1995).

Witness' testimony regarding witness' auto accident injuries relevant to issue of plaintiff's damages. 80 H. 212, 908 P.2d 1198 (1995).

Evidence that victim had $2,300 in cash on person after the shooting irrelevant where fact of consequence was defendant's state of mind at the time of shooting and reasonableness of that state of mind. 80 H. 307, 909 P.2d 1122 (1996).

Evidence of gross weight of cocaine relevant and properly admitted as it made the "consequential fact" that cocaine's net weight was at least one ounce more probable than it would be without the evidence. 80 H. 382, 910 P.2d 695 (1996).

Knife properly admitted as relevant evidence as its attributes made likelihood that victims' injuries were life-threatening more or less probable than without the evidence. 83 H. 335, 926 P.2d 1258 (1996).

Trial court erred in ruling that victim's past use of a handgun was not relevant, as victim's ownership and use of a

handgun, and defendant's knowledge of victim's past conduct when under the influence of drugs, combined with the risk to life that victim posed, was relevant to the issue of defendant's reasonable apprehension on the morning in question. 97 H. 206, 35 P.3d 233 (2001).

Where evidence that child was a victim of battered child syndrome was relevant to show that child's death was not an accident, but the result of an intentional, knowing or reckless criminal act, giving rise to a duty on defendant's part to obtain medical care for child pursuant to §663-1.6, trial court did not err in admitting expert testimony that child was a victim of battered child syndrome. 101 H. 332, 68 P.3d 606 (2003).

Defendant's failure to proclaim defendant's innocence to cellmate was irrelevant under this rule and, thus, not admissible by virtue of rule 402. 104 H. 203, 87 P.3d 275 (2004).

Testimony by defendant's cellmate that defendant desired a reduction of the murder charge to manslaughter was irrelevant under this rule under the circumstances of the case; defendant's reference to a reduction of the charges against defendant did not make the existence of any fact regarding whether defendant committed the murder "more or less probable than it would be without" this testimony. 104 H. 203, 87 P.3d 275 (2004).

The fact that defendant purchased bras for daughter and complaining witness and the allegation that the girls had been sitting at table in their underwear "a couple of days" before the incident were not relevant to any of the events which occurred on date of incident, where, inter alia, the purchase of bras by defendant would not tend to make more probable any fact relating to the elements of sexual contact by defendant. 77 H. 340 (App.), 884 P.2d 403 (1994).

Witness' testimony that witness suffered injuries in accident relevant as to whether and to what extent the rear-end collision caused plaintiff's injuries. 80 H. 188 (App.), 907 P.2d 774 (1995).

Evidence of prior real estate transactions between seller and broker had tendency to make broker's alleged breach of fiduciary duty more probable and were relevant to broker's duty of loyalty. 84 H. 162 (App.), 931 P.2d 604 (1997).

Trial court erred harmfully in excluding, pursuant to this rule and rule 403, defendant's exhibit with respect to defendant's theft-by-deception charges under §708-830(2), on the grounds that defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury, where evidence that defendant, based on defendant's understanding of the tax laws, had a good faith belief that

defendant did not owe taxes on defendant's wages was relevant to whether defendant acted by deception and whether defendant had a defense under §708-834(1). 119 H. 60 (App.), 193 P.3d 1260 (2008).

Where, pursuant to §231-40, the Cheek interpretation of the wilfulness requirement--that a jury must be permitted to consider evidence of a defendant's good faith belief that defendant's conduct did not violate the tax laws, even if that belief was not objectively reasonable, in determining whether defendant acted wilfully--was adopted and applied in construing §231-36(a), the trial court erred in excluding defendant's exhibit pursuant to this rule and rule 403 on the grounds that defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury. 119 H. 60 (App.), 193 P.3d 1260 (2008).

Trial court did not err in admitting seatbelt buckle patent into evidence under this rule and rules 402 and 403 for the limited purpose of showing a defect in the seatbelt where the language in the patent that "known mechanisms are complicated, and some do not positively retain the latch plate" may have evinced a defect in the seatbelt that could have resulted in inertial or inadvertent release in the case, as well as defendant's knowledge of such a defect. 121 H. 143 (App.), 214 P.3d 1133 (2009).

There was no plain error in the admission of officer's statements regarding defendant's telephone conversation with wife while in custody to "clean the car", where statements had at least some bearing on defendant's consciousness of guilt and defendant's attempts to conceal evidence linking defendant to decedent's death, both facts at issue in the case, and there was no danger of confusing the jury as counsel for both sides noted in front of the jury that officer's testimony concerned events in 2007. 126 H. 40 (App.), 266 P.3d 448 (2011).

Mentioned: 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **Rule 402 Relevant evidence generally admissible; irrelevant evidence inadmissible.** All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible. [L 1980, c 164, pt of §1]

RULE 402 COMMENTARY

This rule, similar to Fed. R. Evid. 402, establishes the basic precondition for admissibility of all evidence: it must be "relevant" as that term is defined in Rule 401. In State v. Smith, 59 H. 565, 567-68, 583 P.2d 347, 349-50 (1978), the court held: "All relevant evidence is admissible unless some rule compels its exclusion.... Our laws give a [party] the right to introduce evidence of those relevant and material facts which logically tend to prove the issues involved and which is not otherwise excluded." See State v. Irebaria, 55 H. 353, 519 P.2d 1246 (1974); Territory v. Henry, 39 H. 296 (1952); Bonacon v. Wax, 37 H. 57 (1945).

There are, of course, many qualifications to the general admissibility of relevant evidence. The exclusionary rule in criminal cases, see, e.g., State v. Santiago, 53 H. 254, 492 P.2d 657 (1971), is a prime example. Rule 403 infra, requires exclusion of relevant evidence whenever the relevance or 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." Privilege (Article V) and hearsay (Article VIII) rules frequently interpose a bar to the receipt of relevant evidence.

Case Notes

Trial court did not err in ruling that evidence of motorcyclist's nonuse of helmet was not relevant under rule 401, and thus, not admissible under this rule. 74 H. 308, 844 P.2d 670 (1993).

Evidence regarding search warrant was inadmissible as irrelevant where existence of search warrant was not relevant to issue of whether police officer's murder arose out of performance of official duties. 75 H. 282, 859 P.2d 1369 (1993).

Expert medical testimony that "permanent, serious disfigurement" would have resulted absent medical attention irrelevant where that result was an element of the charged offense; thus testimony was inadmissible under this section. 80 H. 126, 906 P.2d 612 (1995).

Evidence that victim had $2,300 in cash on person after the shooting excluded as irrelevant where fact of consequence was defendant's state of mind at the time of shooting and reasonableness of that state of mind. 80 H. 307, 909 P.2d 1122 (1996).

Evidence of gross weight of cocaine relevant and properly admitted as it made the "consequential fact" that cocaine's net

weight was at least one ounce more probable than it would be without the evidence. 80 H. 382, 910 P.2d 695 (1996).

Where purpose of exhibiting individual to jury is relevant to an issue in dispute and does not contravene any other evidentiary requirements, exhibition admissible. 81 H. 15, 911 P.2d 735 (1996).

Accomplice's testimony regarding other accomplice's prior bad acts was not relevant to defendant's claim of duress under §702-231 and was, therefore, inadmissible under this rule. 101 H. 269, 67 P.3d 768 (2003).

Where evidence that child was a victim of battered child syndrome was relevant to show that child's death was not an accident, but the result of an intentional, knowing or reckless criminal act, giving rise to a duty on defendant's part to obtain medical care for child pursuant to §663-1.6, trial court did not err in admitting expert testimony that child was a victim of battered child syndrome. 101 H. 332, 68 P.3d 606 (2003).

Defendant's failure to proclaim defendant's innocence to cellmate was irrelevant under rule 401 and, thus, not admissible by virtue of this rule. 104 H. 203, 87 P.3d 275 (2004).

Proffered evidence properly excluded as irrelevant. 4 H. App. 175, 664 P.2d 262 (1983).

Although evidence that defendant had previously been convicted of a felony was relevant for purposes of §134-7, evidence that defendant may have received ineffective assistance of counsel during that prior felony trial would not have any bearing on the validity of that felony conviction; thus, trial court did not err in precluding evidence that defendant may have received ineffective assistance during prior trial. 90 H. 489 (App.), 979 P.2d 85 (1999).

Trial court did not err in admitting seatbelt buckle patent into evidence under rules 401 and 403 and this rule for the limited purpose of showing a defect in the seatbelt where the language in the patent that "known mechanisms are complicated, and some do not positively retain the latch plate" may have evinced a defect in the seatbelt that could have resulted in inertial or inadvertent release in the case, as well as defendant's knowledge of such a defect. 121 H. 143 (App.), 214 P.3d 1133 (2009).

Mentioned: 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **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. [L 1980, c 164, pt of §1]

RULE 403 COMMENTARY

This rule is identical with Fed. R. Evid. 403. It recognizes the necessity for discretionary qualification of the general admissibility rule, based on such factors as potential for engendering juror prejudice, hostility, or sympathy; potential for confusion or distraction; and likelihood of undue waste of time. See McCormick §185. "Unfair prejudice," as the Advisory Committee's Note to Fed. R. Evid. 403 explains, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." In some cases assessment of potential for prejudice will depend upon the court's view of the ability and willingness of jurors to follow a limiting instruction, see Rule 105 supra. Necessity for a Rule 403 "balance" can arise in a variety of contexts because of the pervasive nature of the principle. In particular, Rules 404(b), 608(b), and 609 implicitly call for application of this principle.

Hawaii courts have addressed the issue of discretionary exclusion of relevant evidence in the context of admissibility of gruesome or inflammatory photographs, see State v. Apao, 59 H. 625, 586 P.2d 250 (1978). "Other crimes" evidence, see Rule 404(b) infra, presents a classic example of the necessity for the Rule 403 balance, as the Hawaii Supreme Court recognized in State v. Iaukea, 56 H. 343, 349, 537 P.2d 724, 729 (1975): "The responsibility for maintaining the delicate balance between probative value and prejudicial effect lies largely within the discretion of the trial court." In State v. Murphy, 59 H. 1, 575 P.2d 448 (1978), again in commenting on "other crimes" evidence, the court stressed the trial court's responsibility of assessing the balance between probative value and prejudicial effect and noted that considerations germane to such a balancing process should include actual need for the evidence, availability of other evidence on the same issues, probative weight of the evidence, and the potential for creating prejudice and hostility against the accused in the minds of the jurors. The court recently noted that character evidence (see Rule 404(a) infra) must be evaluated with reference to the Rule 403 principle, see State v. Lui, 61 H. 328, 603 P.2d 151 (1979).

Law Journals and Reviews

Henderson v. Professional Coatings Corp.: Narrowing Third-Party Liability in Automobile Accidents. 15 UH L. Rev. 353 (1993).

Case Notes

Admission of evidence upheld. 63 H. 488, 630 P.2d 619 (1981); 4 H. App. 175, 664 P.2d 262 (1983).

Court abused its discretion in excluding evidence of driver's drinking before accident. 68 H. 447, 719 P.2d 387 (1986).

Court abused its discretion in admitting Honolulu Police Department Form 81, though parts of form where defendant invoked defendant's rights were excised; cannot be said that error harmless. 69 H. 68, 733 P.2d 690 (1987).

The admissibility of evidence even after a demonstration of relevance is a matter of discretion; no basis to establish a rule of admissibility based solely on the need for evidence. 70 H. 300, 769 P.2d 1098 (1989).

Videotape was veiled attempt to successfully recreate the motorcycle accident. 70 H. 419, 773 P.2d 1120 (1989).

Trial judge did not abuse discretion in admitting evidence of condition of abandoned child in prosecution for attempted second degree murder. 73 H. 109, 831 P.2d 512 (1992).

Admissibility of novel scientific evidence discussed, focusing on DNA profiling evidence. 73 H. 130, 828 P.2d 1274 (1992).

Trial court did not abuse its discretion in refusing to admit evidence that motorcyclist did not have motorcycle license at time of accident. 74 H. 308, 844 P.2d 670 (1993).

Defendant's statements relevant as direct evidence of a material element of terroristic threatening; court thus had no discretion to exclude. 75 H. 517, 865 P.2d 157 (1994).

Trial court did not err under rule 401 and this rule in admitting evidence that indicated that plaintiff's symptoms may have been linked to drug use and not solely to exposure to silicone. 78 H. 287, 893 P.2d 138 (1995).

Trial court did not abuse its discretion in admitting evidence of appellant's receipt of workers' compensation benefits, where the probative value of the evidence substantially outweighed the danger of unfair prejudice. 79 H. 14, 897 P.2d 941 (1995).

Admission of videotaped interview proper as it enabled jury to view whether sex assault victim's behavior was consistent with a child her age who had experienced a recent upsetting event. 80 H. 107, 905 P.2d 613 (1995).

Probative value of witness' testimony that witness suffered injuries in auto accident and testimony's relevance to whether the rear-end collision caused plaintiff's injuries substantially

outweighed by danger of substantial delay, and confusing the jury. 80 H. 212, 908 P.2d 1198 (1995).

Absent any evidence to support defendant's claim that victim bit co-defendant on leg, court properly declined to allow examination of co-defendant's leg in jury's presence for danger of misleading the jury. 81 H. 15, 911 P.2d 735 (1996).

No prejudice to defendant by prosecution exhibiting co-defendant to jury where ample evidence in record to otherwise support conviction by jury. 81 H. 15, 911 P.2d 735 (1996).

No abuse of discretion by court admitting "gruesome" photos of decedent's sexual parts, face and nude body into evidence as photos of injuries not needlessly cumulative nor unfairly prejudicial. 81 H. 293, 916 P.2d 703 (1996).

Trial court abused discretion by excluding evidence of arson and breach of duty under insurance policy provisions where probative value of evidence on issue of whether insurer was warranted in denying claim outweighed any prejudicial effect. 82 H. 120, 920 P.2d 334 (1996).

Where defendant's witness would have contradicted officers' testimony, exclusion of witness' testimony under this rule was abuse of discretion. 83 H. 229, 925 P.2d 797 (1996).

Where a victim recanted allegations of abuse, probative value of prior incidents of violence between victim and defendant to show context of relationship, where relationship was offered as possible explanation for victim's recantation, far outweighed any prejudice. 83 H. 289, 926 P.2d 194 (1996).

Admitting knife into evidence not legally prejudicial to defendant once sufficient foundation had been laid and knife's relevancy established; no abuse of discretion. 83 H. 335, 926 P.2d 1258 (1996).

Abuse of discretion where court expressly qualified witness as expert in "visibility" analysis and none of factors under this rule appeared to be factors in exclusion of testimony regarding range of visibility. 85 H. 336, 944 P.2d 1279 (1997).

Where court failed to view otherwise relevant videotape before definitively ruling on its admissibility, exclusion of tape was abuse of discretion. 85 H. 336, 944 P.2d 1279 (1997).

Where effect of allowing officer's testimony regarding defendant's statements about defendant's prior involvement in and experience with prostitution and that "what occurred in this case was not prostitution" was to allow defendant to testify without waiving defendant's right against self-incrimination, the prejudicial effect of the statement was minimized by its overall exculpatory import and was thus properly admitted. 88 H. 19, 960 P.2d 1227 (1998).

Where substantial evidence was presented regarding residuary legatee's disposition to exert undue influence, probate court's

error in admitting lay opinion testimony regarding residuary legatee's character did not substantially prejudice residuary legatee's rights and error was thus harmless. 90 H. 443, 979 P.2d 39 (1999).

Trial court's decision to permit witness' testimony regarding witness' meeting with debt collector as probative of witness' state of mind involving dealings with debt collector and to rebut suggestion by purchaser that settlement with debt collector was fabricated was not abuse of discretion; any prejudicial effect was mitigated by court's limiting instruction advising jury to consider testimony only for the purpose of why the meeting took place. 92 H. 482, 993 P.2d 516 (2000).

Trial court did not abuse discretion by excluding evidence that victim had previously been incarcerated where, absent any offer of proof as to victim's violent conduct while in prison, probative value of victim's imprisonment was questionable and outweighed by danger of undue prejudice that jurors might believe that victim was a bad person who "got what he deserved". 97 H. 206, 35 P.3d 233 (2001).

Where trial court was put on advance notice that defendant intended to invoke Fifth Amendment privilege against self-incrimination, court abused discretion by permitting prosecution to question defendant about false identification cards; risk of unfair prejudice occasioned by compelling criminal defendant to invoke privilege in front of jurors was substantial and not outweighed by probative value of prosecution's unanswered questions. 97 H. 206, 35 P.3d 233 (2001).

Trial court correctly determined that evidence of defendant's use and sale of illegal drugs and defendant's threat to "shoot" witness were relevant and did not abuse its discretion in determining that the probative value of these "other bad acts" were not substantially outweighed by the danger of unfair prejudice. 99 H. 390, 56 P.3d 692 (2002).

Trial court did not err in admitting evidence of the twenty-four guns not used by defendant in shooting rampage and testimony of weapons specialist where the evidence was relevant to show that defendant could appreciate the wrongfulness of defendant's conduct based upon the complex decision-making involved in choosing a gun from defendant's arsenal and to show defendant's planning and carrying out of plan to kill defendant's co-workers. 100 H. 442, 60 P.3d 843 (2002).

Reference to witness as "the former insurance commissioner for the State of Hawaii" not unduly prejudicial as there was no evidence that this reference suggested a jury decision on an improper basis; witness was offered as an expert witness and this reference served as the basis for the expert nature of the witness' testimony; thus, appellate court did not err in

concluding that "there was no rule that prohibited an expert from disclosing to the jury his or her prior service as a public officer in the field of his or her expertise". 102 H. 189, 74 P.3d 12 (2003).

Trial court erred in excluding, as cumulative under this rule, the playing of the 911 tape, as defendant had the right to have the jury hear the best evidence of the complainant's demeanor--the 911 tape--and not rely on the opinions of other witnesses as to complainant's demeanor. 106 H. 116, 102 P.3d 360 (2004).

Trial court incorrectly excluded evidence of beach park restroom resurfacing project pursuant to this rule, as project commenced before the subject accident and the evidence was not subject to rule 407 exclusion or the policy considerations thereunder; evidence was probative at least as to notice and under these circumstances, admission of the evidence would not have been unfairly prejudicial. 115 H. 462, 168 P.3d 592 (2007).

Trial court did not err in permitting prosecution to cross-examine defendant regarding defendant's non-statements to defendant's mental examiners where defendant's failure to mention defendant's concerns regarding aliens was clearly relevant to the question of whether defendant was being truthful when defendant testified at trial about having those concerns at the time of the incident, and §704-416 only addresses the admissibility of defendant's statements, not non-statements; thus, as the introduction of defendant's non-statements did not violate chapter 704, defendant's right to a fair trial was not prejudiced by admission of the testimony. 116 H. 200, 172 P.3d 512 (2007).

Where handgun constituted a significant piece of evidence pertaining to the state of mind requisite to the charged offense of kidnapping-with-the-intent-to-terrorize, trial court's admission of testimony regarding the handgun was not erroneous because the testimony's probative value outweighed any potential prejudice. 118 H. 493, 193 P.3d 409 (2008).

Where evidence of the sexual contacts in South Dakota was probative of defendant's opportunity to commit the charged sexual assaults in Hawaii without being detected and (1) the strength of the evidence was essentially the same (2) the similarities between the crimes were strong (3) there was substantial need for the evidence as absent the evidence, the jury would have been left with the false impression that the sexual contact started in Hawaii (4) there was no alternative way to establish the progression of defendant's behaviors, and (5) the evidence was not likely to rouse hostility against defendant by the jury, evidence was properly admitted. 124 H. 90, 237 P.3d 1156 (2010).

No abuse of discretion in trial court's exclusion of evidence under rule. 5 H. App. 251, 687 P.2d 554 (1984).

Trial court abused discretion, in admitting videotape into evidence without first previewing tape's contents, showing tape to jury, and in denying new trial, where prejudicial and misleading impact of videotape's contents on jury far outweighed its probative value. 82 H. 428 (App.), 922 P.2d 1041 (1996).

No abuse of discretion by trial court's admission of doctor's testimony regarding plaintiff's alcohol consumption where probative value of testimony not substantially outweighed by danger of unfair prejudice. 83 H. 78 (App.), 924 P.2d 572 (1996).

Photos of different wounds on victim's body caused by shooting or beating by defendant and accomplice not cumulative and properly admitted; photos' probative value not substantially outweighed by danger of unfair prejudice. 84 H. 112 (App.), 929 P.2d 1362 (1996).

Where seller's settlement offer did not contain any disclaimer of liability or releases from further claims against seller or broker, jury could have interpreted offer, despite cautionary instruction, as an admission of liability by seller; offer thus properly excluded. 84 H. 162 (App.), 931 P.2d 604 (1997).

Where expert's testimony on the battered child syndrome was relevant to prove that the injuries to child were not accidental and that someone must have intended to harm child, trial court did not abuse discretion in admitting testimony. 101 H. 256 (App.), 66 P.3d 785 (2003).

Where ongoing department of health violations had probative value as to defendant care home operator's reckless state of mind, which outweighed any danger of unfair prejudice to defendant, trial court did not abuse discretion in admitting testimony of health inspector regarding the three violations found during the inspector's inspection of defendant's care home. 104 H. 387 (App.), 90 P.3d 1256 (2004).

Where relevant evidence of witness' potential bias was elicited at trial, trial court properly balanced the prejudice concerns of defendant with the relevance and probative value of liability insurance evidence to reveal witness' potential bias; thus, trial court did not abuse its discretion in limiting evidence of bias, interest or motive with due regard for this rule. 106 H. 298 (App.), 104 P.3d 336 (2004).

Where 911 recording contained victim's real-time description of victim's van being chased and repeatedly rammed by defendant, victim's expression of fear, and the actual sounds, atmosphere of the alleged assault, and the angry and threatening voices directed at victim, recording was extremely probative and not unfairly prejudicial; thus, recording was not subject to

exclusion under this rule. 106 H. 517 (App.), 107 P.3d 1190 (2005).

Where defendant inflicted the injuries that evoked the abattoir and did not cite any evidence of the effect of the drugs on the victim other than defendant's proffered cross-examination of the medical examiner, trial court did not abuse its discretion in deciding that the vaporous probative value of the evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury", not to mention "considerations of undue delay or waste of time". 107 H. 452 (App.), 114 P.3d 958 (2005).

Where State introduced into evidence prior instances of violence between defendant and girlfriend to help explain why girlfriend recanted at trial girlfriend's statement to police, evidence of prior violence between defendant and girlfriend was needed because it provided context for their relationship whereas no other evidence in the trial did, and family court alleviated the risk of prejudice by specifically instructing jury not to consider the prior instances of violence in determining defendant's guilt or innocence, family court did not err in finding that probative value of evidence outweighed its prejudicial effect. 110 H. 154 (App.), 129 P.3d 1182 (2006).

Where the significant danger of jury confusion that would result from defendant calling nephew as a witness for the limited purpose of establishing their relationship substantially outweighed the probative value of such evidence, trial court did not abuse its discretion in precluding nephew from testifying. 110 H. 386 (App.), 133 P.3d 815 (2006).

Trial court erred harmfully in excluding, pursuant to rule 401 and this rule, defendant's exhibit with respect to defendant's theft-by-deception charges under §708-830(2), on the grounds that defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury, where evidence that defendant, based on defendant's understanding of the tax laws, had a good faith belief that defendant did not owe taxes on defendant's wages was relevant to whether defendant acted by deception and whether defendant had a defense under §708-834(1). 119 H. 60 (App.), 193 P.3d 1260 (2008).

Where, pursuant to §231-40, the Cheek interpretation of the wilfulness requirement--that a jury must be permitted to consider evidence of a defendant's good faith belief that defendant's conduct did not violate the tax laws, even if that belief was not objectively reasonable, in determining whether defendant acted wilfully--was adopted and applied in construing §231-36(a), the trial court erred in excluding defendant's exhibit pursuant to rule 401 and this rule on the grounds that

defendant's analysis of the tax laws was irrelevant and that evidence of defendant's legal theories would confuse the jury. 119 H. 60 (App.), 193 P.3d 1260 (2008).

Trial court did not abuse its discretion in finding that the probative value of the one-half and one-third of real time speed versions of the slow-motion FBI enhanced videotape was not substantially outweighed by any potential prejudice where the versions were highly probative of the sequence of events when defendant was approached by the two officers and were not cumulative because each provided a somewhat different perspective; they were not unduly prejudicial because there was sufficient foundation established as to their preparation, they contained a time counter indicating the speed at which it was playing, and the jury could compare them to the original. 120 H. 499 (App.), 210 P.3d 22 (2009).

Trial court did not err in admitting seatbelt buckle patent into evidence under rules 401 and 402 and this rule for the limited purpose of showing a defect in the seatbelt where the language in the patent that "known mechanisms are complicated, and some do not positively retain the latch plate" may have evinced a defect in the seatbelt that could have resulted in inertial or inadvertent release in the case, as well as defendant's knowledge of such a defect. 121 H. 143 (App.), 214 P.3d 1133 (2009).

When determining whether proffered evidence is cumulative, a trial court must weigh how much time it would take to present such evidence relative to the evidence's probative value; where seatbelt expert's testimony clearly differed from other expert's testimony, and there was no evidence that trial court attempted to ascertain how long it would take expert to testify, consider limiting the expert's testimony time, or balance whether the probative force of the testimony would be outweighed by its contribution to the length of trial, trial court erred in excluding expert's testimony on cumulative evidence grounds. 121 H. 143 (App.), 214 P.3d 1133 (2009).

Primarily for reasons with regard to the time that had elapsed between the other bad acts and the charged crime and applying the test set out in this rule, the circuit court did not abuse its discretion in allowing the State to adduce at trial evidence of defendant's prior convictions under rule 404(b). 123 H. 456 (App.), 235 P.3d 1168 (2010).

As the right of confrontation is not absolute, circuit court properly ruled that defendant was not entitled to introduce selected portions of witness' statement that were favorable to defendant's defense and at the same time preclude the State from introducing other portions of witness' statement that were necessary to prevent the jury from being misled; thus, circuit

court did not abuse its discretion in ruling that the responsive portions of witness' statement offered by the State were admissible under rule 106 and this rule. 125 H. 462 (App.), 264 P.3d 40 (2011).

There was no plain error in the admission of officer's statements regarding defendant's telephone conversation with wife while in custody to "clean the car", where statements had at least some bearing on defendant's consciousness of guilt and defendant's attempts to conceal evidence linking defendant to decedent's death, both facts at issue in the case, and there was no danger of confusing the jury as counsel for both sides noted in front of the jury that officer's testimony concerned events in 2007. 126 H. 40 (App.), 266 P.3d 448 (2011).

Where defendant presented no evidence linking any third person to decedent's death and failed to show how evidence of decedent's prior sexual behavior could sufficiently link identifiable third persons to decedent's death, defendant did not demonstrate that decedent's prior sexual behavior was relevant by establishing that it had a "tendency to make the existence of any fact that is of consequence" to defendant's defense that someone else killed the decedent "more probable or less probable"; circuit court thus properly excluded evidence of decedent's prior sexual behavior. 126 H. 40 (App.), 266 P.3d 448 (2011).

Circuit court did not abuse its discretion in admitting video showing defendant masturbating for "child" where video: (1) was extremely probative of defendant’s intent to promote or facilitate the commission of one of the predicate felonies necessary to prove first degree electronic enticement of a child under §707-756; (2) provided clear evidence of defendant’s motives and desires regarding the "child" and the extreme actions defendant was willing to undertake in order to entice the "child"; and (3) was the strongest evidence of defendant’s intention to engage in sexual activity with the "child". 128 H. 328 (App.), 289 P.3d 964 (2012).

Mentioned: 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **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 a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character of an accused offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the 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 victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, 609, and 609.1.

(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 where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial. [L 1980, c 164, pt of §1; am L 1994, c 25, §1]

RULE 404 COMMENTARY

This rule closely resembles Fed. R. Evid. 404. It operates to exclude generally evidence of a person's character "for the purpose of proving that he acted in conformity therewith on a particular occasion." The exclusion represents a particularized application of the principle of Rule 403 supra. As the Advisory Committee's Note to Fed. R. Evid. 404 puts it: "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

This rule does not deal with the situation where the character of a person is itself an element of a claim or defense. An example is Wilson v. Wilson, 128 Mont. 511, 278 P.2d 219 (1954), where the moral character of a parent in a child custody proceeding was determinative of the question of custody. As the Advisory Committee's Note to Fed. R. Evid. 404 explains, in such a case "no problem of the general relevancy of character

evidence is involved, and the present rule therefore has no provision on the subject." Rule 405 infra, provides the procedure for proving character in all cases, including the exceptions to Rule 404(a), where this kind of evidence is admissible.

Subsection (a): This subsection expresses the general rule of exclusion of character evidence when offered circumstantially to prove likelihood of particular conduct on a particular occasion. Consistent with the common law approach, there are three classes of exceptions.

The accused in a criminal case may offer evidence of a trait of good character pertinent to the issues in the case, State v. Faafiti, 54 H. 637, 513 P.2d 697 (1973). Examples would be character for peacefulness and non-violence in an assault case and character for honesty in a theft prosecution. In addition, the accused may offer evidence of a relevant character trait of the crime victim.

As examples of situations where victims' character traits would be admissible under subsection (a)(2), the Advisory Committee's Note to Fed. R. Evid. 404 lists homicide cases involving self-defense claims and rape cases involving consent defenses. Rule 412, however, has been recently added to the federal rules (compare Rule 412 infra), and victim character evidence in all sexual assault cases is governed by it. Subsection (a)(2) is therefore applicable mainly to homicide and assault cases. In State v. Lui, 61 H. 328, 603 P.2d 151 (1979), the court observed: "[A] defendant who claims self-defense to a charge of homicide is permitted to introduce evidence of the deceased's violent or aggressive character either to demonstrate the reasonableness of his apprehension of immediate danger or to show that the decedent was the aggressor." For the first purpose, noted the Lui court, there must be a foundation showing that the accused knew of the deceased's character "or of the specific acts of violence committed." But such a foundation "is not required where the factual issue is to determine the aggressor." The evidence was properly excluded in Lui because, since the defendant shot the unarmed victim at a distance of ten feet, there was simply no "factual dispute as to who was the aggressor."

After a character attack on the victim by the accused, or after any defense evidence that the victim "was the first aggressor," subsection (a)(2) allows the prosecution to prove the peaceful character of the victim in rebuttal. This is consistent with the result in State v. Clyde, 47 H. 345, 388 P.2d 846 (1964).

Subsection (a)(3) excepts witnesses' character traits, which may be admissible on the issue of credibility under Rules 607, 608, 609, and 609.1.

Subsection (b): Just as general character is inadmissible to prove particular conduct under subsection (a), so is evidence of any specific instance of conduct ruled out here when the only relevance is in the two-step inference from "other" conduct to general character and then "to show that he acted in conformity therewith" on the occasion in question. The reasons are marginal relevance and the counterbalancing factors listed in Rule 403.

When offered for the specified purposes other than mere character and propensity, however, "other crimes, wrongs, or acts" evidence may be admissible provided the Rule 403 test is met. The House Judiciary Committee Report accompanying the federal rules makes clear that the use of the word "may" in Fed. R. Evid. 404(b) was "not intended to confer any arbitrary discretion on the trial judge" but was rather designed to trigger the Rule 403 balance. The specific items listed in the rule as possible relevant facts justifying admissibility are illustrative of the various situations in which common law courts have admitted this kind of evidence. Rule 404(b) differs from Fed. R. Evid. 404(b) in that the latter does not list "modus operandi."

The addition of "modus operandi" in the present rule is not a difference of substance because this category is actually a species of "identity" proof. That is, the characteristics and methodology of the prior crime or act may be so strikingly similar to those of the crime or act being litigated as to support the inference that both were the handiwork of the very same person. McCormick cautions, however: "Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." McCormick §190. McCormick also cautions against admission by "pigeonholing" rather than the careful exercise of discretion called for by this rule.

This subsection generally restates existing Hawaii law, see State v. Apao, 59 H. 625, 586 P.2d 250 (1978); State v. Murphy, 59 H. 1, 575 P.2d 448 (1978); State v. Iaukea, 56 H. 343, 537 P.2d 724 (1975); State v. Hashimoto, 46 H. 183, 377 P.2d 728 (1962); State v. Yoshida, 45 H. 50, 361 P.2d 1032 (1961); Territory v. Caminos, 38 H. 628, 635 (1950).

RULE 404 SUPPLEMENTAL COMMENTARY

The Act 25, Session Laws 1994 amendment added a notice provision to subsection (b). Applicable only in criminal cases, the requirement of adversary notification "of the date, location, and general nature" of any evidence to be offered under subsection (b) is not conditioned upon motion or request.

Law Journals and Reviews

Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals. 14 UH L. Rev. 271 (1992).

The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence. 20 UH L. Rev. 221 (1998).

Familial Violence and the American Criminal Justice System. 20 UH L. Rev. 375 (1998).

Chief Justice Moon's Criminal Past. 33 UH L. Rev. 755 (2011).

Case Notes

Evidence of victim's criminal record may be admitted to corroborate defendant's self-defense claim. 66 H. 510, 666 P.2d 599 (1983).

Evidence of prior escape convictions and life sentence admissible to rebut defense of necessity and to establish element of crime. 66 H. 613, 670 P.2d 1282 (1983).

Defendant's spending spree indicated total disregard of victim's money and was probative that money had been obtained by robbery. 67 H. 231, 683 P.2d 1217 (1984).

Admissibility in assault and battery case of character evidence and other wrongs or acts. 69 H. 8, 731 P.2d 149 (1986).

Evidence of prior bad acts admissible to show who was the original aggressor. 69 H. 204, 738 P.2d 812 (1987).

Use of the word "may" was not intended to confer an arbitrary discretion to the trial judge but was designed rather to trigger the Rule 403 balance; evidence of other crimes, wrongs, and acts; and expert testimony to accredit a witness, discussed. 69 H. 633, 756 P.2d 1033 (1988).

Allowing evidence of defendant's prior act, attempting to wrest gun away from a police officer, was an abuse of discretion. 70 H. 509, 778 P.2d 704 (1989).

Court was authorized to allow prosecution to introduce evidence of victim's peaceful nature where defense has offered evidence of self-defense. 71 H. 347, 791 P.2d 392 (1990).

Evidence that defendant used a knife in a prior incident was inadmissible. 71 H. 466, 796 P.2d 80 (1990).

Evidence of prior shooting incident admissible to show defendants were knowing participants in uncharged conspiracy to kill rival gang members or under 404(b) exceptions of intent, motive, or plan. 73 H. 23, 828 P.2d 1266 (1992).

Unredacted tapes allegedly referring to defendant's propensity to purchase drugs were properly admitted to prove knowing possession under §712-1241(1)(a). 73 H. 179, 830 P.2d 492 (1992).

Defendant's statements, as direct evidence of charged offense of terroristic threatening, did not constitute "other" crimes, wrongs, or acts. 75 H. 517, 865 P.2d 157 (1994).

Court properly exercised discretion in admitting evidence that defendant's prior arguments with girlfriend would become "a little physical". 79 H. 468, 903 P.2d 1289 (1995).

Admission of evidence of defendant's prior physical, verbal and emotional abuse of wife proper where relevant and more probative than prejudicial. 80 H. 172, 907 P.2d 758 (1995).

Under subsection (b), where a victim recants allegations of abuse, evidence of prior incidents of violence between victim and defendant relevant to show context of relationship, where relationship was offered as possible explanation for victim's recantation. 83 H. 289, 926 P.2d 194 (1996).

Testimony regarding any or all of the multiple acts of sexual abuse was "direct evidence of the charged offense" and did not implicate "other crimes, wrongs, or acts" with which subsection (b) is concerned. 84 H. 1, 928 P.2d 843 (1996).

Officer's testimony regarding defendant's statements about defendant's prior involvement in and experience with prostitution properly admitted under subsection (b) as such involvement and experience were probative of another fact of consequence--they related to defendant's knowledge of prostitution and the prostitution business. 88 H. 19, 960 P.2d 1227 (1998).

Trial court did not abuse discretion by excluding evidence that victim had previously been incarcerated where, absent any offer of proof as to victim's violent conduct while in prison, probative value of victim's imprisonment was questionable and outweighed by danger of undue prejudice that jurors might believe that victim was a bad person who "got what he deserved". 97 H. 206, 35 P.3d 233 (2001).

Trial court erred in ruling that victim's past use of a handgun was not relevant, as victim's ownership and use of a handgun, and defendant's knowledge of victim's past conduct when under the influence of drugs, combined with the risk to life that victim posed, was relevant to the issue of defendant's reasonable apprehension on the morning in question. 97 H. 206, 35 P.3d 233 (2001).

Trial court correctly determined that evidence of defendant's use and sale of illegal drugs and defendant's threat to "shoot" witness were relevant and did not abuse its discretion in determining that the probative value of these "other bad acts" were not substantially outweighed by the danger of unfair prejudice. 99 H. 390, 56 P.3d 692 (2002).

Trial court did not err in admitting evidence of the twenty-four guns not used by defendant in shooting rampage and testimony of weapons specialist where the evidence was relevant to show that defendant could appreciate the wrongfulness of defendant's conduct based upon the complex decision-making involved in choosing a gun from defendant's arsenal and to show defendant's planning and carrying out of plan to kill defendant's co-workers. 100 H. 442, 60 P.3d 843 (2002).

The use of "res gestae" as an independent basis for the admission of evidence should be abandoned in the wake of Hawaii's well-developed and long-standing rules of evidence; under the subsection (b) analysis, apartment incident evidence did not fall within the permissible purposes of subsection (b) to render the evidence relevant and admissible; thus, defendant's judgment of conviction and sentence vacated and remanded. 117 H. 53, 175 P.3d 709 (2008).

Appeals court erred in affirming trial court's ruling that precluded defendant, under subsection (b), from cross-examining victim about victim's alleged marijuana use; defendant was not required to provide subsection (b) "reasonable notice" prior to cross-examining victim about whether victim used marijuana because defendant intended to show the jury that victim's perception and testimony about the incident were not credible; as there was a reasonable possibility that errors contributed to defendant's conviction, errors not harmless and convictions vacated. 118 H. 452, 193 P.3d 368 (2008).

Trial court did not abuse its discretion by precluding subsection (b) evidence that abuse victim had previously "smacked" defendant where defendant did not establish good cause for delaying the notification of the subsection (b) evidence until the day of trial. 118 H. 452, 193 P.3d 368 (2008).

Where, pursuant to subsection (b), defendant was required to give prosecution reasonable notice prior to introducing subsection (b) evidence, it did not violate defendant's constitutional right to present a defense and examine witnesses; subsection (b) is not per se unconstitutional even though it may restrict a defendant's constitutional right to confront an adverse witness and subsection (b)'s policy of reducing surprise and promoting early resolution on the issue of admissibility justified the limitation imposed on the defendant's

constitutional right to testify. 118 H. 452, 193 P.3d 368 (2008).

Trial court did not abuse its discretion in allowing into evidence the early morning incident between defendant and complainant and determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where the incident was probative of defendant's motive in committing the offenses, and was relevant to complainant's state of mind and to whether complainant was subject to strong compulsion, had consented to the sexual intercourse, and was involuntarily restrained. 118 H. 493, 193 P.3d 409 (2008).

Where evidence of the sexual contacts in South Dakota was probative of defendant's opportunity to commit the charged sexual assaults in Hawaii without being detected and (1) the strength of the evidence was essentially the same (2) the similarities between the crimes were strong (3) there was substantial need for the evidence as absent the evidence, the jury would have been left with the false impression that the sexual contact started in Hawaii (4) there was no alternative way to establish the progression of defendant's behaviors, and (5) the evidence was not likely to rouse hostility against defendant by the jury, evidence was properly admitted. 124 H. 90, 237 P.3d 1156 (2010).

Prosecutor is not permitted to bypass the evidentiary rules by asking the jury to infer conduct that, if it had been introduced during the trial, would have been subject to the limitations of subsection (b). 132 H. 97, 319 P.3d 1105 (2014).

Where defendant was accused of committing sexual assault in the fourth degree against the complaining witness, the circuit court should have excluded defendant's earlier statements that defendant wanted to "take" the complaining witness because the statements were, at their core, character evidence used to show action in conformity therewith and were not admissible under a subsection (b) exception. 132 H. 391, 322 P.3d 931 (2014).

Evidence of prior forgery admitted to prove intent. 1 H. App. 49, 613 P.2d 908 (1980).

Appellate review of trial court's exclusion of evidence under rule; reputation evidence cannot relate to time after offense committed. 5 H. App. 251, 687 P.2d 554 (1984).

Exceptions (1) and (2) allow use of character evidence in criminal cases only. 6 H. App. 505, 729 P.2d 388 (1986).

Where trial judge implicitly decided that State's need to prove victim's knowledge of defendant's connection to business of drug dealing and collecting moneys due for drug deals, etc. was not substantially outweighed by its possible prejudicial impact, to extent implicit decision was a finding of fact, it

was not clearly erroneous; to extent it was an exercise of discretion, it was not an abuse. 9 H. App. 578, 855 P.2d 34 (1993).

Trial court did not abuse its discretion in allowing witnesses to testify about defendants' involvement with child protective services, where evidence of defendants' involvement with child protective services was clearly probative of matters other than their propensity to commit the offense charged, and probative value of the evidence was not substantially outweighed by unfair prejudice to defendants. 10 H. App. 73, 861 P.2d 37 (1993).

Trial court did not abuse its discretion in refusing to allow pastor to testify where offer of proof was that pastor would testify about how long pastor had known defendant and in what capacity defendant had been involved in pastor's church; testimony of defendant's good and peaceful character would be admissible. 77 H. 177 (App.), 880 P.2d 1224 (1994).

Proffered testimony that defendant had a "habit" of speeding defendant's motorboat in marina and in channel over several days prior to accident constituted character evidence of prior bad acts which was inadmissible under subsection (b), and not habit evidence, which was admissible under rule 406. 77 H. 446 (App.), 887 P.2d 656 (1993).

As evidence that defendant sold methamphetamine to finance defendant's cocaine use was probative of whether defendant had a motive to manufacture methamphetamine and an intent to do so, and defendant's cocaine use also demonstrated defendant's knowledge of the nature of illegal drugs, where court admitted evidence under subsection (b), any potential prejudice, confusion, or waste of time was not outweighed by the probative value of the evidence; thus, no abuse of discretion. 95 H. 365 (App.), 22 P.3d 1012 (2000).

Where there is evidence to support a finding that the defendant was the aggressor and there is no evidence to support a finding that the other person was the aggressor, the defendant may not introduce evidence of the other person's violent or aggressive character. 97 H. 413 (App.), 38 P.3d 581 (2001).

As absence of mistake is specifically listed as an exception under subsection (b), it was appropriate for State to offer evidence of ongoing department of health violations to show an absence of mistake under subsection (b) in order to negate defendant care home operator’s defense of mistake. 104 H. 387 (App.), 90 P.3d 1256 (2004).

Trial court did not abuse discretion in permitting a deputy prosecuting attorney to testify about defendant's second driving while license suspended or revoked for driving under the influence conviction, as testimony was offered to prove defendant's reckless state of mind regarding whether defendant's

license remained revoked or suspended for DUI-alcohol. 106 H. 123 (App.), 102 P.3d 367 (2004).

Trial court did not err in excluding evidence of witness' alleged involvement in a gang where defendant failed to explain how witness' involvement in gang activity goes to the issue of truthfulness. 108 H. 102 (App.), 117 P.3d 834 (2005).

Trial court did not err in permitting a witness' testimony about defendant's drug-related activities as testimony was not irrelevant or unduly prejudicial; a witness' testimony regarding defendant's drug-related activities was directly relevant to proving defendant's knowledge and intent with respect to the drugs found in the apartment, and defendant's trial strategy itself significantly diminished the risk that any unfair prejudice resulted from a witness' testimony regarding defendant's other drug activities. 114 H. 162 (App.), 158 P.3d 280 (2006).

Evidence of improper comments made by defendant regarding minor and the incidents involving dyeing minor's hair and examining minor's testicles was admissible under subsection (b) where it was relevant to show defendant's motive, purpose, and intent when defendant joined minor in the bathroom that particular evening, and the nature of the prior statements and conduct by defendant was not highly inflammatory or otherwise unduly prejudicial so as to outweigh its probative value. 116 H. 125 (App.), 170 P.3d 861 (2007).

Evidence regarding entire incident, including defendant's subsequent apprehension and possession of baseball bat, was probative of facts of consequence other than character and propensity--establishing modus operandi, identity and opportunity--and thus admissible under subsection (b); thus, trial court did not err in admitting this evidence, with one exception; however, because of the ambiguous nature of the excepted evidence, the court's written and oral instructions limiting the jury's consideration of the information, and the strength of the evidence against defendant, the error was harmless beyond a reasonable doubt. 116 H. 422 (App.), 173 P.3d 569 (2007).

Trial court did not abuse its discretion in preventing defendant from questioning victim about victim's alleged past acts of violence until evidence raising a factual issue as to whether victim was the first aggressor was introduced where evidence to support a finding that victim was the first aggressor had not yet been introduced when victim testified during the State's case in chief, such evidence was not introduced until defendant testified, and after defendant testified, defendant did not attempt to question victim about

victim's alleged past acts of violence. 116 H. 445 (App.), 173 P.3d 592 (2007).

Where defendant's possession of the drug paraphernalia was relevant to show defendant's motive for the charged burglary and robbery, which allegedly led to defendant's kidnapping and murder of victim, even if the drug paraphernalia charge had been severed from the other charges, evidence of defendant's possession of the drug paraphernalia would have been admissible in a trial of the other charges under subsection (b). 119 H. 74 (App.), 193 P.3d 1274 (2008).

Where victim's prior abuse of defendant's girlfriend was circumstantial evidence of the likelihood that victim was the first aggressor in the events that led up to the shooting incident, trial court abused its discretion in precluding defendant from introducing evidence of victim's prior abuses of defendant's girlfriend under subsection (a)(2). 120 H. 420 (App.), 209 P.3d 1234 (2009).

Although the limiting instruction was given four days after the jury had heard the evidence, where the jury needed to consider the prior convictions to rebut the impression created at trial that defendant was a peaceful person, the instruction was not prejudicially insufficient, erroneous, inconsistent, or misleading. 123 H. 456 (App.), 235 P.3d 1168 (2010).

Primarily for reasons with regard to the time that had elapsed between the other bad acts and the charged crime and applying the test set out in HRE rule 403, the circuit court did not abuse its discretion in allowing the State to adduce at trial evidence of defendant's prior convictions under this rule. 123 H. 456 (App.), 235 P.3d 1168 (2010).

Mentioned: 74 H. 54, 837 P.2d 1298 (1992).

" **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 the person's conduct. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 405 COMMENTARY

This rule, which is identical with Fed. R. Evid. 405, establishes the methods by which character may be proved. Before this rule may be invoked, the question of substantive admissibility of character evidence must be decided according to Rule 404. Nor is this rule exclusive. When proving the character of sex assault victims, Rule 412 governs; and when attacking the credibility of witnesses, Rules 608, 609, and 609.1 govern.

Subsection (a): Although specific instances of conduct may be more probative on the issue of character than either opinion or reputation, this rule follows "conventional contemporary common law doctrine," see Advisory Committee's Note to Fed. R. Evid. 405, in rejecting this mode of proof in the usual case where, under Rule 404(a), character evidence is offered circumstantially. The reason is that specific conduct, although probative, offers the greatest danger of creating prejudice, arousing juror hostility, confusing the issues, and wasting time; therefore, this method of proof is allowable only on cross-examination of an opinion or reputation witness.

Hawaii courts have admitted reputation evidence as proof of character, State v. Clyde, 47 H. 345, 388 P.2d 846 (1964). However, such reputation evidence may be excluded if the court determines that the witness has insufficient knowledge of the party's reputation, State v. Faafiti, 54 H. 637, 642-43, 513 P.2d 697, 701-02 (1973):

> Evidence of the defendant's reputation in the community in which he lives and works has long been recognized as admissible, but only where the witness is thoroughly familiar with the general consensus of the relevant community.... Both defendant and witness must have been members of the relevant community for a period of time sufficient to permit slow development of an accurate impression of character.... The appropriate length of time varies with the individual, the community, and the relevant character trait. Hence, the period of time must be determined in the discretion of the trial judge.

The Faafiti court was urged to depart from the traditional rule limiting proof of character to reputation evidence, and to "adopt a rule [similar to Fed. R. Evid. 405] that makes admissible personal opinion testimony as to the accused's character." 56 H. at 644, 513 P.2d at 702. The court did not decide this issue, but commented that an opinion testimony witness should have sufficient personal acquaintance with the individual in question to be able to form an opinion on character. This rule follows Fed. R. Evid. 405 in admitting opinion testimony as to character.

Subsection (b): Where character is "in issue" as an essential element of the action, see the commentary to Rule 404 supra, inquiry into specific conduct on direct examination of a character witness is permitted because of the need for a more "searching inquiry" in this type of case. See the Advisory Committee's Note to Fed. R. Evid. 405.

Case Notes

Victim's character not raised on direct, therefore cross-examination with regard to specific instances of conduct was properly restricted. 819 F.2d 227 (1987).

Character evidence regarding one's disposition to exert undue influence is admissible in a will contest where the contestant has alleged undue influence, only insofar as it tends to show that undue influence was in fact operative at the time of the will's execution--that undue influence was exerted over the testator/testatrix at the execution of and resulted in the challenged will. 90 H. 443, 979 P.2d 39 (1999).

Specific instances of defendants' violent or belligerent acts not admissible where their alleged violent and aggressive character was not an essential element of claim of assault and battery or defense of self-defense. 6 H. App. 505, 729 P.2d 388 (1986).

" **Rule 406 Habit; routine practice.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. [L 1980, c 164, pt of §1]

RULE 406 COMMENTARY

This rule is identical with Fed. R. Evid. 406, the Advisory Committee's Note to which says: "Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait.... A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving.... When disagreement has appeared, its focus has been upon the question what constitutes habit, and the

reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion.... While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated."

Case Notes

Proffered testimony that defendant had a "habit" of speeding defendant's motorboat in marina and in channel over several days prior to accident constituted character evidence of prior bad acts, which was inadmissible under rule 404(b), and not habit evidence, which was admissible under this rule. 77 H. 446 (App.), 887 P.2d 656 (1993).

" **Rule 407 Subsequent remedial measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving dangerous defect in products liability cases, ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. [L 1980, c 164, pt of §1]

RULE 407 COMMENTARY

This rule is similar to Fed. R. Evid. 407, the Advisory Committee's Note to which points out: "The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault.... The ... ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them."

This rule is limited strictly to exclusion of such evidence when offered as proof of negligence or culpable conduct. The second sentence of the rule lists some of the other purposes for which this evidence may be admitted. The rule varies from Fed. R. Evid. 407 in the addition of "dangerous defect in products

liability cases" as one permissible purpose for which remedial measures may be admitted. This codifies the result in Ault v. International Harvester Co., 117 Cal. Rptr. 812, 815-16, 528 P.2d 1148, 1151-52 (1975), where the court held that the rule barring evidence of subsequent repairs should not apply in a products liability case. The Ault court reasoned as follows:

> While [the traditional rule] may fulfill this anti-deterrent function [of encouraging, or at least not discouraging, the making of repairs by defendants] in the typical negligence action, the provision plays no comparable role in the products liability field....
>
> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.... In short, the purpose of [the traditional rule] is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field.

In Hawaii, under Stewart v. Budget Rent-a-Car Corp., 52 H. 71, 75, 470 P.2d 240, 243 (1970), a manufacturer, seller, or lessor is strictly liable in products liability cases provided there is proof of "a defective product which is dangerous to the user or consumer or to his property." Evidence of subsequent remedial measures is admissible under this rule to prove such a defect.

Case Notes

Measures that are taken after an event but that are predetermined before the event are not "remedial" under this rule, because they are not intended to address the event; thus, because such measures are not "remedial", evidence of such measures are not inadmissible under the plain language of this rule. 115 H. 462, 168 P.3d 592 (2007).

" **Rule 408 Compromise, offers to compromise, and mediation proceedings.** Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, or (3) mediation or attempts to mediate a

claim which was disputed, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations or mediation proceedings is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation proceedings. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [L 1980, c 164, pt of §1; am L 1989, c 119, §1]

RULE 408 COMMENTARY

This rule is identical with Fed. R. Evid. 408. The rule has been accepted in Hawaii, see First Bank of Hilo v. Maguire, 25 H. 43, 49-50 (1919); HRCP 68.

RULE 408 SUPPLEMENTAL COMMENTARY

The Act 119, Session Laws 1989 amendment added paragraph (3) relating to mediation. The federal note does not specifically address mediation.

Case Notes

Based on record, no evidence that statements made in course of compromise negotiations. 67 H. 389, 688 P.2d 1145 (1984).

Trial court properly excluded evidence of insurer's settlement offer which court determined would be used to prove liability for or invalidity of the claim or its amount. 82 H. 120, 920 P.2d 334 (1996).

In a criminal trial, evidence of an accused's offer to pay value to a complainant in an attempt to avoid prosecution is not excludable under this rule. 92 H. 161, 988 P.2d 1153 (1999).

This rule applies in criminal proceedings. 92 H. 161, 988 P.2d 1153 (1999).

Testimony properly excluded where it concerned memo regarding settlement agreement. 5 H. App. 174, 683 P.2d 833 (1984).

By virtue of this rule, related compromises or attempts to compromise civil liability are not admissible in a criminal trial because of danger that the evidence may be taken as criminal guilt. 79 H. 265 (App.), 900 P.2d 1332 (1995).

Seller's offer to pay buyer $22,000 in exchange for buyer's cancellation of DROA was promise to pay a valuable consideration to compromise a claim disputed as to validity or amount and was

thus not admissible to prove liability for, or invalidity of, buyer's claim against seller. 84 H. 162 (App.), 931 P.2d 604 (1997).
Mentioned: 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **Rule 409 Payment of medical and similar expenses.** Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. [L 1980, c 164, pt of §1]

RULE 409 COMMENTARY

This rule is identical with Fed. R. Evid. 409, the Advisory Committee's Note to which says:

> Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

" **[Rule 409.5] Admissibility of expressions of sympathy and condolence.** Evidence of statements or gestures that express sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule. [L 2007, c 88, §1]

RULE 409.5 COMMENTARY

This rule, shielding expressions of "sympathy, commiseration, or condolence", resembles measures recently adopted in several sister states. See, e.g., CA Evid. Code §1160, excluding expressions of "sympathy or a general sense of benevolence". The rule favors expressions of sympathy as embodying desirable social interactions and contributing to civil settlements, and

the evidentiary exclusion recognizes that the law should "facilitate or, at least, not hinder the possibility of this healing ritual". Robbennolt, Apologies and Legal Settlement: An Empirical Examination, 102 Mich. L. Rev. 460, 474 (2003). The Hawaii legislature also stated: "Your committee finds it appropriate to allow individuals and entities to express sympathy and condolence without the expression being used ... to establish civil liability". Senate Standing Committee Report No. 1131, March 21, 2007.

Whether a challenged utterance amounts to an expression of sympathy or an acknowledgment of fault will be entrusted to the sound discretion of the trial court under Rule 104(a). In making this determination, the court could consider factors such as the declarant's language, the declarant's physical and emotional condition, and the context and circumstances in which the utterance was made.

Case Notes

Although trial court erred in concluding that the admissibility of petitioner's statement regarding having "made a big mistake" was governed by this rule, and also erred by excluding the preceding words "I'm so sorry", because those words explained the context of the "mistake" comment, the error was harmless beyond a reasonable doubt in light of petitioner's testimony explaining the statement, and the statement was relevant and admissible as a party admission under rule 803(a)(1). 126 H. 460, 272 P.3d 1227 (2012).

This rule, which provides that evidence "expressing sympathy, commiseration, or condolences concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim", applies in civil but not criminal cases; thus the circuit court and appellate court erred in applying this rule in this criminal case. 126 H. 460, 272 P.3d 1227 (2012).

" **Rule 410 Inadmissibility of pleas, plea discussions, and related statements.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;
(2) A plea of nolo contendere;
(3) Any statement made in the course of any proceedings under Rule 11 of the Hawaii Rules of Penal Procedure

or comparable federal or state procedure regarding either of the foregoing pleas; or

(4) Any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel. [L 1980, c 164, pt of §1]

RULE 410 COMMENTARY

This rule is similar to Fed. R. Evid. 410. It substitutes "Hawaii Rules of Penal Procedure or comparable federal or state procedure" in paragraph (3) for the federal language, "Federal Rules of Criminal Procedure or comparable state procedure." The intent of both rules is the same.

Fed. R. Evid. 410 was amended in 1979 to clarify the scope of the exclusion, particularly in regard to plea offers and plea discussions. The intent of the rule is "the promotion of disposition of criminal cases by compromise." See the Advisory Committee's Note to Fed. R. Evid. 410; compare Rule 408 supra. Under the original federal formulation of this rule, however, some federal courts excluded statements of defendants who offered pleas to law enforcement officers, see, e.g., United States v. Herman, 544 F.2d 791 (5th Cir. 1977). This rule conforms to the amended federal rule in that plea offers or discussions are excluded only if made in the course of Rule 11 proceedings or in discussions with the prosecuting attorney. Statements made to law enforcement officers should be assessed, not under this rule, but under the body of law dealing with police interrogation, see, e.g., State v. Santiago, 53 H. 254, 492 P.2d 657 (1971).

Case Notes

Defendant's statements were inadmissible because defendant was a participant in plea discussions. 70 H. 46, 760 P.2d 670 (1988).

" **Rule 411 Liability insurance.** Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 411 COMMENTARY

This rule is identical with Fed. R. Evid. 411. The virtual unanimity of judicial rejection of evidence that a party is or is not insured against liability is soundly based on both legal and policy considerations. Foremost among these is the question of relevance. The fact that a party to an action does or does not carry liability insurance provides no logical basis for an inference of negligence or lack of negligence. Of equal concern is the danger that knowledge of the existence or the lack of liability insurance coverage might bias the jurors and influence them to make a decision on irrelevant and improper grounds. See Carr v. Kinney, 41 H. 166, 176 (1955); Gilliam v. Gerhardt, 34 H. 466 (1938).

Case Notes

Where relevant evidence of witness' potential bias was elicited at trial, trial court properly balanced the prejudice concerns of defendant with the relevance and probative value of liability insurance evidence to reveal witness' potential bias; thus, trial court did not abuse its discretion in limiting evidence of bias, interest or motive with due regard for rule 403. 106 H. 298 (App.), 104 P.3d 336 (2004).

" **Rule 412 Sexual offense and sexual harassment cases; relevance of victim's past behavior.** (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of the sexual offense is not admissible to prove the character of the victim to show action in conformity therewith.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is not admissible to prove the

character of the victim to show action in conformity therewith, unless the evidence is:

(1) Admitted in accordance with subsection (c)(1) and (2) and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection (c) and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual assault is alleged.

(c)(1) If the person accused of committing a sexual offense intends to offer under subsection (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer the evidence not later than fifteen days before the date on which the trial in which the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (b), the court shall order a hearing in chambers to determine if the evidence is admissible. At the hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (b) of rule 104, if the relevancy of the evidence that the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for this purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine the issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence that the accused seeks to offer is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) In any civil action alleging conduct which constitutes a sexual offense or sexual harassment, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

(e) Subsection (d) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(f) In a civil action alleging conduct which constitutes a sexual offense or sexual harassment, if the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(g) Nothing in subsections (d), (e) or (f) shall be construed to make inadmissible evidence offered to attack the credibility of the plaintiff.

(h) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a sexual offense or sexual harassment is alleged. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(1); am L 1999, c 89, §2]

RULE 412 COMMENTARY

This rule is identical with Fed. R. Evid. 412, except that the federal rule applies to cases of "rape or of assault with intent to commit rape," and this rule applies to cases of "rape or sexual assault under any of the provisions of chapter 707, part V of the Hawaii Penal Code."

The purpose of this rule is to exclude general character evidence, including specific instances of conduct, as it relates to the past sexual behavior of rape and sexual assault victims. Fed. R. Evid. 412 was added to the federal rules in 1978, prior to which time this class of evidence was governed by the general

victim provision in Rule 404(a)(2), which allowed the evidence in cases involving consent defenses provided the relevance was not substantially outweighed by the countervailing factors listed in Rule 403. This rule bars evidence of the character and past sexual behavior of victims of sexual assault unless: (1) the evidence is "constitutionally required to be admitted"; or (2) the evidence goes to the issue whether the accused was "the source of semen or injury"; or (3) the evidence consists of past sexual behavior with the accused, and is offered on the issue of consent. The reasons for exclusion are: (1) that the evidence has little or no relevance on the issues of consent and credibility; (2) that the evidence tends to be misleading and time consuming; and (3) that the general admissibility of this evidence has deterred significant numbers of sexual assault victims from reporting or from prosecuting these crimes.

Prior Hawaii law on impeachment of sexual assault victims was contained in Hawaii Rev. Stat. §707-742 (1976) (repealed 1980) (originally enacted as L 1975, c 83, §1; am L 1977, c 109, §1). This statute mandated procedures very similar to those contained in subsection (c) of this rule, but on the substantive issue provided only that "if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and is not inadmissible for any reason, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the question to be permitted." It thus appears that the admissibility of this class of evidence was discretionary with the court.

Subsection (a): Although Rule 404(a)(2) allows "evidence of a pertinent trait of character of the victim of the crime offered by an accused," Rule 412(a) specifically controls in all sexual assault cases, and interposes a flat bar to the receipt of reputation or opinion evidence "of the past sexual behavior of an alleged [sexual assault] victim."

Subsection (b): This subsection bars evidence of specific instances of past sexual behavior of the sexual assault victim except in three instances:

(1) The evidence may be "constitutionally required to be admitted," cf. Davis v. Alaska, 415 U.S. 308 (1974); Giles v. Maryland, 386 U.S. 66 (1967);

(2) If the prosecution evidence identifies the accused not only as the assailant but also as the source of semen or injury, past sexual behavior of the alleged victim within the relevant period of time possesses heightened probative value in rebutting the latter assertion;

(3) If the past sexual behavior was with the accused and is now offered on the issue of consent, the level of probative value will ordinarily justify admission.

Subsection (c): As noted earlier in this commentary, this subsection generally restates existing law. The in camera hearing is designed, as was its predecessor, Hawaii Rev. Stat. §707-742 (1976) (repealed 1980), "to prevent unnecessary embarrassment and humiliation of the complainant and to encourage the reporting and enforcement of rape cases." Because of the sensitive nature of this kind of evidence, the ordinary procedures specified in Rule 104 for the determination of preliminary admissibility questions need the specific augmentation provided in this subsection.

RULE 412 SUPPLEMENTAL COMMENTARY

The Act 191, Session Laws 1992 amendments to Rule 412 are in two sets. The first set, entirely nonsubstantive in character, eliminates the term "rape" in keeping with recent modifications to chapter 707 which have similarly eliminated that term in favor of "sexual assault," see Hawaii Rev. Stat. §§707-730 through 707-733 (Supp. 1992). Moreover, since all the crimes intended to be affected by this rule now bear the name "sexual assault", there is no longer any need for the language, "under any of the provisions of chapter 707, part V of the Hawaii Penal Code," which is, accordingly, eliminated.

The second set of changes adds the language "to prove the character of the victim in order to show action in conformity therewith" to the exclusions of subsections (a) and (b). This language, which parallels limitations contained in Rule 404(a) and (b), makes clear that what is excluded is evidence of the victim's character offered to show a propensity or inclination to behave similarly on the occasion in question. It is believed that this was the original intent of Rule 412, and that the omission of this language in the original draft was inadvertent. In any event, if the accused offers this evidence as relevant to his or her state of mind, the relevance is substantially heightened, see, e.g., Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981) (applying Fed. R. Evid. 412).

The Doe case, where the victim's reputation and past sexual behavior were known to the accused and were admissible to show the reasonableness of the latter's belief that the victim consented, reveals the force of the analogy between Rules 404 and 412. The character-propensity limitation of Rule 404, as the commentary to that rule suggests, has the salutary effect of rendering the rule inapplicable to an alleged victim's aggressive character traits and prior aggressive acts in cases where the accused knew of the victim's character and prior behavior and offers it, not to show propensity and action in conformity, but rather to prove the reasonableness of accused's

fear of the victim, which is an element of a self-defense claim. Rule 404 being inapplicable, the evidence is governed by the general relevancy and balancing principles of Rules 401 and 403. Similarly, as in Doe, if an alleged sexual assault victim's reputation and past sexual behavior were related to or otherwise known by the accused, then the proffer of this material, not to show consent in fact, but rather to show accused's reasonable belief in consent, is to be governed not by this rule but by Rules 401 and 403. Notice that this theory of admissibility applies only where the accused offers evidence sufficient to support a finding, under Rule 104(b), that he or she knew of the material at issue, and so the limitation effected by the new language will not reverse the exclusion of victims' character evidence in the run of cases where the accused, at the time of the alleged sexual assault, was not aware of this material.

The Act 89, Session Laws 1999 amendment, among other things, added subsections (d), (e), (f), and (g), to provide that: (1) in any civil action alleging conduct constituting a sexual offense or sexual harassment, evidence of specific instances of plaintiff's sexual conduct is not admissible by the defendant to prove consent by the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium, and if the plaintiff introduces evidence relating to the plaintiff's sexual conduct, the defendant may cross-examine the witness and offer relevant evidence limited specifically to the rebuttal of the evidence introduced; and (2) in civil cases, Rule 412 does not make inadmissible evidence offered to attack the plaintiff's credibility.

Law Journals and Reviews

Rape and Child Sexual Assault: Dispelling the Myths. 14 UH L. Rev. 157 (1992).

The Protection of Individual Rights Under Hawai‘i's Constitution. 14 UH L. Rev. 311 (1992).

Criminal Procedure Rights Under the Hawaii Constitution Since 1992. 18 UH L. Rev. 683 (1996).

Case Notes

Strong evidence of force destroys issue of consent to render complaining witness' past sexual conduct irrelevant. 62 H. 420, 616 P.2d 219 (1980).

Evidence of complainant's past sexual behavior with persons other than the accused on the issue of consent is inadmissible. 62 H. 572, 617 P.2d 1214 (1980).

Complaining witness' statements of past sexual experience was relevant to the issue of consent; defendant had a right to cross-examine on this issue. 71 H. 115, 785 P.2d 157 (1989).

Admissibility of evidence of complainant's fantasies, discussed. 74 H. 479, 849 P.2d 58 (1993).

Where a defendant seeks to admit allegedly false statements made by a complainant regarding an unrelated sexual assault, the trial court must make a preliminary determination based on a preponderance of the evidence that the statements are false; where the trial court is unable to determine by a preponderance of the evidence that the statements are false, defendant has failed to meet his or her burden, and evidence may be properly excluded. 95 H. 452, 24 P.3d 648 (2001).

Defendant constitutionally entitled to elicit evidence of complainant's past sexual behavior, not to attack complainant's character, but to determine whether complainant was mentally defective and whether defendant knew that complainant was mentally defective. 81 H. 447 (App.), 918 P.2d 254 (1996).

Trial court did not abuse its discretion by refusing to allow minor to be impeached by excluding evidence that minor had falsely denied having prior sexual experiences when minor was interviewed by doctor; evidence would have had limited probative value given the circumstances of the statement, i.e., a fifteen year old being asked intimate questions by a stranger, it would have been cumulative, since the trial court had allowed defendant significant latitude in impeaching minor with prior instances of untruthfulness, and evidence would have been unduly prejudicial and confusing since it would have focused attention on minor's prior sexual history. 116 H. 125 (App.), 170 P.3d 861 (2007).

Where defendant presented no evidence linking any third person to decedent's death and failed to show how evidence of decedent's prior sexual behavior could sufficiently link identifiable third persons to decedent's death, defendant did not demonstrate that decedent's prior sexual behavior was relevant by establishing that it had a "tendency to make the existence of any fact that is of consequence" to defendant's defense that someone else killed the decedent "more probable or less probable"; circuit court thus properly excluded evidence of decedent's prior sexual behavior. 126 H. 40 (App.), 266 P.3d 448 (2011).

"ARTICLE V.
PRIVILEGES

Rule 501 Privileges recognized only as provided. Except as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii, no person has a privilege to:

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing. [L 1980, c 164, pt of §1]

RULE 501 COMMENTARY

This rule closely resembles Uniform Rule of Evidence 501 and Cal. Evid. Code §911, the commentary to which states: "This section codifies the existing law that privileges are not recognized in the absence of statute."

The resolution of privilege rules was perhaps the most controversial aspect in the promulgation of the federal evidence rules. The U.S. Supreme Court proposed for adoption thirteen privilege rules that were ultimately rejected by Congress, which enacted one rule, Fed. R. Evid. 501. The U.S. Senate Report to Fed. R. Evid. 501 explains:

> Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. In addition, a proviso was approved requiring Federal courts to recognize and apply state privilege law in civil cases governed by Erie R. Co. v. Tompkins, ... as under present Federal case law. [S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974).]

The Supreme Court's proposed privilege rules can be found in Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), and these unenacted rules, as well as the Uniform Rule of Evidence, served as models for the present article.

" **Rule 502 Required reports privileged by statute.** A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question. [L 1980, c 164, pt of §1]

RULE 502 COMMENTARY

This rule is identical with the U.S. Supreme Court's proposed Rule 502, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975). A number of Hawaii statutes requiring that reports be made or information be supplied incorporate provisions against unauthorized disclosure of such reports or information. This has the effect of creating a qualified privilege for the reporting party and for the recipient on the reporting party's behalf.

Characteristic of such privilege provisions are those found in statutes dealing with social services, vital statistics, health, and motor vehicle safety. See, e.g., Hawaii Rev. Stat. §346-10 (Supp. 1979), which provides for confidentiality of records maintained by the Department of Social Services and Housing; Hawaii Rev. Stat. §334-5 (1976), which provides for qualified confidentiality of mental health records; Hawaii Rev. Stat. §324-23 (1976), which limits the use in legal proceedings of reports and information made to the Hawaii Tumor Registry; and Hawaii Rev. Stat. §287-14 (1976), which establishes a privilege against disclosure of certain motor vehicle accident reports in civil actions to recover damages.

" **Rule 503 Lawyer-client privilege.** (a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A "representative of the lawyer" is one directed by the lawyer to assist in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Prevention of crime or fraud. As to a communication reflecting the client's intent to commit a criminal or fraudulent act that the lawyer reasonably believes is

likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(3) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(4) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(5) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients; or

(7) Lawyer's professional responsibility. As to a communication the disclosure of which is required or authorized by the Hawaii rules of professional conduct for attorneys. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(2)]

RULE 503 COMMENTARY

This rule is similar to Uniform Rule of Evidence 502, which adds to the U.S. Supreme Court proposal for the lawyer-client privilege, see proposed Rule 503, Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), a definition for "representative of the client," subdivision (a)(2). Inclusion of this provision is based on the principle that a rule of privilege should be explicit.

The desirability of incorporating an express definition of who may be considered a "representative of the client" is underscored by inconsistent federal court rulings on this issue in the context of corporate client-attorney relationships, compare City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), with Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970). The definition embodied in this rule is more expansive than the highly-constricted "control group" limitation imposed in City of Philadelphia, supra, in that it includes as a "representative" not only one having authority to act upon legal advice but also

one authorized merely to obtain legal services on behalf of the client. Determination of what constitutes "authority" in such a case may be made according to recognized principles of agency.

Although Hawaii had no previous statutory provision for this privilege, it was recognized by the Hawaii courts, see McKeague v. Freitas, 40 H. 108 (1953); Wery v. Pacific Trust Co., 33 H. 701 (1936). Judicial definition of the scope and limitations of the privilege in those cases is consistent with the present rule.

RULE 503 SUPPLEMENTAL COMMENTARY

The Act 191, Session Laws 1992 amendment modified subsection (d)(1) and added subsections (d)(2) and (d)(7).

Subsection (d)(1): The language of the previous rule ("sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud") strongly implied a requirement that the client be shown to have entertained an unlawful intent at the time of the consultation with counsel, and some of the crime-fraud exception cases have so held, e.g., Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 281 (8th Cir. 1984). But the crime-fraud exception obtains without regard to the lawyer's awareness--or lack of awareness--of the client's unlawful motivation.

That being so, and keeping in mind that the paramount policy of the crime-fraud exception is to thwart the exploitation of legal advice and counseling in furtherance of unlawful goals, courts have extended the exception to cases where the client's criminal intent is formed only after legal consultation, e.g., Fidelity-Phoenix Fire Ins. Co. of New York v. Hamilton, 340 S.W.2d 218, 219 (Ky. 1960), where the client, after learning from his first lawyer that his fire damages were exempted from insurance coverage by a suspension provision in the policy, went to a second lawyer and falsely represented facts that supported a claim under the policy. The court held that the claim was fraudulent and that the communications to the first lawyer were not privileged. The extension of the crime-fraud exception to this sort of case is approved in Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C.L. Rev. 443, 458-59, 480-81 (1986). It is, moreover, fully consistent with the lawyers' rule of professional responsibility, see Hawaii Code of Professional Responsibility, DR 7-102(B)(1), requiring the lawyer to rectify or to reveal client fraud committed "in the course of the representation." Indeed, one advantage of the current amendment is to expand the crime-fraud exception to

allow for revelations that Hawaii lawyers are professionally committed to making.

Subsection (d)(2): This new addition to the attorney-client privilege exceptions conforms the rule of privilege to the lawyers' professional responsibility rule, see Hawaii Code of Professional Responsibility, DR 4-101(C)(3), permitting a lawyer to reveal the client's intention "to commit a crime, and the information necessary to prevent the crime." DR 4-101(C)(3) is permissive, but tort law, cf. Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334 (1976), may compel such a revelation.

There may be substantial overlap between subsections (d)(1) (crime-fraud exception) and (d)(2) (this rule), but the underlying policies are not the same. The crime-fraud exception is designed to promote the rectification of client fraud committed in exploitation of legal consultation; the present rule, on the other hand, relaxes the privilege bar to enable the lawyer to try to prevent the crime or fraud.

Subsection (d)(7): This new rule recognizes that, in the exercise of their professional responsibility and in complying with applicable professional norms, lawyers may be duty bound to divulge what would otherwise constitute confidential information covered by Rule 503. In such instances the privilege should yield. Most such revelations would not be testimonial, and so the privilege, which applies only in court proceedings, see Rules 101 and 1101, would strictly speaking not be a bar. Just such an analysis likely explains the failure of the former rule to countenance revelation of a client's intent to commit a serious crime. On the other hand, many lawyers believe that Rule 503 expresses policy that should carry over and inform the exercise of professional obligations and norms. This rule makes clear that the privilege will yield to the professional duty.

Rules of Court

See HRPC rule 1.6.

Law Journals and Reviews

Searching for Confidentiality in Cyberspace: Responsible Use of E-mail for Attorney-Client Communications. 20 UH L. Rev. 527 (1998).

Endangering Individual Autonomy in Choice of Lawyers and Trustees--Misconceived Conflict of Interest Claims in the Kamehameha Schools Bishop Estate Litigation. 21 UH L. Rev. 487 (1999).

Understanding the Attorney-Client and Trustee-Beneficiary Relationships in the Kamehameha Schools Bishop Estate Litigation: A Reply to Professor McCall. 21 UH L. Rev. 511 (1999).

Case Notes

Where defendant contended that documents were privileged from discovery pursuant to joint defense privilege arising from rule 503(b)(3), "pending action ... concerning a matter of common interest" not established. 925 F. Supp. 1478 (1996).

Attorney-client privilege did not apply where (1) defendant had not met its burden of establishing that a document was a confidential communication between defendant and its counsel; and (2) defendant had not provided any information regarding how another document was transmitted to counsel and the court could not find that the communication was confidential. 447 F. Supp. 2d 1131 (2006).

Privilege and "common interest doctrine" or "joint defense doctrine", discussed. 642 F. Supp. 2d 1192 (2009).

Cases decided before adoption of statute--scope and limitations of privilege generally. 62 H. 34, 609 P.2d 137 (1980).

Statement by insured to insurer after accident not within privilege. 68 H. 528, 723 P.2d 171 (1986).

Discussion between defendant and defendant's attorney not confidential within meaning of subsections (a)(5) and (b) where communications between them were knowingly conducted in police informant's presence in courthouse hallway. 84 H. 229, 933 P.2d 66 (1997).

When a prosecutor seeks arguably privileged testimony, the prosecutor must either (1) give notice to the person who might claim the privilege and the person's counsel, so that the person or the person's attorney can seek judicial review of any claim or privilege or waive the privilege, or (2) give notice to the person's counsel and, if the person's counsel does not raise the privilege and seek judicial review, the prosecutor must seek the court's ruling on the privilege issue. 97 H. 512, 40 P.3d 914 (2002).

Where memorandum was prepared on behalf of a representative of developer in an effort to ensure that proposed development met all applicable laws and developer's needs, memorandum was a confidential communication made for the purpose of facilitating the rendition of legal services for developer between developer's representative and a lawyer; thus, trial court did not abuse discretion in determining that memorandum was privileged. 102 H. 465, 78 P.3d 1 (2003).

" **Rule 504 Physician-patient privilege.** (a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a physician.

(2) A "physician" is a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including alcohol or drug addiction, among oneself, the patient's physician, and persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the physician at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness or substance abuse, or in proceedings for the discharge or release of a patient previously hospitalized for mental illness or substance abuse.

(2) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Proceedings against physician. There is no privilege under this rule in any administrative or judicial proceeding in which the competency, practitioner's license, or practice of the physician is at issue, provided that the identifying data of the patients whose records are admitted into evidence shall be kept confidential unless waived by the patient. The administrative agency, board, or commission may close the proceeding to the public to protect the confidentiality of the patient.

(5) Furtherance of crime or tort. There is no privilege under this rule if the services of the physician were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or tort.

(6) Prevention of crime or tort. There is no privilege under this rule as to a communication reflecting the patient's intent to commit a criminal or tortious act that the physician reasonably believes is likely to result in death or substantial bodily harm. [L 1980, c 164, pt of §1; gen ch 1985; am L 2002, c 134, §1]

RULE 504 COMMENTARY

This rule is based upon Uniform Rule of Evidence 503 and the former statute, Hawaii Rev. Stat. §621-20.5 (1976, Supp. 1979) (repealed 1980) (originally enacted as L 1972, c 104, §1(o); am L 1978, c 52, §1), which codified Hawaii's physician-patient privilege.

The rule makes clear that privileged communications may relate to the diagnosis or treatment of "physical, mental, or emotional condition[s], including alcohol or drug addiction." Designed to encourage free disclosure between physician and patient, the privilege belongs only to the patient and may be invoked by the physician "only on behalf of the patient."

Subsection (d)(4) conforms to the 1978 amendment to the predecessor statute, Hawaii Rev. Stat. §621-20.5 (1976) (repealed 1980).

The federal common law does not recognize the privilege. In Gretsky v. Basso, 136 F. Supp. 640, 641 (D. Mass. 1955), the court upheld admission of hospital patients' records against a claim of privilege, ruling: "[T]his is a federal administrative proceeding and state evidentiary restrictions [do] not apply." In Felber v. Foote, 321 F. Supp. 85, 87-88 (D. Conn. 1970), the court said: "[T]he common law knew no privilege for confidential information imparted to a doctor.... Whatever protection there is against disclosure of a patient's communications to his physician is afforded solely by the law of the individual states."

RULE 504 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment adds subsections (d)(5) and (d)(6), which are two new exceptions to the privilege coverage of this rule.

Subsection (d)(5), entitled "Furtherance of crime or tort", bears close kinship to the counterpart crime-fraud exception to the lawyer-client privilege, Rule 503(d)(1). See the 1992 supplemental commentary to Rule 503, explaining that "the paramount policy of the crime-fraud exception is to thwart the exploitation of legal advice and counseling in furtherance of unlawful goals". A similar policy, applicable to physicians' services, informs this exception.

This new exception lifts the privilege shield from communications that reflect a patient's effort to exploit a physician's services for a criminal or tortious purpose, such as the unlawful acquisition of controlled drugs and substances. As the commentary to Cal. Evid. Code §997, which is similar, points out: "[T]here is no desirable end to be served by encouraging such communications."

Subsection (d)(6), entitled "Prevention of crime or tort", is intended to allow physicians to make disclosures to avoid tort liability of the sort imposed by Tarasoff v. Regents, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist's common law duty to warn foreseeable victims of a patient the therapist knows to be dangerous and likely to harm those victims). Hawaii will likely embrace Tarasoff, see Lee v. Corregedore, 83 H. 154, 925 P.2d 324 (1996), declining to create a duty to prevent a patient's suicide but recognizing a psychotherapist's duty to "disclose the contents of a confidential communication where the risk to be prevented thereby is the danger of violent assault...." Hawaii added a Tarasoff exception to its lawyer-client privilege in 1992, Rule 503(d)(2), and the present amendment extends the same protection to physicians.

Case Notes

Physician-patient privilege applicable in criminal cases. 66 H. 448, 666 P.2d 169 (1983).

Under subsection (d), doctor's communications with U.S. Attorney, engaged in pursuant to federal district court order requiring that patient be subjected to physical examination, were not privileged. 89 H. 188, 970 P.2d 496 (1998).

Defendant's toxicology report was a privileged physician-patient communication; admission of report into evidence was not harmless beyond a reasonable doubt. 102 H. 449, 77 P.3d 940 (2003).

Where medical records of petitioner's treatment at the hospital was protected by petitioner's physician-patient privilege that was not waived, regardless of any relevancy of those records to the judicial proceeding before the respondent judge, petitioner's right of confidentiality under subsection (b) prohibited any disclosure of petitioner's medical records, including in camera disclosure to the respondent judge. 125 H. 31, 251 P.3d 594 (2011).

Where petitioner was not a party to plaintiff's dog bite lawsuit against defendant, petitioner's health information in petitioner's medical records at hospital was protected by petitioner's right to privacy under the state constitution, article I, §6 and the physician-patient privilege of this rule. 125 H. 31, 251 P.3d 594 (2011).

" **Rule 504.1 Psychologist-client privilege.** (a) Definitions. As used in this rule:

(1) A "client" is a person who consults or is examined or interviewed by a psychologist.

(2) A "psychologist" is a person authorized, or reasonably believed by the client to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including substance addiction or abuse.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis or treatment of the client's mental or emotional condition under the direction of the psychologist, including members of the client's family.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the client's mental or emotional condition, including substance addiction or abuse, among the client, the client's psychologist, and persons who are participating in the diagnosis or treatment under the direction of the psychologist, including members of the client's family.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, or the personal representative of a deceased client. The person who was the psychologist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the client for mental illness or substance abuse, or in proceedings for the discharge or release of a client previously hospitalized for mental illness or substance abuse.

(2) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a client, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the client in any proceeding in which the client relies upon the condition as an element of the client's claim or defense or, after the client's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Proceedings against psychologist. There is no privilege under this rule in any administrative or judicial proceeding in which the competency, practitioner's license, or practice of the psychologist is at issue, provided that the identifying data of the clients whose records are admitted into evidence shall be kept confidential unless waived by the client. The administrative agency, board, or commission may close the proceeding

to the public to protect the confidentiality of the client.

(5) Furtherance of crime or tort. There is no privilege under this rule if the services of the psychologist were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or tort.

(6) Prevention of crime or tort. There is no privilege under this rule as to a communication reflecting the client's intent to commit a criminal or tortious act that the psychologist reasonably believes is likely to result in death or substantial bodily harm. [L 1980, c 164, pt of §1; am L 1985, c 115, §18; gen ch 1985; am L 2002, c 134, §2]

Cross References

Privileged communications between clinical social workers and their clients, see §467E-15.

RULE 504.1 COMMENTARY

The rejected privilege rules proposed by the U.S. Supreme Court in 1972, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), contained no general physician-patient privilege but only a "psychotherapist-patient" privilege. The case for psychotherapists and their patients was made in the original Advisory Committee's Note:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule ... there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client.

Accordingly, unenacted federal Rule 504 and Uniform Rule of Evidence 503 provide the models for this rule. Both provisions include within the definition of psychotherapist "a person licensed or certified as a psychologist under the laws of any state or nation"." The present rule limits the privilege to communications between a client and a psychologist licensed

under the provision of Hawaii Rev. Stat. ch. 465 (1976). In all other respects, the rule faithfully tracks the provisions of Rule 504 supra.

RULE 504.1 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment (1) expands the definition of "psychologist" in subsection (a)(2); (2) conforms the definition of "confidential communication", in subsection (a)(3), and the general statement of the privilege in subsection (b), to the amended definition of "psychologist"; and (3) adds subsections (d)(5) and (d)(6), containing two new exceptions to the privilege coverage of this rule.

Subsection (a)(2)'s definition of "psychologist" is expanded to include persons "authorized, or reasonably believed by the client to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including substance addiction or abuse". Elimination of the predecessor law's jurisdictional limitation (privilege available only to persons licensed to practice psychology under Hawaii Rev. Stat. ch. 465) conforms this privilege's coverage to that of the lawyer-client and physician-patient privileges of Rules 503 and 504. And describing a qualifying psychologist's work as the "diagnosis or treatment of a mental or emotional condition" conforms this rule to Rule 503 of the Uniform Rules of Evidence. The amendments to subsections (a)(3) and (b) merely incorporate the revised "psychologist" definition of subsection (a)(2).

Subsection (d)(5), entitled "Furtherance of crime or tort", bears close kinship to the counterpart crime-fraud exception to the lawyer-client privilege, Rule 503(d)(1). See the 1992 supplemental commentary to Rule 503, explaining that "the paramount policy of the crime-fraud exception is to thwart the exploitation of legal advice and counseling in furtherance of unlawful goals". A similar policy, applicable to psychologists' services, informs this exception.

This new exception lifts the privilege shield from communications that reflect a client's effort to exploit a psychologist's services for a criminal or tortious purpose. As the commentary applicable to Cal. Evid. Code §1018, which is similar, points out: "[T]here is no desirable end to be served by encouraging such communications."

Subsection (d)(6), entitled "Prevention of crime or tort", is intended to allow psychologists to make disclosures to avoid tort liability of the sort imposed by Tarasoff v. Regents, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist's common law duty to warn foreseeable victims of a patient the therapist knows to be dangerous and likely to

harm those victims). Hawaii will likely embrace Tarasoff, see Lee v. Corregedore, 83 H. 154, 925 P.2d 324 (1996), declining to create a duty to prevent a patient's suicide but recognizing a psychotherapist's duty to "disclose the contents of a confidential communication where the risk to be prevented thereby is the danger of violent assault...." Hawaii added a Tarasoff exception to its lawyer-client privilege in 1992, Rule 503(d)(2), and the present amendment extends the same protection to psychologists.

Case Notes

When a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights. 101 H. 172, 65 P.3d 119 (2003).

Mother could not invoke psychologist-client privilege where counseling sessions were held pursuant to a family court order and the communications between psychologist and mother were made known to the department of human services. 8 H. App. 161, 795 P.2d 294 (1990).

The exception under subsection (d)(3) requires more than relevance; it requires a client to rely upon client's "mental or emotional condition" as an element of client's claim or defense; thus, psychologist-client privilege applied and none of the exceptions were applicable in client's request for custody of children. 112 H. 437 (App.), 146 P.3d 597 (2006).

" **Rule 505 Spousal privilege.** (a) Criminal proceedings. In a criminal proceeding, the spouse of the accused has a privilege not to testify against the accused. This privilege may be claimed only by the spouse who is called to testify.

(b) Confidential marital communications; all proceedings.

(1) Definition. A "confidential marital communication" is a private communication between spouses that is not intended for disclosure to any other person.

(2) Either party to a confidential marital communication has a privilege to refuse to disclose and to prevent any other person from disclosing that communication.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of (A) the other, (B) a child of either, (C) a third person residing in the household of either, or (D) a third person committed in the course of committing a

crime against any of these, or (2) as to matters occurring prior to the marriage. [L 1980, c 164, pt of §1]

RULE 505 COMMENTARY

This rule supersedes two previous Hawaii statutes, Hawaii Rev. Stat. §621-18 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §53; am L 1927, c 164, §1; am L 1971, c 151, §1; am L 1972, c 104, §1(m)), and Hawaii Rev. Stat. §621-19 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §54). The former provided that in criminal cases spouses were not "competent or compellable" to give evidence against each other except in cases where the spouse was accused of an offense against the testifying spouse or against the children of either. The latter read as follows: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

The present rule recodifies and clarifies the two superseded Hawaii statutes. It also derives in part from Uniform Rule of Evidence 504 and the U.S. Supreme Court proposal for federal Rule 505, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975). Subsection (a), applicable only in criminal cases, follows the recent holding of the U.S. Supreme Court in Trammel v. United States, 455 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980), investing the spousal disqualification only in the spouse called to testify and holding that the accused has no privilege to prevent adverse spousal testimony. The Trammel court said: "When one spouse is willing to testify against the other in a criminal proceeding--whatever the motivation--their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." 63 L. Ed. 2d 196.

The prior statute barring disclosure of marital communications was a rule of privilege; however, although the wording implied that the testifying spouse was the holder of the privilege, this was not expressed in the statute, rendering uncertain the question whether the privilege was waivable by either or both the parties. Further, the statute purported to embrace all communications made during the marriage, not merely those intended as confidential, a provision somewhat more sweeping than is required by the intent of such a rule. The present rule invests the privilege in either spouse and limits the scope to confidential communications.

Appellate decisions construing the two predecessor statutes are consistent with the present rule. In an early case,

Republic of Hawaii v. Kahakauila, 10 H. 28 (1895), the court noted that testimony by the husband of a wife charged with adultery, to prove that she was married, was improperly admitted. In construing the scope of the exceptions to the rule of spousal incompetency, the court in Territory v. Alford, 39 H. 460, 472 (1952), held that testimony of the wife forced into prostitution by her husband was properly admitted against him on the grounds that the crime charged was "an offense against the person of the wife." The court has also held that general spousal testimony is not barred in civil litigation, Briggs v. Mills, 4 H. 450 (1882).

Case Notes

Presumption of confidentiality not overcome by spouse's statements to third parties regarding subject of communication. 67 H. 247, 686 P.2d 9 (1984).

The spousal privilege under this rule is not a constitutional right requiring an in-court colloquy or express waiver prior to a spouse's testifying against his or her spouse; thus, trial court did not err by failing to conduct an in-court colloquy with or obtain an express waiver from wife prior to wife testifying against husband. 99 H. 219 (App.), 53 P.3d 1204 (2002).

" **Rule 505.5 Victim-counselor privilege.** (a) Definitions. As used in this rule:

(1) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the provision of counseling or treatment services to the victim or those reasonably necessary for the transmission of the communication.

(2) "Domestic violence victims' program" means any refuge, shelter, office, safe home, institution, or center established for the purpose of offering assistance to victims of abuse through crisis intervention, medical, legal, or support counseling.

(3) "Sexual assault crisis center" means any office, institution, or center offering assistance to victims of sexual assault and the families of such victims through crisis intervention, medical, legal, or support counseling.

(4) "Social worker" means a person who has received a master's degree in social work from a school of social

work accredited by the Council on Social Work Education.

(5) A "victim" is a person who consults a victim counselor for assistance in overcoming any adverse emotional or psychological effect of sexual assault, domestic violence, or child abuse.

(6) A "victim counseling program" is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services.

(7) A "victim counselor" is either a sexual assault counselor or a domestic violence victims' counselor. A sexual assault counselor is a person who is employed by or is a volunteer in a sexual assault crisis center, has undergone a minimum of thirty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a social worker, nurse, psychiatrist, psychologist, or psychotherapist, and whose primary function is the rendering of advice, counseling or assistance to victims of sexual assault. A domestic violence victims' counselor is a person who is employed by or is a volunteer in a domestic violence victims' program, has undergone a minimum of twenty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a direct service supervisor of a domestic violence victims' program, and whose primary function is the rendering of advice, counseling, or assistance to victims of abuse.

(b) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.

(c) Who may claim the privilege. The privilege may be claimed by the victim, the victim's guardian or conservator, or the personal representative of a deceased victim. The person

who was the victim counselor at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the victim.

(d) Exceptions. There is no privilege under this rule:

(1) Perjured testimony by victim. If the victim counselor reasonably believes that the victim has given perjured testimony and a party to the proceeding has made an offer of proof that perjury may have been committed.

(2) Physical appearance and condition of victim. In matters of proof concerning the physical appearance and condition of the victim at the time of the alleged crime.

(3) Breach of duty by victim counselor or victim counseling program. As to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim.

(4) Mandatory reporting. To relieve victim counselors of any duty to refuse to report child abuse or neglect under chapter 350, domestic abuse under chapter 586, or abuse of a vulnerable adult under part X of chapter 346, and to refuse to provide evidence in child abuse proceedings under chapter 587A.

(5) Proceedings for hospitalization. For communications relevant to an issue in proceedings to hospitalize the victim for mental illness or substance abuse, or in proceedings for the discharge or release of a victim previously hospitalized for mental illness or substance abuse.

(6) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a victim, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose of which the examination is ordered unless the court orders otherwise.

(7) Condition an element of claim or defense. As to a communication relevant to the physical, mental, or emotional condition of the victim in any proceeding in which the victim relies upon the condition as an element of the victim's claim or defense or, after the victim's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(8) Proceedings against the victim counselor. In any administrative or judicial proceeding in which the competency or practice of the victim counselor or of the victim counseling program is at issue, provided

that the identifying data of the victims whose records are admitted into evidence shall be kept confidential unless waived by the victim. The administrative agency, board or commission shall close to the public any portion of a proceeding, as necessary to protect the confidentiality of the victim. [L 1992, c 217, §5; am L 1993, c 193, §2; am L 2008, c 154, §27; am L 2010, c 135, §7]

RULE 505.5 COMMENTARY

This rule, which resembles victim-counselor privilege provisions now in existence in some twenty states, e.g., Cal. Evid. Code §§1035 through 1037.7 (1992), encourages and protects the counseling of emotionally distressed victims of violent crimes by according privilege status to confidential communications made in the course of the counseling process. In adopting a similar law, N.J. Stat. Ann. §2A:84A-22.13 and 22.15 (1991), the New Jersey Legislature declared that the "counseling of victims is most successful when the victims are assured [that] their thoughts and feelings will remain confidential and will not be disclosed without their permission." The present provision proceeds upon just such a policy basis.

RULE 505.5 SUPPLEMENTAL COMMENTARY

The Act 154, Session Laws 2008 amendment replaced the term "dependent adult" with the term "vulnerable adult" in subsection (d)(4), with reference to chapter 346, part X. Act 154 amended chapter 346, part X, by, among other things, expanding the category of adults eligible for adult protective services by replacing the term "dependent adult" with the less restrictive term "vulnerable adult."

Law Journals and Reviews

Empowering Battered Women: Changes in Domestic Violence Laws in Hawai‘i. 17 UH L. Rev. 575 (1995).

Case Notes

When a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights. 101 H. 172, 65 P.3d 119 (2003).

" **Rule 506 Communications to clergy.** (a) Definitions. As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the communicant.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the latter's professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the communicant or by the communicant's guardian, conservator, or personal representative. The member of the clergy may claim the privilege on behalf of the communicant. Authority so to do is presumed in the absence of evidence to the contrary. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(3)]

RULE 506 COMMENTARY

This rule is identical with the U.S. Supreme Court proposal for Rule 506, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), except that "accredited Christian Science Practitioner" has been added to the definition of "clergyman" in subsection (a)(1), consistent with Uniform Rule of Evidence 505(a)(1). The rule supersedes a prior Hawaii statute, Hawaii Rev. Stat. §621-20 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §55; am L 1933, c 45, §1; am L 1972, c 104, §1(n)):

> No clergymen of any church or religious denomination shall, without the consent of the person making the confidential communication, divulge in any action or proceeding, whether civil or criminal, any confidential communication made to him in his professional character according to the uses of the church or religious denomination to which he belongs.

The present rule accords generally with the prior statute but broadens the scope of the privilege slightly in two particulars. Under the prior statute the privilege was limited to confidential communications made "according to the uses of the

church or religious denomination to which [the clergyman] belongs." There seems no good reason to limit the privilege in this way so long as confidentiality was intended by the communicant. The present rule clarifies that uncertain point, granting the privilege to all confidential communications made to the clergyman in his professional capacity as a spiritual adviser. In addition, the privilege is extended to cover confidential communications to one who is not a clergyman if the person making the communication reasonably believes that he is.

" **Rule 507 Political vote.** Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted pursuant to chapter 11, by secret ballot unless the vote was cast illegally. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 507 COMMENTARY

This rule is similar to Uniform Rule of Evidence 506 and to the unenacted U.S. Supreme Court proposal for Rule 507, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975). The Advisory Committee's Note to proposed Rule 507 pointed out: "Secrecy in voting is an essential aspect of effective democratic government, insuring free exercise of the franchise and fairness in elections. Secrecy after the ballot has been cast is as essential as secrecy in the act of voting."

The present rule applies only if the election in question was "political [and] conducted pursuant to chapter 11 [of the Hawaii Rev. Stat. (1976)]." The scope is accordingly governed by Hawaii Rev. Stat. §11-3 (1976): "This chapter shall apply to all elections, primary, special primary, general, special general, special, or county, held in the State." Provision in the rule for an exception in the event of an illegally cast vote is consistent with the law of election offenses and crimes, Hawaii Rev. Stat. ch. 19 (1976).

" **Rule 508 Trade secrets.** A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the

privilege and of the parties and the furtherance of justice may require. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 508 COMMENTARY

This rule is similar to Uniform Rule of Evidence 507. Unlike the other privileges in this section, the rule provides a qualified right against disclosure, subject to broad judicial discretion. Hawaii courts have not addressed the issue at the appellate level; however, HRCP 26(c)(7) provides qualified protection against such disclosure during pre-trial discovery, investing the court with discretion to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." This rule extends that protection to the trial stage.

" **Rule 509 Privilege against self-incrimination.** To the extent that such privilege exists under the Constitution of the United States or the State of Hawaii, a person has a privilege to refuse to disclose any matter that may tend to incriminate the person. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 509 COMMENTARY

This rule is similar to Cal. Evid. Code §940. It derives directly from the constitutional privilege against self-incrimination assured by the Fifth Amendment to the U.S. Constitution and by Article I, Section 10, of the Constitution of the State of Hawaii. It was also incorporated in a prior statute, Hawaii Rev. Stat. §621-18 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §53; am L 1927, c 164, §1; am L 1971, c 151, §1; am L 1972, c 104, §1(m)), which provided in part:

> Nothing herein shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, compellable to be a witness against himself; or, except as otherwise provided, shall render any person compellable to answer any question tending to incriminate himself....

In a landmark case nearly a century ago, Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), the U.S. Supreme Court concluded that the privilege against self-incrimination extended not only to the accused in a criminal case but also to witnesses generally: "The object [of the privilege] was to insure that a person should not be compelled, when acting as a witness in any

investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard." See Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment privilege applicable to states); State v. Santiago, 53 H. 254, 492 P.2d 657 (1971).

This privilege may be lost in only two ways. The first is through voluntary disclosure by the holder of the privilege, see Rule 511 infra. The second is through a grant of immunity, as provided for by statute, see Hawaii Rev. Stat. ch. 621C (Supp. 1979); Kastigar v. United States, 406 U.S. 441 (1972).

" **Rule 510 Identity of informer.** (a) Rule of privilege. The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(c) Exceptions.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the

informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 510 COMMENTARY

This rule is identical with the U.S. Supreme Court proposal for Rule 510, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App.

U.S. Code Service, App. 6 (1975). The original Advisory Committee's Note says: "The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent ... and the privilege of withholding their identity was well established at common law."

The intent of the rule is to balance the necessity for effective law enforcement machinery and the requirement of constitutional safeguards for the defendant. The rule restates existing law. In McCray v. Illinois, 386 U.S. 300 (1967), the court held that no constitutional requirement dictated disclosure of the identity of an informant for the sole purpose of challenging a finding of probable cause for issuance of a search or arrest warrant. See also United States v. Harris, 403 U.S. 573 (1971).

The Hawaii Supreme Court has ruled similarly. In State v. Delaney, 58 H. 19, 24, 563 P.2d 990, 994 (1977), the court held: "[N]either the federal nor state constitutions dictate disclosure of an informer's identity where the sole purpose is to challenge the finding of probable cause. A trial court may, in its discretion, require disclosure if it believes that the officer's testimony [regarding the informer] is inaccurate or untruthful." Relying on McCray v. Illinois, supra, and the previous decision in State v. Texeira, 50 H. 138, 433 P.2d 593 (1967), the Delaney court also held that the trial court properly disallowed questions that might indirectly disclose the informer's identity.

Subsection (c)(2) of this rule deals with the situation where the informant can supply testimony relevant to the merits of a criminal or civil case. In this situation disclosure is ordinarily required, see Roviaro v. United States, 353 U.S. 53 (1957), cf. Smith v. Illinois, 390 U.S. 129 (1968).

Case Notes

In camera hearing is mandatory prior to ordering disclosure of confidential informant's identity or ordering dismissal of indictment. 68 H. 653, 729 P.2d 385 (1986).

Where confidential informer was not going to be called to testify at trial as information informer provided was not the basis for any of the offenses charged against defendant, informer did not actively participate in any of offenses charged, and proof of defendant's guilt depended on circumstances at time warrant was executed and not on any information supplied by informer, subsection (c)(2) exception

requiring disclosure of informant did not apply. 88 H. 396, 967 P.2d 228 (1998).

Where defendant filed motion for disclosure of identity of confidential informant, arguing that informant would be able to give testimony necessary to a fair determination of defendant's guilt and that the subsection (c)(2) exception therefore applied, trial court erred by presuming informer privilege applied and not determining whether an exception to the privilege applied. 88 H. 433, 967 P.2d 265 (1998).

Prior to granting the motion to suppress evidence, the circuit court should have reviewed, in camera, pursuant to subsection (c)(3), the sealed search warrant affidavit of detective that was the basis of the district court judge's determination of probable cause for issuance of the search warrant. 103 H. 191 (App.), 80 P.3d 1012 (2003).

Where trial court judge was satisfied that information received by officer from confidential informant was "reasonably believed to be reliable or credible", and judge did not believe that officer's testimony regarding confidential informant was "inaccurate or untruthful", judge did not err in not requiring disclosure of confidential informant's identity "for the sole purpose of challenging the finding of probable cause" for the issuance of a search warrant. 108 H. 361 (App.), 120 P.3d 260 (2005).

Discussed: 88 H. 363, 966 P.2d 1089 (1998).

" **Rule 511 Waiver of privilege by voluntary disclosure.** A person upon whom these rules confer a privilege against disclosure waives the privilege if, while holder of the privilege, the person or the person's predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is a privileged communication. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(4)]

RULE 511 COMMENTARY

This rule closely resembles Uniform Rule of Evidence 510. The sole justification for any rule of privilege is protection of a personal right of confidentiality that is recognized to be of greater societal importance than the principle of free disclosure of all relevant evidence in a judicial proceeding. Any intentional disclosure by the holder of the privilege defeats this purpose and eliminates the necessity for the privilege in that instance. Consistent with this, waiver of privilege is generally absolute. Once confidentiality has been

destroyed by intentional disclosure, the holder of the privilege may not reinvoke it, and the evidence is as admissible as if no privilege had initially existed.

Hawaii courts have recognized the principle of waiver of privilege by voluntary disclosure, see McKeague v. Freitas, 40 H. 108 (1953); Territory v. Cabrinha, 24 H. 621 (1919); Takamori v. Kanai, 11 H. 1 (1897).

Case Notes

Defendant established that documents withheld from production were attorney-client communications which remained privileged where disclosure to Farm Credit Administration was not voluntary or consensual. 925 F. Supp. 1478 (1996).

To determine whether a waiver has occurred, a trial court must look to the facts of each case and consideration must be given to all of the circumstances surrounding the disclosure; a court may consider the following factors: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness. 102 H. 465, 78 P.3d 1 (2003).

Where medical records of petitioner's treatment at the hospital was protected by petitioner's physician-patient privilege that was not waived, regardless of any relevancy of those records to the judicial proceeding before the respondent judge, petitioner's right of confidentiality under HRE rule 504(b) prohibited any disclosure of petitioner's medical records, including in camera disclosure to the respondent judge. 125 H. 31, 251 P.3d 594 (2011).

Where petitioner testified without counsel at petitioner's deposition and was not expressly advised that petitioner could refuse to answer questions about the treatment of petitioner's physical condition, petitioner's disclosure, upon deposition, of petitioner's treatment for petitioner's arm injury at the hospital was not a voluntary disclosure under this rule; thus, the disclosure of such treatment was not a waiver of petitioner's physician-patient privilege on the matter. 125 H. 31, 251 P.3d 594 (2011).

Natural mother of child waived alleged privilege when she testified to a significant part of the alleged privileged matter. 85 H. 165 (App.), 938 P.2d 1184 (1997).

Because an attorney acts as an agent and may possess the authority to bind the client when it comes to waiving the privilege pursuant to this rule, the trial court's ruling that defendant voluntarily disclosed or consented to disclosure of the toxicology report, thus waiving defendant's physician-

patient privilege, was not clearly erroneous. 107 H. 282 (App.), 112 P.3d 768 (2005).
Cited: 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **Rule 512 Privileged matter disclosed under compulsion or without opportunity to claim privilege.** Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (1) compelled erroneously, or (2) made without opportunity to claim the privilege. [L 1980, c 164, pt of §1]

RULE 512 COMMENTARY

This rule is identical with the U.S. Supreme Court proposal for Rule 512, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975). The original Advisory Committee's Note said: "Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available...." Rejecting the argument that the holder of the privilege should resist erroneous compulsion by exhausting all remedies, including appeal from a judgment of contempt, the Note explained: "[T]his exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available." This rule also resembles Uniform Rule of Evidence 511.

" **Rule 513 Comment upon or inference from claim of privilege; instructions.** (a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party exercising a privilege (1) is entitled to an instruction that no inference may be drawn therefrom, or (2) is entitled to have no instruction on the matter given to the jury. Conflicting

requests among multiple parties shall be resolved by the court as justice may require. [L 1980, c 164, pt of §1]

RULE 513 COMMENTARY

This rule is similar to Uniform Rule of Evidence 512. The foundation for the rule may be inferred from Griffin v. California, 380 U.S. 609 (1965), in which the Supreme Court held that adverse judicial comment upon a claim of privilege against self-incrimination impermissibly burdens the privilege itself. See Tehan v. Shott, 382 U.S. 406, 415 (1966). McCormick agrees that "allowing comment upon the exercise of a privilege or requiring it to be claimed in the presence of the jury tends greatly to diminish its value." McCormick §76. McCormick recommends recognizing "only privileges which are soundly based in policy and [according] those privileges the fullest protection [by precluding comment and drawing of inferences]." Id. The present rule does just that.

To the extent that it relates to the privilege against self-incrimination, Hawaii has recognized the "no comment" rule in both prior statute and case law. Hawaii Rev. Stat. §621-15 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §52) provided, in part: "[N]o inference shall be drawn prejudicial to the accused by reason of such neglect or refusal [to testify], nor shall any argument be permitted tending to injure the defense of the accused person on account of such failure to offer himself as a witness."

In The King v. McGiffin, 7 H. 104 (1887), the court noted that the prosecution's comment in its summation upon the failure to the accused to testify was improper, and in Kaneshiro v. Belisario, 51 H. 649, 466 P.2d 452 (1970), the court extended the "no comment" rule to civil as well as criminal proceedings. The present rule applies to all the privileges established in this article.

Subsection (c) accords to the party against whom adverse inferences from a claim of privilege might be drawn the option of having the admonitory instruction given to the jury or waiving it. In State v. Baxter, 51 H. 157, 454 P.2d 366 (1969), the court held that the admonitory instruction could be given even over the objection of the party claiming the privilege, but cautioned that "a trial court may well be advised not to give an admonitory instruction when the [party] objects." The same result was reached in Lakeside v. Oregon, 435 U.S. 333 (1978). The present rule modifies these holdings by investing in the party exercising the privilege the right "to have no instruction on the matter given to the jury." The same result was contended for by Justice Abe in his dissent in Baxter, supra.

Case Notes

Where trial court was put on advance notice that defendant intended to invoke Fifth Amendment privilege against self-incrimination, court abused discretion by permitting prosecution to question defendant about false identification cards; risk of unfair prejudice occasioned by compelling criminal defendant to invoke privilege in front of jurors was substantial and not outweighed by probative value of prosecution's unanswered questions. 97 H. 206, 35 P.3d 233 (2001).

Trial court did not abuse its discretion by prohibiting defense from calling witness in order to have witness invoke witness' Fifth Amendment privilege against self-incrimination in front of the jury where, under subsection (a), witness' invocation of privilege in front of jury would not have been entitled to any probative weight and could not properly have been considered by the jury. 110 H. 386 (App.), 133 P.3d 815 (2006).

Based on the plain language of subsection (c), former directors were entitled to the circuit court's jury instruction precluding the jury from making any inference based on former directors' assertion of the attorney-client privilege; asking the jury to accept that former directors' assertion of the privilege suggested that former directors had not relied on the advice of their attorneys and, hence, had not acted reasonably and with due care in the merger would have been tantamount to asking the jury to make an inference based on former directors' assertion of the privilege; thus, circuit court properly denied motion in limine. 123 H. 82 (App.), 230 P.3d 382 (2009).

"ARTICLE VI.
WITNESSES

Rule 601 General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules. [L 1980, c 164, pt of §1]

RULE 601 COMMENTARY

This rule is identical with the first sentence of Fed. R. Evid. 601. The second sentence of Fed. R. Evid. 601, providing that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be

determined in accordance with State law," has been omitted as extraneous.

The rule embodies the intent expressed in the Advisory Committee's Note to Fed. R. Evid. 601 to abolish "religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person" as bases for disqualification of a witness. Proper grounds for witness disqualification are set forth in Rules 602 and 603.1 infra.

Although earlier Hawaii statute and case law preserved some of the traditional common-law witness disqualifications, see, e.g., The King v. Brown, 3 H. 114 (1869) (parties in interest), these disqualifications were eliminated by later statutes. See, e.g., Hawaii Rev. Stat. §§621-14, 621-17 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §§49, 51; am L 1943, c 146, §1; am L 1972, c 104, §1(i), (j), (l)). Thus, Rule 601 effects no change in existing Hawaii law.

This rule is subject to Rule 505 supra, providing that "the spouse of the accused [in a criminal case] has a privilege not to testify against the accused." In addition, conviction of crime and interest in the litigation may be provable under Rules 609 and 609.1 infra, to impeach the credibility of witnesses.

Case Notes

Witness incompetent to testify as to all matters dealt with in hypnotherapy sessions. Hypnotically induced recollection held per se inadmissible. 68 H. 233, 709 P.2d 103 (1985).

Where evidence was insufficient to find officer had present recollection of field sobriety test, officer not qualified to testify as witness to that matter. 80 H. 138 (App.), 906 P.2d 624 (1995).

" **Rule 602 Lack of personal knowledge.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(5)]

RULE 602 COMMENTARY

This rule, which is identical with Fed. R. Evid. 602, restates the traditional common-law rule barring a witness from

testifying to facts of which he has no direct personal knowledge. See McCormick §§10, 11. "Personal knowledge," for purposes of this rule, means that the witness perceived the event about which he testifies and that he has a present recollection of that perception. The personal knowledge requirement should not be confused with the hearsay ban, see Rule 802 infra. In fact, the requirements of Rule 602 apply to a hearsay statement admitted under any of the hearsay exception rules, 802.1, 803, and 804 infra, in that admissibility of a hearsay statement is predicated on the foundation requirement of the witness' personal knowledge of the making of the statement itself.

Evidence of personal knowledge is a general foundation requirement for admissibility of all evidence, subject to Rule 703 relating to expert witnesses. The Advisory Committee's Note to Fed. R. Evid. 602 points out: "It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy." However, preliminary determination of personal knowledge need not be explicit but may be implied from the witness' testimony. "If under the circumstances proved, reasonable men could differ as to whether the witness did or did not have adequate opportunity to observe, then the testimony of the witness should come in, and the jury will appraise his opportunity to know in evaluating the testimony." McCormick §10. Compare Apo v. Dillingham, 50 H. 369, 371, 440 P.2d 965, 967 (1968), where the court said: "A party may testify as to the boundaries of the land he claims. But before such testimony is admissible, the witness must indicate his knowledge of the contents of documents to which he refers."

Case Notes

There was no violation of this rule and circuit court did not err in admitting witness' testimony, where all of the relevant portions of witness' testimony were based on witness' own perception. 78 H. 383, 894 P.2d 80 (1995).

Prior court erred in concluding that four tests were recommended by laser gun manufacturer to establish that the laser gun was working properly where police officer who testified regarding the laser gun lacked personal knowledge that the operator's manual was "provided by" gun manufacturer, and thus there was no evidence establishing that the four tests performed by the officer were recommended by the manufacturer. 130 H. 353, 311 P.3d 676 (2013).

Where evidence insufficient to find officer had present recollection of field sobriety test, officer's testimony

regarding test should have been stricken and jury instructed to disregard testimony. 80 H. 138 (App.), 906 P.2d 624 (1995).

Officer had sufficient personal knowledge, under this rule, of intoxilyzer test officer administered to defendant and was thus competent to testify as to test results; when officer could not remember exact reading of test result, it was proper under rule 612 for State to allow officer to review defendant's test result report and refresh officer's present recollection of defendant's exact score. 95 H. 409 (App.), 23 P.3d 744 (2001).

" **Rule 603 Oath or affirmation.** Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the witness' duty to do so. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 603 COMMENTARY

This rule is identical with Fed. R. Evid. 603. Its intent is to retain the common-law requirement that a witness must solemnly undertake to tell the truth. As the Advisory Committee's Note to Fed. R. Evid. 603 puts it: "[N]o special verbal formula is required."

Although under early common law, refusal of a witness to affirm his belief in a supreme being or to invoke the deity according to a specified formulary oath rendered him incompetent, modern law is contrary. In United States v. Looper, 419 F.2d 1405, 1407 (4th Cir. 1969), the court said: "The common law ... requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth."

The liberal requirement for an "oath or affirmation" is broadly consistent with Hawaii law. Hawaii Rev. Stat. §1-21 (1976) provides that "[t]he word 'oath' includes a solemn affirmation." A prior statute, superseded by this rule, stated: "Every court ... may administer the following oath-affirmation to all witnesses legally called before them: Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth?" Hawaii Rev. Stat. §621-12 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §48; am L 1973, c 155, §1). In State v. Ponteras, 44 H. 71, 75, 351 P.2d 1097, 1100 (1960), the court, in determining the issue of the sufficiency of an oath administered

to a minor, stated: "No particular words are required in exacting the declaration or promise from a child to tell the truth."

The rule is also in accord with Hawaii's statutes on perjury. Hawaii Rev. Stat. §§710-1060 through 710-1062 (1976) all proscribe false statements under oath, and Hawaii Rev. Stat. §710-1000(10) (1976) defines "oath" for the purposes of these statutes: "'Oath' includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated...." In addition, Hawaii Rev. Stat. §710-1068 (1976) provides that it is no defense that "the oath was administered or taken in an irregular manner."

" **Rule 603.1 Disqualifications.** A person is disqualified to be a witness if the person is (1) incapable of expressing oneself so as to be understood, either directly or through interpretation by one who can understand the person, or (2) incapable of understanding the duty of a witness to tell the truth. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 603.1 COMMENTARY

The intent of this rule, which is similar to Cal. Evid. Code §701, is to complement Rule 601 supra, and to require disqualification of witnesses whose incapacity either to articulate in an understandable fashion or to understand the truthtelling obligation renders their testimony valueless.

Under this rule the competency of a witness is a matter for determination by the court. Competency has traditionally embodied a level of threshold capacity "to understand the oath and to perceive, recollect, and communicate that which he is offered to relate." Law Revision Comm'n Comment to Cal. Evid. Code §701. Capacity to perceive and to recollect are implicit in Rule 602's personal knowledge requirement. This rule covers the oath and the ability to communicate, matters which may be of concern in cases of youthful or mentally infirm witnesses.

This rule generally restates existing Hawaii law. A superseded statute, Hawaii Rev. Stat. §621-16 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §50; am L 1972, c 104, §1(k)), provided that the court could "receive the evidence of any minor; provided, that the evidence of the minor is given upon his affirmation to tell the truth...; provided also, that no such evidence shall in any case be received unless it is proved to the satisfaction of the court ... that the minor perfectly understands the nature and object of the affirmation...." To the extent that the previous law required a

"perfect" understanding, the current rule effects a liberalization of the competency standard for children. In Republic v. Ah Wong, 10 H. 524, 525 (1896), the court said: "There is no precise age within which children are excluded from testifying. Their competency is to be determined, not by their age, but by the degree of their knowledge and understanding."

In Territory v. Titcomb, 34 H. 499, 502 (1938), the court announced that "the proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath?.... [I]f he can stand the test proposed, the jury must determine all the rest." Rule 603.1 is consistent with the Ah Wong and Titcomb decisions.

Case Notes

Issue of complainant's competency to testify was reasonably called into question, and trial court committed plain error in failing to engage in independent inquiry and make an express finding as to whether complainant was competent to testify before allowing complainant's substantive testimony to be exposed to jury; supreme court not convinced beyond reasonable doubt that error harmless. 74 H. 479, 849 P.2d 58 (1993).

Testimonial capacity of mentally defective person. 5 H. App. 659, 706 P.2d 1333 (1985).

" **Rule 604 Interpreters.** An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 604 COMMENTARY

This rule is identical with Fed. R. Evid. 604. In Hawaii, circuit and district court judges are empowered to appoint interpreters by Hawaii Rev. Stat. §606-9 (1976). In addition, HRCP 43(f) and HRCrP 28(b) authorize the courts to appoint and to determine the compensation for interpreters.

Under this rule, an interpreter is regarded as a witness for purposes of the oath requirement of Rule 603 supra, and as an expert, consistent with provisions of Rule 702 infra, for the purpose of determining his qualifications to interpret or to translate in the matter at issue. Under Hawaii law, preliminary determination of his qualifications is a matter within the discretion of the court, John Ii Estate v. Judd, 13 H. 319 (1901). Hawaii law also holds that opportunity for a thorough

cross-examination to test the qualifications of witnesses offered as expert translators is essential, McCandless v. Water Co., 35 H. 314, 320 (1940).

A line of Hawaii Supreme Court decisions establishes that the Hawaiian language may be judicially noticed by the court, see Territory v. Bishop Trust Co., 41 H. 358, 367 (1956); McCandless v. Water Co., 35 H. 314, 321-22 (1940); commentary to Rule 201 supra. "In this jurisdiction the Hawaiian language is not to be regarded as a foreign language, but as one of which the courts and judges must take judicial notice.... [T]he trial judge was at liberty to use his own knowledge of the Hawaiian language and also to call to his assistance the official interpreters of the court and, if it was deemed advisable, other experts." 35 H. at 321.

" **Rule 605 Competency of judge as witness.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. [L 1980, c 164, pt of §1]

RULE 605 COMMENTARY

This rule is identical with Fed. R. Evid. 605, the Advisory Committee's Note to which says:

> The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support.

" **Rule 606 Competency of juror as witness.** (a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may the juror's affidavit or evidence of any statement by the juror indicating an effect of this kind be received. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 606 COMMENTARY

Subsection (a) of this rule is similar to Fed. R. Evid. 606(a) except that the second sentence of the federal rule, "If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury," is omitted as unnecessary. Subsection (b) is taken verbatim from the 1971 draft of Rule 606(b) of the Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971).

Subsection (a): Despite the common law tradition that a juror was generally competent to testify as a witness, see McCormick §68, such a rule is inconsistent with the juror's role as an impartial trier of fact. It offers dangers analogous to those discussed in the commentary to Rule 605 supra.

Subsection (b): Under traditional English common law, the general competency of a juror to testify as a witness had one limitation: he was barred from giving testimony to impeach his own verdict. See McCormick §68; Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). "The values sought to be promoted," according to the Advisory Committee's Note to the original proposal for federal Rule 606(b), "include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." However, the blanket prohibition also bars testimony relevant to misconduct, irregularities, and improper influences external to the process of deliberation. The intent of this subsection is to strike a proper balance by excluding testimony relating to the internal deliberative process and allowing testimony about objective misconduct and irregularities. No attempt is made to specify substantive grounds for setting aside verdicts.

The Advisory Committee's Note to the original federal proposal, upon which subsection (b) is modeled, said: "The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to

whether the happening is within or without the jury room.... The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion." For example, under this rule jurors would be competent to testify to the consumption of alcoholic beverages by deliberating jurors, a matter which under some circumstances may be cause for setting aside a verdict, see Kealoha v. Tanaka, 45 H. 457, 370 P.2d 468 (1962). A similar rule is found in Cal. Evid. Code §1150.

Case Notes

Where respondents contended that the court's colloquy with the jury was prohibited by subsection (b), the court's questions did not require the jurors to discuss their thoughts, emotions, or mental processes. Among other things, the court's first three inquiries asked only if the verdict "accurately reflected" each juror's verdict; the questions regarding the accuracy of the verdict did not fall within the prohibition in subsection (b). 131 H. 437, 319 P.3d 356 (2014).

Juror competent to testify about objective juror misconduct. 7 H. App. 1, 739 P.2d 251 (1987).

Jury foreperson's misrecollection of evidence barred. 7 H. App. 424, 774 P.2d 246 (1989).

Trial court did not err when it concluded that subsection (b) precluded the consideration of juror number 11's post-verdict affidavit which purported to demonstrate juror number 7's incompetence to participate in deliberations and render a verdict where the affidavit proffered by juror 11 fell far short of the "strong evidence" of incompetence necessary to merit a further inquiry. 120 H. 94 (App.), 201 P.3d 607 (2006).

Circuit court did not abuse its discretion in denying the motion to correct verdict and enter judgment or the motion to resubmit where circuit court found that the jury's error was that it misunderstood the legal effect of its answer to a simple yes-or-no question and was not merely a clerical error; the record amply supported this finding; this type of juror confusion was not a basis for amending the verdict. 129 H. 250 (App.), 297 P.3d 1106 (2013).

" **Rule 607 Who may impeach.** The credibility of a witness may be attacked by any party, including the party calling the witness. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 607 COMMENTARY

This rule, which is identical with Fed. R. Evid. 607, rejects the traditional theory that a party calling a witness "vouches" for his truthfulness and therefore is barred from impeaching him. See generally McCormick §38. As the Advisory Committee's Note to Fed. R. Evid. 607 puts it:

> A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right [to impeach] leaves the party at the mercy of the witness and the adversary.... The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability.

This rule supersedes a statute, Hawaii Rev. Stat. §621-25 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §58; am L 1972, c 104, §1(r)), which precluded a party from impeaching his own witness "by general evidence of bad character" but permitted impeachment by prior inconsistent statement when the witness "prove[d] adverse." In construing the provisions of the prior statute, the Hawaii courts suggested that a witness would "prove adverse" if his testimony was materially inconsistent with the prior statement, his inconsistency came as a surprise to the party offering his testimony, and he either expressly denied or, by evasion, implied a denial of the prior statement, Territory v. Witt, 27 H. 177 (1923); see also Kwong Lee Wai v. Ching Shai, 11 H. 444 (1898). Rule 607 thus effects a significant change in Hawaii law in accord with a growing trend in other jurisdictions, e.g., Cal. Evid. Code §785. Another good reason for abandoning the old impeachment limitation is that, as applied to defense witnesses, its constitutionality is suspect in criminal cases, see Chambers v. Mississippi, 410 U.S. 284 (1973).

" **Rule 608 Evidence of character and conduct of witness.**

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the

witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility. [L 1980, c 164, pt of §1; gen ch 1985; am L 1992, c 191, §2(6); am L 1993, c 6, §25 and c 198, §1(1)]

RULE 608 COMMENTARY

This rule is identical with Fed. R. Evid. 608 except that this rule contains, in subsection (b), the added language, "and bias, interest or motive as provided in rule 609.1." This added language does not modify the intended effect of Fed. R. Evid. 608, because the Advisory Committee's Note to that rule points out that evidence of bias or interest is not considered "character" evidence. This rule is simply more explicit.

Subsection (a): This provides for admissibility of opinion or reputation evidence relevant to a witness' general character for veracity, and thus constitutes a specific exception to the general prohibition in Rule 404(a) of character evidence as proof of propensity or behavior in conformity with such character. In accordance with previous law on the subject, evidence of a reputation for truthfulness offered to bolster credibility is admissible only to rebut an attack on the witness' veracity. See Brown v. Walker, 24 H. 285, 291 (1918). According to the rule, only a character attack "by opinion or reputation evidence or otherwise" will qualify. The Advisory Committee's Note to Fed. R. Evid. 608(a) points out: "Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not."

Consistent with this rule, the Hawaii courts have held that evidence of character for veracity must address itself expressly to the character of the witness for truthfulness, not to some collateral trait of character. In Republic of Hawaii v. Tokuji, 9 H. 548, 552 (1894), the court said: "Evidence to be admissible for the purpose of affecting the credibility of a

witness must be such as bears directly upon his character for truth and veracity."

Subsection (b): This allows cross-examination of the witness relative to specific collateral conduct to the extent that such conduct is relevant to veracity. Such conduct may not be independently proved even if the witness expressly denies it. Previous law was to the same effect, see Territory v. Goo Wan Hoy, 24 H. 721, 727 (1919), where the court said:

> The rules of evidence do not allow specific acts of misconduct or specific facts of a disgraceful or criminal character to be proved against a witness by others but it has been held by this court that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act in his life and may be compelled to answer unless he claims the privilege.

See also Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 412 P.2d 669 (1966); Republic of Hawaii v. Luning, 11 H. 390 (1898).

The rule also applies to any defendant who elects to testify. In State v. Pokini, 57 H. 17, 22-23, 548 P.2d 1397, 1400-01 (1976), the court observed: "[O]nce having taken the witness stand in his behalf, the defendant may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness.... The defendant may be asked questions regarding his occupation or employment.... But there are obvious limitations beyond which the court may not allow the examiner to venture. The subject matter of the inquiry must have some rational bearing upon the defendant's capacity for truth and veracity.... And where the testimony sought to be elicited is of minimal value on the issue of credibility and comes into direct conflict with the defendant's right to a fair trial, the right of cross-examination into those areas must yield to the overriding requirements of due process. See State v. Santiago, 53 H. 254, 492 P.2d 657 (1971)...." In other words, the express limitation of Rule 609(a) governs when the misconduct involves an allegation of prior crime.

RULE 608 SUPPLEMENTAL COMMENTARY

Subsection (a) of this rule is identical with Fed. R. Evid. 608(a), and the commentary to subsection (a) is the original 1980 commentary. Subsection (b) was substantially amended by Act 191, Session Laws 1992, and the subsection (b) commentary has been rewritten to explain the operation of the new rule.

Subsection (b): This allows cross-examination of a witness concerning specific instances of conduct that are relevant to the trait of credibility. The first sentence governs attack of a witness by revelation of that witness' relevant misdeeds. The

second sentence governs cross-examination of a witness who testifies to the character of another witness under subsection (a). The 1992 amendment is not intended to modify rulings requiring that Rule 608(b) material have specific relevance to the trait of truthfulness, e.g., State v. Estrada, 69 H. 204, 738 P.2d 812 (1987); State v. Reiger, 64 H. 510, 644 P.2d 959 (1982); State v. Sugimoto, 62 H. 259, 614 P.2d 386 (1980); Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 412 P.2d 669 (1966); State v. Faulkner, 1 H. App. 651, 624 P.2d 940 (1981).

Regarding the first sentence, that is, the witness' own prior misdeeds, the previous law envisioned cross-examination but barred proof in the form of extrinsic evidence even when the witness denied having committed the prior acts sought to be attributed, e.g., Cozine v. Hawaiian Catamaran, Ltd., supra, 49 H. at 102, 412 P.2d at 686. The extrinsic evidence bar, although it afforded an easily applied, bright-line solution to a difficult problem, occasionally excluded probative impeaching evidence that would have survived a Rule 403 analysis. For that reason, the rule has been questioned in some recent scholarship, e.g., R. Lempert & S. Saltzburg, A Modern Approach to Evidence 299 (2d ed. 1982). Some Rule 608(b) material is highly relevant to the issue of testimonial credibility, e.g., State v. Estrada, supra (witness, in recent application for employment as Maui police officer, stated he resigned from the Honolulu police force because he wanted to move to Maui; but Honolulu police report would have revealed he was permitted to resign after having been discovered to have proposed sex to a prostitute he arrested and to have failed to report a bribe attempt by the same prostitute). The intent of the 1992 amendment to Rule 608(b) is to invest the trial judge with discretion to admit the extrinsic evidence in such a case, assuming the witness is confronted on cross-examination and denies the material.

If the witness admits on cross-examination having committed the prior misdeed, then there is no need for the extrinsic evidence and Rule 403 will exclude it. Even if the witness denies the material, the Rule 403 balance is expected to dictate exclusion in a substantial number of cases. After all, the previous blanket ban was purportedly informed by Rule 403. But if the probative value of the extrinsic evidence of specific prior misdeeds is not substantially outweighed by the negative Rule 403 factors, it is admissible "in the discretion of the court."

The second sentence of Rule 608(b) preserves the extrinsic evidence bar when the witness in question is a Rule 608(a) witness, testifying to the character for veracity of some other witness, and the specific conduct is that of the other witness.

Case Notes

Appellate review of trial court's exclusion of evidence under rule. 5 H. App. 251, 687 P.2d 554 (1984).

Where complainant's character for truthfulness was attacked when defense counsel vigorously cross-examined complainant about prior inconsistent statements to grand jury and whether complainant ever lied before, bolstering character evidence under subsection (a) properly allowed. 85 H. 417 (App.), 945 P.2d 849 (1997).

Trial court did not err in excluding evidence of witness' alleged involvement in a gang where defendant failed to explain how witness' involvement in gang activity goes to the issue of truthfulness. 108 H. 102 (App.), 117 P.3d 834 (2005).

Where defendant's past conduct when passing complainant on the road was not "probative of untruthfulness" under subsection (b), it was error for trial court to admit such evidence for the purpose of attacking defendant's credibility, to allow the State to inquire about such conduct in the cross-examination of defendant, and to admit testimony of complainant as to this conduct; as there was a reasonable probability that error in admitting "prior bad acts" testimony contributed to conviction, error was not harmless beyond a reasonable doubt. 110 H. 116 (App.), 129 P.3d 1144 (2005).

Mentioned: 74 H. 54, 837 P.2d 1298 (1992).

" **Rule 609 Impeachment by evidence of conviction of crime.** (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.

(b) Effect of pardon. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon.

(c) Juvenile convictions. Evidence of juvenile convictions is admissible to the same extent as are criminal convictions under subsection (a) of this rule.

(d) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible.

Evidence of the pendency of an appeal is admissible. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 609 COMMENTARY

This rule departs markedly from Fed. R. Evid. 609 for two reasons: (1) existing Hawaii law, based upon due process considerations, requires that defendants in criminal cases not be impeached with prior convictions, and this limitation is incorporated in Rule 609; and (2) the history of federal Rule 609 makes clear that, as finally approved by Congress, the rule was addressed, in significant measure, to the issue of impeachment of defendants in criminal cases. In addition, Fed. R. Evid. 609 is confusing, ambiguous, and awkwardly worded. It purports to mandate the admissibility of certain kinds of prior convictions, thus embodying a questionable exception to Rule 403's discretionary balance, and directs a discretionary, probative value/prejudicial effect judicial determination for other kinds of prior convictions, thus needlessly duplicating the Rule 403 principle. It also establishes an arbitrary, ten-year time limit for usable prior convictions, without regard to the nature of the crime.

This rule supersedes Hawaii Rev. Stat. §621-22 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §57; am L 1972, c 104, §1(q)), which provided for discretionary receipt, for credibility assessment of all witnesses other than criminal accused, of evidence of "felonies, or of misdemeanors involving moral turpitude." This statute was authoritatively construed in Asato v. Furtado, 52 H. 284, 292-93, 474 P.2d 288, 294-295 (1970):

> We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness' propensity for lying or truthtelling, and that such convictions ought not to be admitted for purposes of impeachment....
>
> This is true not only of minor offenses like parking tickets ... but also of some major offenses like murder or assault and battery. It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will tell the truth....
>
> For these reasons, we think it unwise to admit evidence of any and all convictions on the issue of credibility. We hold that admission of such evidence should be limited to those convictions that are relevant to the issue of truth and veracity. A perjury conviction, for example, would carry considerable probative value in a determination of whether a witness is likely to falsify under oath. We also

think that other crimes that fall into the class of crimes involving dishonesty or false statement would have some value in a rational determination of credibility.

Subsection (a): The first sentence of this subsection reflects the wisdom of Asato v. Furtado, supra. The phrase "dishonesty or false statement," which appears in Asato and in Fed. R. Evid. 609(a), becomes simply "dishonesty" in the present rule. The intent is that crimes "involving dishonesty" be construed to include crimes involving false statement. The negative phraseology (the evidence "is inadmissible except when the crime is one involving dishonesty") is employed to make it clear that Rule 403's discretionary balance governs the question of admissibility under this rule. For purposes of this balance, the relevance of a prior conviction involving dishonesty will depend primarily upon the nature of the crime and the age of the conviction.

The second sentence of Rule 609(a) tracks the language of the previous statute, and implements the due process mandate of State v. Santiago, 53 H. 254, 492 P.2d 657 (1971).

Subsections (b), (c), (d): Subsection (b) of this rule, relating to the effect of a pardon upon the admissibility of a prior conviction, is similar to Fed. R. Evid. 609(c). Subsection (c), relating to the admissibility of juvenile adjudications, treats them as admissible "to the same extent as are criminal convictions under subsection (a)." This section, like the first sentence of subsection (a), is subject to the court's discretion under Rule 403 supra, to exclude relevant evidence when probative value is substantially outweighed by prejudicial impact or other negative factors. Subsection (d), regarding the pendency of an appeal from the previous conviction, is identical with Fed. R. Evid. 609(e).

Case Notes

Where defense counsel failed to object to the prosecution's premature elicitation of testimony regarding defendant's prior conviction during its redirect examination of officer before defendant had "introduced testimony for the purpose of establishing defendant's credibility as a witness" as required by subsection (a), ineffective assistance of counsel. 96 H. 83, 26 P.3d 572 (2001).

Where prosecution failed to establish that defendant's prior theft conviction involved conduct relevant to or probative of defendant's veracity as a witness, defendant's prior conviction could not be deemed a "crime of dishonesty" and was therefore inadmissible to impeach defendant's credibility as a witness; trial court thus erred in ruling that defendant's prior theft

conviction was admissible under subsection (a). 96 H. 83, 26 P.3d 572 (2001).

Trial court did not abuse its discretion in denying motion to recall state witness who subsequently pleaded guilty to charge in unrelated case for impeachment purposes where evidence against defendant was overwhelming. 8 H. App. 624, 817 P.2d 130 (1991).

Trial court properly denied admission of person's prior convictions where court considered when person was convicted, for what crime, and for the facts underlying the conviction, and concluded convictions would be more prejudicial than probative. 82 H. 419 (App.), 922 P.2d 1032 (1996).

" **Rule 609.1 Evidence of bias, interest, or motive.** (a) General rule. The credibility of a witness may be attacked by evidence of bias, interest, or motive.

(b) Extrinsic evidence of bias, interest, or motive. Extrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter. [L 1980, c 164, pt of §1]

RULE 609.1 COMMENTARY

This rule has no federal counterpart, which means that common-law principles of bias, interest, or motive impeachment govern the practice in the federal courts. The problem is that the common law is divided on the question whether the impeaching material must, on cross-examination, be brought to the attention of the witness being impeached as a precondition to the proffer of extrinsic evidence. McCormick §40.

Rule 609.1 settles the issue and restates the rule of State v. Murphy, 59 H. 1, 17-18, 575 P.2d 448, 459-60 (1978):

> The general rule is that a witness may be impeached through a showing of bias, hostility or prejudice, and this may be done by use of the witness' own testimony or by other evidence.... We believe that the correct rule is ... that before any bias of a witness can be introduced, a foundation must first be laid by cross-examining the witness regarding the facts which assertedly prove the bias. Two reasons [are] recognized ... for such a preliminary foundation. First, the foundational cross-examination gives the witness a fair opportunity to explain statements or equivocal facts which, standing alone, tend to show bias. Second, such cross-examination lends

expediency to trials, for if the facts showing bias are admitted by the witness, the introduction of extrinsic evidence becomes unnecessary.

Case Notes

Admission of evidence of bias rests in the trial court's discretion. 67 H. 581, 698 P.2d 293 (1985).

Bias, interest, or motive is always relevant. 69 H. 204, 738 P.2d 812 (1987).

Trial court abused discretion by unconstitutionally excluding evidence of complainant's prior conviction, by prohibiting cross-examination of complainant, from which jury could have inferred that complainant had a motive to bring false charges against defendant and give false testimony at trial. 83 H. 109, 924 P.2d 1215 (1996).

Trial court was correct only insofar as it stated, by quoting this rule, that the credibility of a witness may be attacked by evidence of bias, interest, or motive, and that such evidence pertaining to a witness' credibility is always relevant and admissible at trial; trial court erred, however, in ruling that such evidence could be used by the jury in considering petitioners' motives as plaintiffs in filing the present lawsuit. 129 H. 313, 300 P.3d 579 (2013).

Where relevant evidence of witness' potential bias was elicited at trial, trial court properly balanced the prejudice concerns of defendant with the relevance and probative value of liability insurance evidence to reveal witness' potential bias; thus, trial court did not abuse its discretion in limiting evidence of bias, interest or motive with due regard for rule 403. 106 H. 298 (App.), 104 P.3d 336 (2004).

" **Rule 610 Religious beliefs or opinions.** Evidence of beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 610 COMMENTARY

This rule is identical with Fed. R. Evid. 610, the Advisory Committee's Note to which says:

> While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or

bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.

Case Notes

Trial court did not err in allowing witness to testify regarding witness' religious beliefs where prosecution did not inquire into witness' religious beliefs for the purpose of enhancing witness' credibility but was instead seeking to establish why witness did not murder person defendant sought to have witness murder. 99 H. 390, 56 P.3d 692 (2002).

The State did not elicit evidence of complainant's "beliefs or opinions on matters of religion" in violation of this rule where prosecutor's questions regarding the religious necklace were relevant to showing complainant's ability to positively identify the items complainant was wearing during defendant's assaults. 106 H. 365 (App.), 105 P.3d 242 (2004).

" **Rule 611 Mode and order of interrogation and presentation.** (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. [L 1980, c 164, pt of §1; gen ch 1985]

Rule 611 Commentary

This rule is identical with Fed. R. Evid. 611.

Subsection (a): This subsection states the common-law principle allowing the court broad discretion in determining order and mode of interrogation. 6 Wigmore, Evidence §1867 (Chadbourn rev. 1976); McCormick §5. The intent is to define

broad objectives and to leave the attainment of those objectives to the discretion of the court. This subsection restates existing Hawaii law, see Lindeman v. Raynor, 43 H. 299 (1959); Flint v. Flint, 15 H. 313, 315 (1903); Mist v. Kawelo, 13 H. 302 (1901). The principle was recently reaffirmed in State v. Altergott, 57 H. 492, 506, 559 P.2d 728, 737 (1977), where the court added: "[I]n practice abuse [of discretion] is more often found when complaint is made that the judge has unduly curbed the examination than when undue extension of the discretion to permit the questioning is charged."

Subsection (b): Limiting the scope of cross-examination to the subject matters raised on direct examination plus credibility is the traditional view, in support of which the U.S. Senate Judiciary Committee wrote:

> Although there are good arguments in support of broad cross-examination from [the standpoint] of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

Hawaii law is to the same effect, see Yamashiro v. Costa, 26 H. 54, 60-61 (1921); Booth v. Beckley, 11 H. 518, 522 (1898).

Subsection (c): This rule conforms to the traditional common-law ban on the use of leading questions on direct examination and to the traditional exceptions for the hostile, reluctant, and unwilling witness, the child witness, the adult with communications problems, or the witness whose memory is "exhausted," as well as the customary "preliminary matters" exception. McCormick §6.

See Condron v. Harl, 46 H. 66, 81, 374 P.2d 613, 621 (1962): "The allowance of leading questions is a matter for the exercise of discretion of the trial judge, whose ruling will be reversed only for prejudicial abuse of discretion." See also State v. Yoshino, 45 H. 640, 372 P.2d 208 (1962); Ciacci v. Wolley, 33 H. 247 (1934); Territory v. Slater, 30 H. 308 (1928); Territory v. Fong Yee, 25 H. 309 (1920).

Case Notes

The trial court relied on its discretion to exercise control over the mode and order of interrogation in denying petitioner's trial counsel's objection to the directive that petitioner take the stand. While this rule grants a trial court the right to

"exercise reasonable control over the mode and order of ... presenting evidence", it does not trump a criminal defendant's federal constitutional rights. 23 F. Supp. 3d 1182 (2014).

Court's allowing witnesses to supplement their answers with further clarifying responses did not constitute an abuse of discretion. 78 H. 230, 891 P.2d 1022 (1995).

Appeals court erred in determining that the trial deputy prosecuting attorney's question during cross-examination amounted to prosecutorial mistake or error because the prosecution was entitled to develop the issue that defendant broached on direct examination and again on cross-examination. 105 H. 352, 97 P.3d 1004 (2004).

Trial court properly exercised discretion to control manner in which testimony was gathered from defendant and limiting defendant's testimony during defense presentation to matters not previously covered. 80 H. 450 (App.), 911 P.2d 85 (1996).

" **Rule 612 Writing used to refresh memory.** If a witness uses a writing to refresh the witness' memory for the purpose of testifying, either:

(1) While testifying, or

(2) Before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 612 COMMENTARY

This rule is identical with Fed. R. Evid. 612, except that the federal rule begins with the phrase, "Except as otherwise

provided in criminal proceedings by section 3500 of title 18, United States Code," and this phrase is omitted here as inappropriate. The Advisory Committee's Note to Fed. R. Evid. 612 points out that "[t]he purpose of the rule is ... to promote the search of credibility and memory."

This rule restates existing Hawaii law found in State v. Altergott, 57 H. 492, 503, 559 P.2d 728, 736 (1977), where the court observed: "A writing which is used to refresh the recollection of a witness, it is said by Wigmore, differs from a record of past recollection in being in no strict sense evidence, so that the offering party has no right to have the jury see it although the opponent may show it to the jury and the jury may demand it." In other words, the writing used to refresh memory is not evidence, and therefore does not present hearsay problems, because, after refreshing, the witness testifies from present memory, and the writing serves merely as a jog to present memory. If the witness has no present memory, as in the case where the attempt to refresh under this rule is unsuccessful, then the admissibility of the writing is governed by hearsay doctrine (especially Rule 802.1(4), "Past recollection recorded") and the authentication and original document requirements of Articles IX and X.

Case Notes

Although recitation by complainant of police report describing the cell phone text messages would have been inadmissible hearsay under rules 802.1(4) and 803(b)(8), where complainant could recall substantial details about the messages prior to reading the report, which suggested that complainant possessed a memory of the messages that only needed refreshment via the report, complainant properly testified about the text messages after viewing the police report pursuant to this rule. 117 H. 127, 176 P.3d 885 (2008).

Officer had sufficient personal knowledge, under rule 602, of intoxilyzer test officer administered to defendant and was thus competent to testify as to test results; when officer could not remember exact reading of test result, it was proper under this rule for State to allow officer to review defendant's test result report and refresh officer's present recollection of defendant's exact score. 95 H. 409 (App.), 23 P.3d 744 (2001).

" **Rule 613 Prior statements of witnesses.** (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents

disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless, on direct or cross-examination, (1) the circumstances of the statement have been brought to the attention of the witness, and (2) the witness has been asked whether the witness made the statement.

(c) Prior consistent statement of witness. Evidence of a statement previously made by a witness that is consistent with the witness' testimony at the trial is admissible to support the witness' credibility only if it is offered after:

(1) Evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement; or

(2) An express or implied charge has been made that the witness' testimony at the trial is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen; or

(3) The witness' credibility has been attacked at the trial by imputation of inaccurate memory, and the consistent statement was made when the event was recent and the witness' memory fresh. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 613 COMMENTARY

This rule differs markedly from Fed. R. Evid. 613, except that subsection (a) of each rule is identical with the other.

Subsection (a): The purpose of this subsection is to abolish the rule of The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), which required that a writing used during cross-examination be first shown to the witness. See the Advisory Committee's Note to Fed. R. Evid. 613. That rule was previously abolished in Hawaii by statute, Hawaii Rev. Stat. §621-24 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §60), which provided: "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the cause or prosecution, without the writing being shown to him...."

Subsection (b): This subsection, governing the extrinsic proof of prior inconsistent statements used to impeach witnesses, should be read in conjunction with Rules 607 and 802.1(1).

Since Rule 607 allows the impeachment of a witness by "any party, including the party calling him," this subsection envisions establishing the traditional foundation "on direct or cross-examination." Requiring that the foundation be established during the examination-in-chief of the witness represents a departure from Fed. R. Evid. 613(b), which abolishes the traditional foundation requirement in favor of simply affording the witness "an opportunity to explain or deny" the impeaching statement at any time during the trial. The only advantage of the federal rule is that "several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement," see the Advisory Committee's Note to Fed. R. Evid. 613(b); the disadvantage, when the impeaching statement is not mentioned during the examination-in-chief of the witness, is that the witness must be kept available during the trial so that the "opportunity to explain or deny" can at some point be afforded. This disadvantage appears to outweigh the advantage of surprising collusive witnesses who have made a joint statement, a situation that may not often arise and in any event may be susceptible of solution under Rule 615 infra.

Prior Hawaii law, see Hawaii Rev. Stat. §621-23 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §59) required, as a precondition to the use of extrinsic evidence of a prior inconsistent statement, that the circumstances of the statement be brought to the attention of the witness and that the witness "not distinctly admit that he has made the statement." See Kekua v. Kaiser Foundation Hosp., 61 H. 208, 601 P.2d 364 (1979); State v. Napeahi, 57 H. 365, 556 P.2d 569 (1976). The theory was that, since the prior statement was hearsay and admissible only for impeachment purposes, the witness' admission that he made the statement completed the impeachment and obviated need for extrinsic evidence of the statement. Rule 802.1(1), however, now provides for substantive use of most prior inconsistent witness statements, and therefore the witness' admission that he made the statement no longer obviates the need for the proponent to prove the statement by extrinsic evidence. Subsection (b) therefore requires only that (1) the circumstances of the statement be brought to the attention of the witness, and (2) the witness be asked whether he made the statement.

In State v. Pokini, 57 H. 26, 29, 548 P.2d 1402, 1405 (1976), the court observed: "The foundation requirement is for the purpose of rekindling the witness' memory, and substantial compliance is all that is necessary." See Territory v. Alcosiba, 36 H. 231, 236 (1942): "A proper foundation of the time, place and circumstance having been laid within the meaning

[of the statute] ... proof of the prior statements was [properly] made...."

State v. Altergott, 57 H. 492, 505-08, 559 P.2d 728, 738 (1977), dealt with the proper scope of cross-examination concerning a prior inconsistent statement. Noting that the scope of cross-examination is generally entrusted to the trial court's discretion, the Altergott court held that repetitive and detailed questioning about a prior statement that a witness admitted was false was proper:

> Neither a witness nor a party may lawfully escape such cross-examination by his mere testimony or admission that the witness has made statements inconsistent with his testimony at the trial and that they were false. Cross-examination may not be shut off in this way. The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness.

In Asato v. Furtado, 52 H. 284, 288, 474 P.2d 288, 292 (1970), the court treated the issue of asserted inconsistency through omission:

> Whether an omission to state previously a fact now asserted constitutes an inconsistency, sufficient to allow the previous statement to be shown, depends upon the circumstances under which the prior statement was made. Not every omission will constitute such an inconsistency. But where the prior circumstances were such that the speaker could have been expected to state the omitted fact, either because he was asked specifically about it, or because he was purporting to render a full and complete account of the transaction or occurrence, and the omitted fact was an important and material one, so that it would have been natural to state it, the omission gives rise to a justifiable inference that the omitted fact was omitted because it did not exist.

Subsection (c): This subsection, relating to prior consistent statements, has no Fed. R. Evid. counterpart. While Fed. R. Evid. 801(d)(1)(B) purports to exclude one class of consistent statements from the hearsay ban, the federal rules do not address the issue whether other kinds of consistent statements may be used to rehabilitate witnesses. More specifically, the federal rules provide no answer to the issue posed in State v. Altergott, 57 H. 492, 559 P.2d 728 (1977): when the cross-examination of a witness "amounts only to an imputation of inaccurate memory," can a consistent statement made "when the event was recent and the memory fresh" be admitted to

rehabilitate? Altergott, relying on McCormick §49 answered this question in the affirmative, and the same result is effected by Rule 613(c)(3). The balance of subsection (c) comes from Cal. Evid. Code §791.

Rules of Court

Depositions, see HRPP rule 15(e); DCRCP rule 32(a).

Case Notes

Wife's tape recorded statement to detective properly admitted under subsection (b) and rule 802.1(1)(C) as substantive evidence of husband's guilt. 83 H. 289, 926 P.2d 194 (1996).

Where the information in a non-party witness' out-of-court statement goes beyond the scope of direct or cross-examination, that information must be redacted before the rest of the statement may be admitted; taped statements thus admitted in violation of subsection (b). 91 H. 181, 981 P.2d 1127 (1999).

Where witness admitted throughout testimony to having made prior oral inconsistent statements, witness' transcribed interview admitted in violation of subsection (b) and rule 802.1(1). 91 H. 181, 981 P.2d 1127 (1999).

Where defendant's credibility was the linchpin of defendant's defense of duress and choice of evils, the prosecution's failure to comply with the foundational requirements of this rule deprived the defendant of a fair opportunity to respond to witness' testimony impeaching defendant's credibility; thus, there was a strong possibility that the erroneous admission of witness' testimony contributed to defendant's conviction and was not harmless error. 101 H. 269, 67 P.3d 768 (2003).

Where trial court erroneously ruled on whether complainant's review of complainant's statement would refresh complainant's recollection by sustaining prosecution's objection on the basis that the complainant had answered defendant's question, this erroneous ruling inhibited defendant from confronting the complainant with a potential prior inconsistent statement under subsection (b), adversely affected defendant's substantial right to confrontation, and was reversible error. 118 H. 493, 193 P.3d 409 (2008).

No merit to State's contention that complainant's videotaped statements were "prior consistent statements" which could be admitted into evidence to rehabilitate complainant's credibility under subsection (c), where complainant's credibility was never attacked by any of the means set forth in subsection (c). 9 H. App. 414, 844 P.2d 1 (1992).

Claimant's response to a criminal victim compensation form's directive to "provide a written statement [about] how the crime affected you" not a prior consistent statement under subsection (c) when offered to support the credibility of the claimant's trial testimony that claimant was not seeking compensation, in the absence of an expression to that effect in the response itself; nor is the statement admissible under subsection (c) to buttress complainant's testimony about complainant's post-incident feelings because defense counsel did not attack complainant's credibility on this subject, by one of the three means required by subsection (c). 79 H. 255 (App.), 900 P.2d 1322 (1995).

Complainant's prior inconsistent statement inadmissible where record failed to establish that complainant was "subject to cross-examination concerning the subject matter of the statement" pursuant to rule 802.1(1). 80 H. 469 (App.), 911 P.2d 104 (1996).

An uncorroborated prior inconsistent statement of a family or household member offered under this rule and rule 802.1 as substantive evidence of the facts stated therein may be sufficient, if believed, to establish physical abuse and the manner in which such abuse was inflicted in a prosecution for physical abuse of a family or household member under §709-906. 84 H. 253 (App.), 933 P.2d 90 (1997).

While the requirement that "the declarant is subject to cross-examination concerning the subject matter of the declarant's statement" is foundational under rule 802.1(2), it is not a requirement under subsection (c); thus, while social worker's recounting of the allegation of sexual assault made by victim during an unrecorded interview may not have been admissible for its substance under rule 802.1(2), it was admissible to rehabilitate the victim's credibility under subsection (c). 103 H. 373 (App.), 82 P.3d 818 (2003).

Where record showed that (1) complainant testified on direct examination about the incidents involving defendant; (2) parts of the testimony were inconsistent with portions of complainant's first statement; (3) complainant admitted on cross-examination that complainant wrote the first statement and signed it; and (4) the prior inconsistent statements were offered in compliance with the foundational requirements of subsection (b), trial court erred in failing to admit as substantive evidence at trial pursuant to rule 802.1(1)(B) portions of complainant's first statement that were inconsistent with complainant's testimony at trial. 116 H. 403 (App.), 173 P.3d 550 (2007).

Mentioned: 74 H. 85, 839 P.2d 10 (1992).

" **Rule 614 Calling and interrogation of witness by court.** (a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present. [L 1980, c 164, pt of §1]

RULE 614 COMMENTARY

This rule is identical with Fed. R. Evid. 614.

Subsections (a) and (b): The right of the court both to call and to question witnesses has long been recognized as fundamental in the Anglo-American adversary system. McCormick §8; 9 Wigmore, Evidence §2484 (3d ed. 1940).

The power of the court to summon witnesses on its own motion was addressed in Kamahalo v. Coelho, 24 H. 689, 694 (1919), where the trial court called in a handwriting expert. The supreme court said: "[C]ourts have from the earliest period exercised the right to call in experts to aid them in their deliberations and this right we concede." Compare Rule 706 infra, dealing with expert witnesses.

The Hawaii Supreme Court has also recognized the right of the court to interrogate witnesses. In Territory v. Kekipi, 24 H. 500, 504 (1918), the court said:

> The trial judge should never assume the duties of counsel, but if he at any time becomes convinced that the witness has misunderstood the questions propounded by either counsel and as a result of such misunderstanding the import of his testimony is in doubt, it is not only his privilege but his duty to ask such questions of the witness as are necessary to remove such doubt and fully develop the truth in the case.

Accord, Territory v. Sable Hall, 39 H. 397 (1952). This right is strictly circumscribed. In Territory v. Van Culin, 36 H. 153, 162 (1942), the Hawaii Supreme Court held that the trial judge's extensive cross-examination of a criminal defendant biased the jury and, therefore, constituted reversible error. The court said: "When a trial judge so indulges himself, no matter what his motives may be or what explanation or excuse may be offered, his conduct can have but one effect upon the jury and that is to impress them that the judge is convinced of the

defendant's guilt." Cf. State v. Pokini, 57 H. 17, 548 P.2d 1397 (1976).

Subsection (c): The intent of this subsection is to enable counsel to avoid the tactical awkwardness of objecting to judicial summoning or interrogation of witnesses in the jury's presence without courting the hazard of waiving the right to object due to lack of timeliness. Compare Rule 605.

Case Notes

Under specific facts of case, court did not fail to act impartially when it called its own additional witnesses; hence no abuse of discretion. 80 H. 251 (App.), 909 P.2d 579 (1995).

Within trial court's discretion to call its own witnesses after the parties have rested. 80 H. 251 (App.), 909 P.2d 579 (1995).

Trial judge did not overstep permissible bounds in questioning officer and deprive defendant of a fair trial as judge's questions were directed at ascertaining the interaction between defendant and officer and sought pertinent and material information about whether defendant's conversations with officer constituted offers or agreements to engage in sex for a fee. 107 H. 360 (App.), 113 P.3d 811 (2005).

" **Rule 615 Exclusion of witnesses.** At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 615 COMMENTARY

This rule is identical with Fed. R. Evid. 615, the Advisory Committee's Note to which points out that "the efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." See 6 Wigmore §§1837-1841 (Chadbourn rev. 1976); Harkins v. Ikeda, 57 H. 378, 557 P.2d 788 (1976); State v. Leong, 51 H. 581, 583, 465 P.2d 560, 562 (1970).

The authorities differ, however, on whether such exclusion is subject to judicial discretion or is mandatory on a motion of

any party. The present rule adopts the latter position. This modifies prior Hawaii case law, which has held that exclusion of witnesses is discretionary. Hawaiian Ocean View Estates v. Yates, 58 H. 53, 564 P.2d 436 (1977); Yoshitomi v. Kailua Tavern, Ltd., 39 H. 93, 98 (1951).

The present rule does not address the question of the appropriate judicial penalty in the event of violation by a witness of an exclusion order, as this is a procedural rather than an evidentiary concern. However, the Hawaii Supreme Court addressed this point and held in Yoshitomi that the trial court's refusal to admit the testimony of a witness who had disobeyed the exclusion order was within the scope of sound judicial discretion. 39 H. at 98-99. In Leong, however, the court distinguished Yoshitomi by implication, holding that the trial court's refusal in a criminal case to admit the testimony of a defense witness who had violated the exclusion rule constituted reversible error, violating the defendant's "constitutional right to have witnesses testify in his favor." 51 H. at 586, 465 P.2d at 562-63.

Case Notes

No abuse of discretion where witness was not scheduled to testify and had observed part of the trial. 71 H. 347, 791 P.2d 392 (1990).

Purpose of rule is to codify practice of sequestering witnesses to discourage or expose fabrication, inaccuracy, and collusion. 73 H. 331, 832 P.2d 269 (1992).

Witness whose presence shown to be essential. 4 H. App. 498, 669 P.2d 163 (1983).

The defendant had the burden of proving there was either prejudice or an abuse of discretion. 7 H. App. 488, 782 P.2d 886 (1989).

Permitting officer-witness to view a diagram that had previously been marked by other witnesses did not violate the trial court’s witness sequestration order issued pursuant to this rule; as the officer responsible for recovering and documenting evidence during the search and seizure, officer had no reason to be influenced by or rely upon markings made by other witnesses, and trial court took sufficient remedial action by permitting defendant to cross-examine officer about officer’s viewing of the diagram. 114 H. 162 (App.), 158 P.3d 280 (2006).

" **Rule 616 Televised testimony of child.** In any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the

time of the testimony, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by two-way closed circuit video equipment to be viewed by the court, the accused, and the trier of fact, if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate. During the entire course of such a procedure, the attorneys for the defendant and for the State shall have the right to be present with the child, and full direct and cross-examination shall be available as a matter of right. [L 1985, c 279, §1; am L 1993, c 198, §1(2)]

Cross References

Televised testimony of victims and witnesses, see §801D-7.

RULE 616 COMMENTARY

This rule, which was recommended by the Hawaii Supreme Court in its Final Report of the Committee on Hawaii Rules of Evidence 30 (1991), resembles Uniform Rule of Evidence 807(d). The preliminary determination that taking the child witness' testimony in the accused's presence "would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate" is necessary to avoid offending the Confrontation Clause, see Maryland v. Craig, 497 U.S. 836 (1990). This preliminary determination is for the court under Rule 104(a).

Case Notes

Subsection (b) (1985), which permitted introduction of child victim's videotaped statement without showing of necessity, impermissibly infringed on defendant's right of confrontation. 79 H. 128, 900 P.2d 135 (1995).

"ARTICLE VII.
OPINIONS AND EXPERT TESTIMONY

Rule 701 Opinion testimony by lay witnesses. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 701 COMMENTARY

This rule is identical with Fed. R. Evid. 701. The rule retains the common-law requirement that lay opinion be based upon firsthand knowledge, McCormick §10, but liberalizes the traditional doctrine of "strict necessity," which allowed such testimony only where "all the facts cannot be placed before the jury with such clearness as to enable them to draw a correct inference...." Tsuruoka v. Lukens, 32 H. 263, 264 (1932). The present rule adopts in its place the more liberal "convenience" test, McCormick §11, allowing such testimony when it is "helpful" to the trier of fact in determining or clarifying facts in issue.

The "strict necessity" doctrine has been construed to allow lay opinions concerning pain and suffering, see Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 113, 412 P.2d 669, 691 (1966). Such a result is of course consistent with this rule. The witness may be required to specify the facts upon which the opinion is based, see Sumner v. Jones, 22 H. 23 (1914).

Several considerations support substitution of the "convenience" standard for the "strict necessity" test. As the Advisory Committee's Note to Fed. R. Evid. 701 puts it: "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration." The committee also cited the "practical impossibility" of distinguishing fact from opinion.

The danger that such liberalization might open the door to factually unsupported, conjectural, or biased inferences is averted by the explicit requirement of firsthand knowledge, by implicit judicial discretion under the rule to exclude opinions for lack of "helpfulness," and by express judicial discretion under Rule 403 supra, to exclude because of the danger of prejudice, confusion, or misleading the jury. The adversary system itself provides still another safeguard, allowing detailed cross-examination on the factual bases of such opinions.

Law Journals and Reviews

Henderson v. Professional Coatings Corp.: Narrowing Third-Party Liability in Automobile Accidents. 15 UH L. Rev. 353 (1993).

Case Notes

Lay opinion evidence was properly admitted since it was based on firsthand knowledge and perception and may have been helpful to the jury. 73 H. 331, 832 P.2d 269 (1992).

Harmless error where no reasonable possibility that any improper lay opinion testimony by officer contributed to defendant's DUI conviction. 80 H. 8, 904 P.2d 893 (1995).

No abuse of discretion where trial court permitted detective to testify on whether pouches qualified as rigidly constructed containers or commercial gun cases as testimony was based on detective's personal knowledge of gun transporting container requirements, was based on detective's observation and perception of pouches in question, and was helpful by providing jury with opinion of a person--with experience in the field of gun transport--regarding the nature of the pouches. 93 H. 87, 997 P.2d 13 (2000).

Where plaintiff's opinions as to the location of the restroom building and cart path were admissible as lay opinions under this rule supporting plaintiff's contention that a genuine issue of material fact existed as to whether defendant increased the risk of being struck by an errant shot due to its golf course design, trial court erred in granting summary judgment to defendant. 110 H. 367, 133 P.3d 796 (2006).

Trial court properly permitted police officer to state opinion that traffic control sign was official. 9 H. App. 73, 823 P.2d 154 (1992).

District court abused its discretion in admitting police officer's opinion testimony regarding defendant's field sobriety test results into evidence; admission of opinion testimony was harmless error. 9 H. App. 516, 852 P.2d 476 (1993).

Trial court did not abuse its discretion in allowing witnesses to testify that defendant did not appear remorseful after learning of son's death. 10 H. App. 73, 861 P.2d 37 (1993).

No abuse of discretion in excluding witnesses' opinions on bartender's actions at time of incident. 10 H. App. 331, 871 P.2d 1235 (1992).

Where officer's opinion was not based solely on officer's personal knowledge but in significant part upon hearsay report of another officer, it was not admissible as lay opinion. 92 H. 98 (App.), 987 P.2d 996 (1999).

Where plaintiff witnessed the car collision, reviewed the pertinent undisputed vehicle specifications and was thus able to form a rational opinion based on plaintiff's perception as to the defective nature of the air bag, and this opinion went to the determination of a material fact in issue, such evidence was enough to deny defendants summary judgment irrespective of

expert testimony offered by defendant's expert. 92 H. 180 (App.), 989 P.2d 264 (1999).

State failed to establish proper foundation for admission under this rule of officer's opinion that defendant failed field sobriety tests; trial court erred in concluding defendant was DUI under §291-4(a)(1) when it relied upon officer's opinion that defendant had "failed" the tests, rather than on defendant's actions or demeanor in performing the tests. 95 H. 409 (App.), 23 P.3d 744 (2001).

Where witnesses' testimonies about (1) training and instruction of certified nurse's aides, (2) review of defendant care home operator's records and files, and (3) defendant's qualifications to operate and operation of a care home were based on witnesses' observations and personal knowledge and not in the form of opinion or inference, they did not constitute impermissible lay opinion. 104 H. 387 (App.), 90 P.3d 1256 (2004).

Circuit court erred in admitting federal agent's opinion testimony that revolver recovered from defendant's car had been recently fired, "within the same day, probably eight hours or so", which was particularly significant as it provided a direct link between the firing of the gun and victim's murder, where: (1) State did not set forth sufficient foundation for admission of this time-frame testimony as lay opinion; (2) the agent's opinion on the time frame in which defendant's gun had been fired required expert testimony; and (3) the State did not satisfy the foundational requirements for admission of the time-frame testimony as expert testimony. 122 H. 2 (App.), 222 P.3d 409 (2010).

Cited: 62 H. 650, 618 P.2d 1144 (1980).

" **Rule 702 Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(7)]

RULE 702 COMMENTARY

This rule is identical with Fed. R. Evid. 702 except for the deletion of a comma after the word "education."

The rule liberalizes the traditional common law stricture limiting expert testimony to "some science, profession, business or occupation ... beyond the ken of the average layman," McCormick §13. Hawaii decisions have tended to adhere to the traditional limitation, e.g., State v. Smith, 59 H. 565, 583 P.2d 347 (1978), where the court allowed expert medical testimony regarding the effects of LSD on human beings. Noting that the "allowance or disallowance of the testimony of an expert witness is addressed to the sound discretion of the trial court," the court in Smith established two preconditions for the receipt for expert testimony: "first, the subject matter of the inquiry must be of such a character that only persons of skill, education or experience in it are capable for forming a correct judgment as to any facts connected therewith and second, the testimony must be of a nature to aid the jury." 59 H. at 569, 583 P.2d at 350. Rule 702 requires only that the testimony be of assistance to the trier of fact. The Advisory Committee's Note to Fed. R. Evid. 702 recommends, as the test for admissibility, "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." So understood, the shift is in degree only.

The rule also sets a broad standard with respect to the scope of expert testimony. The traditional limitation to scientific, professional, or technical matters is expanded to include "other specialized knowledge" helpful to the trier of fact. Consistent with this, the determination of an expert's qualifications is similarly broad, admitting as an expert a person qualified "by knowledge, skill, experience, training, or education."

Committing the determination of expert qualifications to the discretion of the court is consistent with State v. Torres, 60 H. 271, 277, 589 P.2d 83, 87 (1978), where the court said:

> [T]he determination of whether or not a witness is qualified as an expert in a particular field is largely within the discretion of the trial judge and, as such, will not be upset absent a clear abuse of discretion.

See also State v. Murphy, 59 H. 1, 575 P.2d 448 (1978); City and County of Honolulu v. Bonded Investment Co., Ltd., 54 H. 385, 507 P.2d 1084 (1973).

Determination by the court that a witness qualifies as an expert is binding upon the trier of fact only as this relates to admissibility of the expert's testimony. The trier of fact may nonetheless consider the qualifications of the witness in determining the weight to be given to his testimony. See Territory v. Adelmeyer, 45 H. 144, 363 P.2d 979 (1961).

RULE 702 SUPPLEMENTAL COMMENTARY

The Act 191, Session Laws 1992 amendment added the second sentence to this rule. The problem with Fed. R. Evid. 702, as adopted in 1975, and with original Haw. R. Evid. 702, patterned thereafter, was that neither of these rules nor their commentaries mentioned Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), establishing a requirement that a novel scientific development or technique "have gained general acceptance in the particular field in which it belongs" as a condition of admissibility in connection with expert testimony. The general-acceptance standard of Frye was widely recognized as a reliability check of emerging scientific developments and techniques.

The criterion of Rule 702, that expert testimony "assist the trier of fact to understand the evidence," necessarily incorporates a reliability factor and thus countenances a Frye-like inquiry as an ingredient of the reliability determination. This is the holding of State v. Montalbo, 73 H. 130, 828 P.2d 1274 (1992), observing that Rule 702's assistance requirement contemplates expert testimony based upon "a sound factual foundation...an explicable and reliable system of analysis...[and having the capacity to] add to the common understanding of the jury." The reliability determination "could include the Frye test," id., but is not so limited: "[I]t is possible that a court could also consider the scientific procedure itself, as well as other evidence of the procedure's reliability." Id. Montalbo thus anticipated the present Rule 702 amendment, thereby confirming the drafters' belief that the amendment makes explicit what was formerly implicit in the assistance criterion. General acceptance in the scientific community is highly probative of the reliability of a new technique but should not be used as an exclusive threshold for admissibility determinations.

Rules of Court

Expert witnesses, see HRPP rule 28(a).

Law Journals and Reviews

The Protection of Individual Rights Under Hawai‘i's Constitution. 14 UH L. Rev. 311 (1992).

Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers. 23 UH L. Rev. 151 (2000).

Scientific Expert Admissibility in Mold Exposure Litigation: Establishing Reliability of Methodologies in Light of Hawai‘i's Evidentiary Standard. 26 UH L. Rev. 99 (2003).

Case Notes

Witness was qualified to testify as expert. 64 H. 302, 640 P.2d 286 (1982).

Medical examiner's conclusion that death occurred by homicide was inadmissible. 70 H. 509, 778 P.2d 704 (1989).

Use of expert testimony in child abuse cases, discussed. 71 H. 552, 799 P.2d 48 (1990).

Expert testimony in child abuse case inadmissible as an opinion as to the child's credibility. 72 H. 527, 825 P.2d 1051 (1992).

Admissibility of novel scientific evidence discussed, focusing on DNA profiling evidence. 73 H. 130, 828 P.2d 1274 (1992).

Expert testimony necessary to establish reasonable probability of future pain and suffering. 74 H. 1, 837 P.2d 1273 (1992).

Trial court did not abuse its discretion by excluding proffered expert testimony on hedonic damages, where the proffered testimony was based on willingness-to-pay approach. 77 H. 282, 884 P.2d 345 (1994).

Trial court did not abuse its discretion in ruling that psychiatrist's testimony regarding cause of [decedent's] death would assist the trier of fact and that it was not untrustworthy or speculative. 78 H. 230, 891 P.2d 1022 (1995).

Trial court properly limited chemical engineer's testimony to matters within the engineer's background, experience, and training, that is, within the field of chemical engineering; court did not abuse its discretion in limiting testimony of one of plaintiff's treating physicians, a general practitioner, where nothing in the physician's background or experience suggested physician would be competent to testify regarding the effects of silicone on the human body. 78 H. 287, 893 P.2d 138 (1995).

Testimony of domestic violence expert was relevant, specialized knowledge that would assist jury in determining whether defendant was under the influence of extreme mental disturbance when defendant killed wife. 80 H. 172, 907 P.2d 758 (1995).

Domestic violence expert properly allowed to testify that victims of domestic violence often recant allegations of abuse. 83 H. 289, 926 P.2d 194 (1996).

Criminologist was qualified as an expert and provided relevant, specialized knowledge, unknown to the average juror, which would assist jury in determining whether ammunition

casings found at crime scene had been fired from rifle defendant had fired. 83 H. 507, 928 P.2d 1 (1996).

As scientific principles and procedures underlying hair and fiber evidence are well-established and of proven reliability, evidence could be treated as "technical knowledge"; independent reliability determination under rule 104 thus unnecessary. 85 H. 462, 946 P.2d 32 (1997).

Two-pronged standard of review adopted for challenges to expert evidence under this rule; court did not commit plain error in admitting expert evidence of the Widmark formula for the purpose of ascertaining defendant's blood alcohol concentration level at the time of defendant's arrest. 95 H. 94, 19 P.3d 42 (2001).

Trial court did not abuse its discretion in qualifying witness as an expert in the field of metallurgy and corrosion analysis where, irrespective of the fact that witness was employed as a stockbroker and had little recent experience, witness had earned degrees in metallurgy and engineering and had some work experience involving corrosion issues in water pipes; it is not necessary for expert witness to have the highest possible qualifications to enable him or her to testify as an expert. 100 H. 97, 58 P.3d 608 (2002).

Trial court did not abuse discretion in excluding defendant's expert witness' videotape where, based on five factors, the record demonstrated that trial court had sufficient reason to question the reliability, and even relevance, of the accident reconstruction video. 100 H. 356, 60 P.3d 306 (2002).

Where officer testified that officer received field training in the testing and identification of illegal drugs and drug paraphernalia and knew through training and experience how a pipe like that recovered from defendant is used to smoke crystal methamphetamine, prosecution had laid sufficient foundation establishing officer's knowledge and experience; thus, trial court did not err in allowing officer to testify that residue contained in pipe recovered from defendant may have been an amount sufficient to be used. 100 H. 498, 60 P.3d 899 (2002).

Circuit court's failure to formally qualify two witnesses as experts in the field of ballistics did not affect petitioner's substantial rights and did not preclude the admission of the testimony of the two witnesses into evidence under this rule. The plain language suggests that to testify as an expert witness, one need only possess the requisite knowledge, skill, experience, training or education to offer an opinion on a subject requiring scientific, technical or other specialized knowledge and does not indicate that the trial court must formally qualify a witness as an expert in front of the jury before the witness' testimony can properly be admitted.

Moreover, nothing in the Hawaii rules of evidence would preclude a trial court from declining to qualify a witness as an expert in front of the jury, so long as the requisite foundation for the witness' testimony is established. 129 H. 206, 297 P.3d 1062 (2013).

Firearms instructor's testimony properly allowed by circuit court where the instructor's testimony established that the instructor had the requisite skill, knowledge, experience, training, or education with the use, identification and operation of shotguns to testify regarding pattern tests performed with a shotgun recovered from the investigation and that the instructor's testimony regarding the tests the instructor conducted had a reliable base in the knowledge and experience of the instructor's discipline and rested on a reliable foundation; thus, instructor's expertise in the use and operation of firearms was sufficient to meet the foundational requirements of this rule. 129 H. 206, 297 P.3d 1062 (2013).

Forensic pathologist's testimony properly allowed by circuit court where the record established that forensic pathologist was capable of concluding that victim's cause of death was a shotgun injury to the back at a distance of approximately sixty feet, and that such a conclusion had a reliable basis in the knowledge and experience of the forensic pathologist's discipline and rested on a reliable foundation. 129 H. 206, 297 P.3d 1062 (2013).

Trial courts should not require a "reasonable degree of scientific certainty" before admitting expert opinions, but may exclude expert testimony based on speculation or possibility. The circuit court plainly erred in precluding defense expert's testimony with regard to the probable effects of cocaine on the victim at the time of the shooting. 131 H. 463, 319 P.3d 382 (2014).

Expert's testimony that child's knowledge of sexual terms and activities were consistent with characteristics of sexually abused child was of assistance to jury in understanding origin of child's actions and words and not unduly prejudicial. 8 H. App. 638, 819 P.2d 1122 (1991).

Family court did not abuse its discretion when it decided that witness was an expert in domestic violence and when it entered decisions with respect to witness' testimony. 9 H. App. 496, 850 P.2d 716 (1993).

Trial court did not err in precluding witness from expressing opinion, since record disclosed that witness was never qualified as an "expert by knowledge, skill, experience, training, or education" in accordance with this rule. 79 H. 342 (App.), 902 P.2d 977 (1995).

Doctor properly qualified as expert witness where doctor licensed in two states, practiced for twenty years, and performed over five hundred breast augmentation operations. 86 H. 93 (App.), 947 P.2d 961 (1997).

Although it may have been error admitting into evidence, as expert opinion under this rule, officer's testimony concerning §712-1231(b), the social gambling defense, where defendant was not entitled to this defense in a prosecution for promoting gambling in the first degree under §712-1221(1)(c), error was harmless. 92 H. 98 (App.), 987 P.2d 996 (1999).

Trial court properly admitted fingerprint examiner's expert testimony that expert positively identified the latent fingerprint as belonging to defendant; evidence presented established that expert's testimony was reliable and that trial court was well within its discretion in finding that expert's testimony satisfied the reliability prong of this rule. 109 H. 359 (App.), 126 P.3d 402 (2005).

Without some evidence showing that drug money was not contaminated by police, State failed to lay a sufficient foundation for the admission of the dog-sniff evidence under this rule; thus, trial court erred in admitting dog-sniff evidence and refusing to strike it. 110 H. 129 (App.), 129 P.3d 1157 (2006).

As the use of an expert to comment on or rebut other testimony presented at trial is allowable and expected, trial court abused its discretion in precluding doctor from testifying as to the cause of bruises and marks on vehicle accident victim's thorax and left side of body to rebut testimony by victim's brother; as exclusion of testimony denied defendant a fair trial, trial court's judgment vacated. 121 H. 143 (App.), 214 P.3d 1133 (2009).

Based on doctor's credentials and experience, doctor was qualified to testify about the results of doctor's surrogate study showing no seatbelt loading marks where such marks should have been if victim had been wearing the seatbelt at the time of the crash; doctor had completed a residency with the Navy in aerospace medicine, had been qualified by other trial courts as a biomechanical expert, had consulted on approximately one thousand motor vehicle cases and had taught courses in biomechanics and injury causation analysis. 121 H. 143 (App.), 214 P.3d 1133 (2009).

Circuit court erred in admitting federal agent's opinion testimony that revolver recovered from defendant's car had been recently fired, "within the same day, probably eight hours or so", which was particularly significant as it provided a direct link between the firing of the gun and victim's murder, where: (1) State did not set forth sufficient foundation for admission

of this time-frame testimony as lay opinion; (2) the agent's opinion on the time frame in which defendant's gun had been fired required expert testimony; and (3) the State did not satisfy the foundational requirements for admission of the time-frame testimony as expert testimony. 122 H. 2 (App.), 222 P.3d 409 (2010).

" **Rule 702.1 Cross-examination of experts.** (a) General. A witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be cross-examined as to (1) the witness' qualifications, (2) the subject to which the witness' expert testimony relates, and (3) the matter upon which the witness' opinion is based and the reasons for the witness' opinion.

(b) Texts and treatises. If a witness testifying as an expert testifies in the form of an opinion, the witness may be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication only if:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming the witness' opinion, or

(2) Such publication qualifies for admission into evidence under rule 803(b)(18). [L 1980, c 164, pt of §1; gen ch 1985]

RULE 702.1 COMMENTARY

This rule has no counterpart in Fed. R. Evid. It is modeled on Cal. Evid. Code §721.

Subsection (a): An expert witness differs from a lay witness principally in his ability to draw and to testify to inferences that are beyond the competence of the trier of fact. In addition, the expert is not restricted to firsthand knowledge and may base his opinions and inferences on a wide variety of data and facts perceived by him or made known to him, whether or not they are admissible in evidence, see Rule 703 infra.

Such a broad testimonial range suggests the need for an equally broad cross-examination, and subsection (a) of this rule provides the appropriate latitude. Subsection (a) restates existing law, see McCandless v. Waiahole Water Co., Ltd., 35 H. 314, 320 (1940).

Subsection (b): This subsection clarifies the permissible use of texts and treatises on cross-examination. Hawaii courts have long recognized that an expert may be subjected to cross-

examination concerning publications upon which he has relied, see Fraga v. Hoffschlaeger, 26 H. 557, 567 (1922).

Subsection (b)(2) parallels Rule 803(b)(18) which, agreeably with Fed. R. Evid. 803(18), exempts from the hearsay exclusion those texts and treatises that are used on cross-examination. The criterion of Rule 803(b)(18) is that the material be "established as a reliable authority," regardless of whether or not the witness has relied on it. Use of such material on cross-examination was approved in Ruth v. Fenchel, 37 N.J. Super. 295, 117 A.2d 284 (1955), aff'd, 21 N.J. 171, 121 A.2d 373 (1956). The Ruth case was cited approvingly by Chief Justice Richardson in Tittle v. Hurlbutt, 53 H. 526, 534, 497 P.2d 1354, 1359 (1972), in connection with the following statement: "This court recognizes the wisdom of enlarging the scope of use of medical texts on cross-examination." That wisdom is codified in subsection (b).

Case Notes

Section 704-416 overrides this rule. 71 H. 591, 801 P.2d 27 (1990).

" **Rule 703 Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 703 COMMENTARY

The first two sentences of this rule are identical with Fed. R. Evid. 703 in its entirety. The last sentence was added to clarify the court's discretion to exclude untrustworthy opinions.

The traditional view limits the facts or data upon which an expert may base an inference or an opinion to those obtained upon firsthand knowledge or to facts of record. McCormick §14. Characteristic examples of expert testimony based upon firsthand knowledge are the testimony of a physician, based on his medical examination of an individual, of a ballistics expert, based upon his examination of a bullet, or of a handwriting analyst, based

upon his study of a specimen of handwriting. The expert may become conversant with facts of record either by being present during testimony or, more characteristically, through their submission to him in the form of a hypothetical question.

Hawaii decisions appear to adhere to the limitations of the traditional rule, see State v. Davis, 53 H. 582, 499 P.2d 663 (1972); Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 106, 412 P.2d 669, 687 (1966); Kawamoto v. Yasutake, 49 H. 42, 410 P.2d 976 (1966). In State v. Dillingham Corp., 60 H. 393, 411, 591 P.2d 1049, 1060 (1979), however, the court said:

> In this jurisdiction, we have taken a liberal view toward the admission of evidence used to support an expert's opinion as to fair market value [of realty].... The factors considered and the extent of knowledge and reasoning of an otherwise qualified appraiser are matters which go to the weight rather than the competence of his testimony.

Rule 703 allows opinions based on data not admissible in evidence so long as "of a type reasonably relied upon by experts in the particular field." The Advisory Committee's Note to Fed. R. Evid. 703 points out:

> [T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

McCormick agrees: "It is reasonable to assume that an expert in a science is competent to judge the reliability of statements made to him by other investigators or technicians." McCormick §15.

There are several safeguards against untrustworthy opinions. The facts or data must be established as reliable in the particular field. Therefore, concluded the Advisory Committee's Note to Fed. R. Evid. 703, a court would not be justified in "admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not

satisfied." Second, the present modification of the federal rules formulation provides expressly for exclusion at the discretion of the court. Finally, Rule 705 infra, allows the court at its discretion to require prior disclosure of facts or data upon which an opinion or inference is based.

A number of other jurisdictions have adopted a similar rule, see, e.g., Cal. Evid. Code §801(b).

Case Notes

Admissibility of novel scientific evidence discussed, focusing on DNA profiling evidence. 73 H. 130, 828 P.2d 1274 (1992).

Trial court did not abuse its discretion by excluding proffered expert testimony on hedonic damages, where the proffered testimony was based on willingness-to-pay approach. 77 H. 282, 884 P.2d 345 (1994).

Trial court did not abuse its discretion in ruling that psychiatrist's testimony regarding cause of [decedent's] death would assist the trier of fact and that it was not untrustworthy or speculative. 78 H. 230, 891 P.2d 1022 (1995).

No abuse of discretion in admitting expert testimony where domestic violence expert provided relevant, specialized knowledge, unknown to the average juror, and did not comment or otherwise offer opinion on the credibility of any witness in the case. 80 H. 172, 907 P.2d 758 (1995).

Rule 705 and this rule do not foreclose expert witness from revealing, during direct examination, contents of material reasonably relied upon, though hearsay, to explain basis of opinion, provided expert actually relied on material as basis of opinion, materials are of type reasonably relied upon by experts in field in forming opinions on subject, and materials do not otherwise indicate lack of trustworthiness. 85 H. 336, 944 P.2d 1279 (1997).

Trial court did not abuse its discretion in allowing expert witness' testimony regarding plaintiff's injuries where, inter alia, trial court determined that information gained by expert witness at a lecture was of the type reasonably relied upon by experts in expert witness' field in forming opinions about back injuries. 10 H. App. 298, 869 P.2d 1352 (1994).

Trial court did not abuse its discretion in allowing defendant's expert witness to testify where expert admitted that expert had not personally examined plaintiff. Expert based opinions on medical records, clinical notes, etc. of doctors; all of these were admitted into evidence during the trial; in addition, expert referred to photographs that were received into evidence. 77 H. 209 (App.), 881 P.2d 1277 (1994).

Order of expert witness' testimony immaterial where expert gave testimony after reviewing facts made known to expert before trial and facts were subsequently introduced into evidence. 86 H. 93 (App.), 947 P.2d 961 (1997).

Circuit court did not plainly err by allowing doctor to testify regarding the necessity and reasonableness of plaintiff's medical expenses where doctor's testimony was based on doctor's experience as a treating physician and independent medical exam doctor and doctor's knowledge of the industry practice. 124 H. 236 (App.), 240 P.3d 899 (2010).

" **Rule 704 Opinion on ultimate issue.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. [L 1980, c 164, pt of §1]

RULE 704 COMMENTARY

This rule is identical with Fed. R. Evid. 704. It abolishes the common-law rule disallowing testimony upon an "ultimate issue" in the case of trial.

Rejection of the "ultimate issue" ban is consistent with recent actions in a majority of the states, see McCormick §12. Determination of what is or is not an "ultimate issue" rendered the rule difficult to apply in practice; undue restrictiveness in its application often deprived the jury of useful information; the necessity for framing testimony in such a way that it does not violate the rule often produced awkward and confusing circumlocutions; and the usual justification for the ban, that such testimony invades the province of the jury, was of questionable logical validity in any event. See McCormick, supra; 7 Wigmore, Evidence §§1920, 1921.

Prior to the adoption of this rule Hawaii adhered to the "ultimate issue" exclusion, see Friedrich v. Department of Transportation, 60 H. 32, 586 P.2d 1037 (1978); Sherry v. Asing, 56 H. 135, 147, 531 P.2d 648, 657 (1975); Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 412 P.2d 669 (1966).

The abolition of the "ultimate issue" rule does not leave the court without safeguards. First, the present rule requires that the testimony be "otherwise admissible." Second, under the limitations of Rules 701 and 702 supra, opinion testimony must be helpful to the trier of fact. Third, under Rule 705 infra, the court at its discretion may require prior disclosure of the underlying facts or data upon which the opinion is based. Finally, under Rules 403 and 703 supra, the court has discretion to exclude the testimony entirely if it is prejudicial,

confusing, misleading, unnecessarily cumulative, or lacking in trustworthiness. As the Advisory Committee's Note to Fed. R. Evid. 704 puts it:

> These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have the capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Case Notes

Medical examiner's conclusion that death occurred by homicide was inadmissible. 70 H. 509, 778 P.2d 704 (1989).

Although officer's opinion testimony was offering a legal conclusion as to whether defendant was DUI, any error in connection with testimony was harmless beyond a reasonable doubt. 91 H. 288, 983 P.2d 189 (1999).

Fact that expert's testimony regarding child sexual abuse embraced ultimate issue to be decided by trier of fact did not render it inadmissible. 8 H. App. 638, 819 P.2d 1122 (1991).

Family court abused its discretion in permitting officers' testimony, which was tantamount to an expression of their opinion that the complainant had been truthful in accusing defendant, which impermissibly invaded the province of the jury; this error affected defendant's substantial rights and defendant's convictions thus vacated. 112 H. 136 (App.), 144 P.3d 584 (2006).

" **Rule 705 Disclosure of facts or data underlying expert opinion.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 705 COMMENTARY

The difference between this rule and Fed. R. Evid. 705 is that the latter rule eliminates the need for prior disclosure "unless the court requires otherwise"; the present rule eliminates the need for prior disclosure so long as "the underlying facts or data have been disclosed in discovery proceedings."

The traditional approach, in cases where the expert lacked firsthand knowledge of the underlying facts, was to permit the opinion testimony only after the basis was specified in a hypothetical question derived strictly from evidence already admitted in the action. The hypothetical question has been subject to extensive criticism on the grounds that it is unnecessarily time-consuming, that it encourages bias, and that it often is confusing to the jury. See, e.g., Barretto v. Akau, 51 H. 383, 463 P.2d 917 (1969); McCormick §§14, 17. The general practice of incorporating into the hypothetical question the entire body of relevant data adduced by prior testimony often results in a formulation of formidable length and density. In a recent Hawaii case, the question alone took up five pages of the transcript, Cozine v. Hawaiian Catamaran, Ltd., 49 H. 77, 108, 412 P.2d 669, 689 (1966). This is by no means a record. In an early California case, the hypothetical question took up 83 pages of transcript, with an additional 14 pages of objections. McCormick §14 n. 95.

The intent of this rule and of Fed. R. Evid. 705 is to eliminate the burdensome and outmoded necessity of formulating a hypothetical question in every instance in which an expert bases his opinion upon other than firsthand knowledge, and to render prior disclosure of underlying data discretionary with the court except in those relatively rare instances where discovery proceedings have not yielded the underlying material. In practice, such instances should be limited to situations where experts are obtained while the trial is in progress, given the continuing duty to disclose discovery material imposed by HRCrP 16(c)(2) and HRCP 26(e)(1)(B). In such instances prior testimonial disclosure, which need not be in hypothetical form, is required in order to allow the adversary to judge whether the basis lacks sufficient trustworthiness to qualify under Rule 703.

For similar provisions, see Cal. Evid. Code §802; Kans. Code Civ. Proc. §§60-456, 60-457; Uniform Rule of Evidence 705.

Case Notes

Rule 703 and this rule do not foreclose expert witness from revealing, during direct examination, contents of material reasonably relied upon, though hearsay, to explain basis of opinion, provided expert actually relied on material as basis of

opinion, materials are of type reasonably relied upon by experts in field in forming opinions on subject, and materials do not otherwise indicate lack of trustworthiness. 85 H. 336, 944 P.2d 1279 (1997).
Mentioned: 74 H. 141, 838 P.2d 1374 (1992).

" **Rule 706 Court-appointed experts.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that a particular expert witness was appointed by the court. [L 1980, c 164, pt of §1]

RULE 706 COMMENTARY

Fed. R. Evid. 706 purports to govern the appointment and compensation of expert witnesses. It also contains a subdivision (c) entitled, "Disclosure of appointment," which is similar to this rule. The Advisory Committee's Note to the federal rule points out that a trial judge has inherent power to appoint an expert witness, and defends subdivision (c) as "essential if the use of court appointed experts is to be fully effective."

Hawaii judges are empowered to appoint experts of their own choosing by HRCrP 28(a) and by Kamahalo v. Coelho, 24 H. 689 (1919). This rule does not address appointment or compensation because those matters are more appropriately dealt with in court rules than in rules of evidence.

"**ARTICLE VIII.**
HEARSAY

Rule 801 Definitions. The following definitions apply under this article:

"Declarant" is a person who makes a statement.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

"Statement" is an oral assertion, an assertion in a writing, or nonverbal conduct of a person, if it is intended by the person as an assertion. [L 1980, c 164, pt of §1; gen ch 1985; am L 2002, c 134, §3]

RULE 801 COMMENTARY

This rule is identical with Fed. R. Evid. 801(a), (b), and (c). The substance of Fed. R. Evid. 801(d) (prior witness

statements and party admissions) is treated in Rules 802.1 and 803(a) infra.

Paragraph (1): The definition of "statement" includes some nonverbal conduct as well as express oral or written assertions, see McCormick §250. The definition expresses an important limitation, however. A "statement" must be intended by the declarant to be an "assertion," that is, a declaration of fact or belief. This limitation is relevant primarily to nonverbal rather than oral or written conduct. "It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion," Fed. R. Evid. 801, Advisory Committee's Note.

The determination of intent in relation to nonverbal conduct is not always simple. Patently assertive gestures such as nodding to signal acquiescence or, in the instance of a mute, using hand-signing offer no problem. "[W]here the gesture or other act is done, so far as appears, solely for the purpose of expression it is on a parity ... with any purely verbal statement," McCormick §250. However, much nonverbal conduct, although tending logically to prove the actor's belief in an event or condition, is not motivated by the intent to assert that belief and should not be considered hearsay. An example of nonassertive, non-hearsay conduct is the treatment of a patient by a physician for a particular ailment. The physician's conduct on this occasion logically evidences his belief that the patient is so afflicted, but the intent to assert is lacking, and thus the conduct does not constitute a "statement," even though offered to prove that belief. Other than in instances in which the assertive intent of nonverbal conduct is clear and unambiguous, the issue is properly one for preliminary determination by the court in accordance with Rule 104.

Paragraph (3): This definition of "hearsay" is identical with that contained in Fed. R. Evid. 801(c). It is also consistent with recent expressions of the Hawaii Supreme Court, see Kekua v. Kaiser Foundation Hosp., 61 H. 208, 217, 601 P.2d 364, 370 (1979) ("Extrajudicial statements ... offered in evidence for the truth of the matter asserted therein"); State v. Murphy, 59 H. 1, 16, 575 P.2d 448, 458-59 (1978). Compare Territory v. Williams, 41 H. 348 (1956), where the statements were not offered to prove the truth of the matters asserted but rather to prove that the declarant understood the English language and the nature of an oath. In such a case the court can minimize the danger that the trier of fact may consider the statements as proof of the matters asserted by delivering an instruction pursuant to Rule 105.

Another class of non-hearsay statements is illustrated in State v. Iwasaki, 59 H. 401, 581 P.2d 1171 (1978), where the

defendant was charged with managing a prostitution business. Testimony by undercover police officers that alleged prostitutes had solicited the officers and discussed sexual activities was objected to as hearsay, but the court held that the prostitutes' statements "were [admissible as] part of the transaction constituting the alleged violation." The court also characterized the statements as "verbal acts" and as part of the "res gestae." To the same effect was Wilson v. Von Holt, 25 H. 529 (1920), where the conversation served to explain the purpose and nature of the delivery of a painting. The statements, although perhaps assertive in nature, were an integral part of the transaction and thus acquired a measure of independent legal significance, similar to the words of a contract or a marriage ceremony.

In determining whether or not a statement is offered "to prove the truth of the matter asserted," the proposition sought to be proved by the proponent of the statement must be evaluated. In Kainea v. Kreuger, 31 H. 108 (1929), for example, a predecessor in possession of land had told witnesses that "the property belongs to them." Ownership of the property was very much in question, but the proponent of the statement claimed title through adverse possession, and the statement was offered, not for the truth of the assertion, but rather to show that the declarant had given "notice to the world that the possession which he was holding was hostile to all others." 31 H. at 113. In such cases where statements are offered to show notice, limiting instructions under Rule 105 may be in order.

RULE 801 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment clarifies the definition of "Statement" by substituting "assertion in a writing" for "written assertion". Accordingly, an entire written narrative will not qualify as a single "statement" under Rules 802.1, 803, and 804. The intent is to codify Williamson v. United States, 512 U.S. 594 (1994) (admission of declarant's entire written confession, which contained inculpatory and noninculpatory elements, as a "statement" against interest was erroneous because "statement" means a "single declaration or remark", and the noninculpatory portions of the narrative should have been excluded), and State v. Ortiz, 91 H. 181, 981 P.2d 1127 (1994) (admission of entire transcription of police interview of witness as a prior inconsistent "statement" was erroneous because portions of the narrative were not inconsistent with trial testimony and the trial court should not have viewed the interview "as a single 'statement'"). As

amended, the definition bears resemblance to the definition of "statement" found in Uniform Rules of Evidence Rule 801(a)(3).

Although technically not applicable to the hearsay rules of article 8, Rule 1001(1)'s expansive definition of "writing" may usefully inform the meaning of that term in this rule.

Case Notes

Declarant's statement offered for truth of contents, not for fact that statement was made. 67 H. 499, 692 P.2d 1158 (1985).

Written document, alleged contract, was not hearsay and was properly admitted into evidence by trial court. 10 H. App. 15, 859 P.2d 935 (1993).

Officer's testimony was not hearsay because it did not go to show the truth of the statement, but to establish the basis for the officer's subsequent actions in arresting defendant. 79 H. 175 (App.), 900 P.2d 172 (1995).

Complainant's out-of-court statements not hearsay where offered by State not for their truth, but to show that police had reasonable grounds under §709-906 to issue warning citation which defendant subsequently violated. 82 H. 381 (App.), 922 P.2d 994 (1996).

Where store security manager's testimony regarding the price/value of items, based on a universal price code with the price on the item that the manager verified through the store register system, was inadmissible hearsay, State failed to introduce substantial evidence of the value of the items necessary to support the charged offense of second or third degree theft; however, evidence was sufficient to support conviction of lesser included offense of fourth degree theft. 95 H. 169 (App.), 19 P.3d 752 (2001).

Where exhibit was not authenticated by a citation to a verified source, and without this certification, the document was hearsay and did not fall under any hearsay exception, by applying rules 901 and 902 and this rule, the exhibit was inadmissible and could not be considered by the trial court. 114 H. 56 (App.), 156 P.3d 482 (2006).

In light of the record, where the two hearsay statements under this rule could have been, but was not, validly objected to by defense counsel and excluded from evidence, trial court did not violate a duty not to admit inadmissible hearsay testimony into evidence or a duty to strike inadmissible hearsay testimony after it was admitted into evidence and defendant was not the victim of the trial court's plain error; however, defendant had the right to attempt to prove, in a post-conviction/appeal proceeding pursuant to HRPP rule 40, that defendant's trial

counsel's failure to object to the statements was ineffective assistance of counsel. 120 H. 73 (App.), 201 P.3d 586 (2005).

" **Rule 802 Hearsay rule.** Hearsay is not admissible except as provided by these rules, or by other rules prescribed by the Hawaii supreme court, or by statute. [L 1980, c 164, pt of §1]

RULE 802 COMMENTARY

This rule is identical with Fed. R. Evid. 802, except for the substitution of the phrase "by the Hawaii supreme court or by statute" for the federal rule formulation, "by the Supreme Court pursuant to statutory authority or by Act of Congress," and the addition of a comma after "rules" to increase clarity.

The exclusionary rule does not apply to statements that fall under any of the various hearsay exceptions categorized in Rules 802.1, 803, and 804. Another important limitation to the rule is the provision excepting rules prescribed by the Hawaii Supreme Court. Some examples of this exception are HRCP 4(g), allowing proof of service by affidavit; HRCP 43(e), allowing affidavits on a motion based on facts not appearing of record; HRCP 56, allowing affidavits in summary judgment proceedings; and HRCP 65(b), allowing showing by affidavit for a temporary restraining order.

The Hawaii Supreme Court has frequently and routinely affirmed the truism that hearsay is inadmissible unless it qualifies under a hearsay exception, e.g., State v. Bannister, 60 H. 658, 660, 594 P.2d 133, 134 (1979). The rationale, noted the Bannister court, is that "the trier of fact is unable to test the [declarant's] trustworthiness."

Case Notes

Where store security manager's testimony regarding the price/value of items, based on a universal price code with the price on the item that the manager verified through the store register system, was inadmissible hearsay, State failed to introduce substantial evidence of the value of the items necessary to support the charged offense of second or third degree theft; however, evidence was sufficient to support conviction of lesser included offense of fourth degree theft. 95 H. 169 (App.), 19 P.3d 752 (2001).

" **Rule 802.1 Hearsay exception; prior statements by witnesses.** The following statements previously made by

witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

(1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
  (A) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or
  (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or
  (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement;

(2) Consistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is consistent with the declarant's testimony, and the statement is offered in compliance with rule 613(c);

(3) Prior identification. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, and the statement is one of identification of a person made after perceiving that person; or

(4) Past recollection recorded. A memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. [L 1980, c 164, pt of §1; gen ch 1985; am L 1992, c 191, §2(8)]

RULE 802.1 COMMENTARY

This rule effects a reorganization of certain of the hearsay provisions found in Article VIII of the federal rules. The formulation follows generally the scheme of Cal. Evid. Code in treating all appropriate prior witness statements in a single rule. The federal rules, in contrast, treat certain prior inconsistent statements, prior consistent statements, and prior

identifications as non-hearsay, Fed. R. Evid. 801(d)(1); and place past recorded recollections among the hearsay exceptions for which the availability of the declarant is immaterial, Fed. R. Evid. 803(5).

This rule should be understood in connection with Rule 613, "Prior statements of witnesses." Rule 613(b) governs the use of prior inconsistent statements for impeachment purposes, and Rule 613(c) governs the use of prior consistent statements for rehabilitation purposes. The present rule, in contrast, defines those prior statements by witnesses that may in addition be considered by the trier of fact to prove the truth of the matters asserted, that is, as exceptions to the hearsay ban of Rule 802.

Paragraph (1): At common law all prior inconsistent statements of witnesses were classed as hearsay and thus required instructions limiting consideration to impeachment purposes. Prior Hawaii law was to the same effect, see generally Kekua v. Kaiser Foundation Hosp., 61 H. 208, 601 P.2d 364 (1979). Fed. R. Evid. 801(d)(1)(A) modified the common-law rule to permit one class of inconsistent statements--those "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition"--to be used substantively for the truth of the contents. The present paragraph retains this exempted federal class in paragraph (1)(A) and adds two new classes of inconsistent statements that become exceptions to the hearsay rule, paragraph (1)(B) and (C). The intent is to include in paragraph (1) all written or recorded statements that can fairly be attributed to the witness-declarant. The language of paragraph (1)(A) is virtually identical with Fed. R. Evid. 801(d)(1)(A); the language of paragraph (1)(B) and (C) is borrowed from the federal "Jencks Act," 18 U.S.C. §3500(e)(1) and (2).

The "Jencks Act" governs the production or discovery, in federal criminal trials, of written or recorded statements made to government agents by government witnesses. Subdivision (e)(1) statements are those "signed or otherwise adopted or approved" by a witness. Subdivision (e)(2) statements, although not signed or approved by the witness, are "substantially verbatim" written or recorded accounts of oral statements made "contemporaneously with the making" of the oral statements. The language of subdivisions (e)(1) and (e)(2) is virtually the same as that of paragraph (1)(B) and (C) of the present rule. The purpose of subdivisions (e)(1) and (e)(2) of the Jencks Act, according to the Supreme Court in Palermo v. United States, 360 U.S. 343, 349-52 (1959), is to define the "most trustworthy class of statements" of witnesses to be turned over to the defense for impeachment purposes. Regarding the requirement

that (e)(2) subdivision statements be "substantially verbatim," the court said: "It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available" under the Act. Since the purpose of Congress in writing subdivision (e) of the Jencks Act was similar to the legislative intent in adopting paragraph (1)(B) and (C) of the present rule, the Palermo case and other cases construing the Jencks Act, e.g., Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964), will be helpful in defining the parameters of this rule.

The trustworthiness of statements defined in paragraph (1)(A), (B), and (C) is further assured by the requirement that the witness-declarant be "subject to cross-examination concerning the subject matter of the statement." The situation envisioned is one where the witness has testified about an event and his prior written statement also describes that event but is inconsistent with his testimony. Since the witness can be cross-examined about the event and the statement, the trier of fact is free to credit his present testimony or his prior statement in determining where the truth lies. Because the witness is subject to cross-examination, the substantive use of his prior inconsistent statements does not infringe the sixth amendment confrontation rights of accused in criminal cases, see California v. Green, 399 U.S. 149 (1970).

Paragraph (2): Rule 613(c) identifies three classes of prior consistent statements that are admissible for rehabilitation purposes. The present paragraph permits substantive use of these statements. This is consistent with prior Hawaii law, see State v. Altergott, 57 H. 492, 559 P.2d 728 (1977).

Paragraph (3): The substantive use of prior identifications is allowed in Fed. R. Evid. 801(d)(1)(C), the Advisory Committee's Note to which says: "The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions." Note that this paragraph addresses only the hearsay issue. The use of prior identifications in criminal cases may present constitutional problems as well, see, e.g., Foster v. California, 394 U.S. 440 (1969); Gilbert v. California, 388 U.S. 263 (1967).

Paragraph (4): This paragraph is identical with Fed. R. Evid. 803(5), and it restates the common-law hearsay exception for recorded recollection, see State v. Altergott, 57 H. 492, 559 P.2d 728 (1977).

Law Journals and Reviews

Familial Violence and the American Criminal Justice System. 20 UH L. Rev. 375 (1998).

Case Notes

Composite sketch is hearsay but is admissible under prior identification exception if it complies with rule 802.1(3). 66 H. 254, 659 P.2d 745 (1983).

Prior identification exception allows admission of pretrial identifications not merely as corroborative evidence but as substantive proof of identity. 66 H. 254, 659 P.2d 745 (1983).

Prior identification evidence was properly admitted as substantive proof of identity where identifying witness failed to make in-court identification. 72 H. 573, 827 P.2d 648 (1992).

Abuse victim's prior inconsistent statements met requirements under this section for admissibility as substantive evidence of defendant's guilt. 81 H. 131, 913 P.2d 57 (1996).

Wife's tape recorded statement to detective properly admitted under paragraph (1)(C) and rule 613(b) as substantive evidence of husband's guilt. 83 H. 289, 926 P.2d 194 (1996).

Where witness admitted throughout testimony to having made prior oral inconsistent statements, witness' transcribed interview admitted in violation of paragraph (1) and rule 613(b). 91 H. 181, 981 P.2d 1127 (1999).

Admission into evidence of witness' grand jury testimony under paragraph (4) did not violate defendant's constitutional right to confrontation where witness' testimony was supported by numerous guarantees of trustworthiness and defendant was able to cross-examine witness on witness' subsequent failure to remember alleged incident. 92 H. 61, 987 P.2d 959 (1999).

Admission into evidence of witness' handwritten statement on the bottom of an identification form under paragraph (4) did not violate defendant's constitutional right to confrontation where witness' statement was supported by numerous guarantees of trustworthiness. 92 H. 61, 987 P.2d 959 (1999).

Where prior inconsistent statements were properly admitted under paragraph (1)(C) and witnesses were cross-examined with respect to their statements, substantive use of statements did not violate defendant's constitutional right to confrontation. 92 H. 61, 987 P.2d 959 (1999).

Although recitation by complainant of police report describing the cell phone text messages would have been inadmissible hearsay under paragraph (4) and rule 803(b)(8), where complainant could recall substantial details about the messages prior to reading the report, which suggested that complainant possessed a memory of the messages that only needed refreshment

via the report, complainant properly testified about the text messages after viewing the police report pursuant to rule 612. 117 H. 127, 176 P.3d 885 (2008).

Appeals court correctly concluded that witness' statement was admissible as a past recollection recorded under paragraph (4) where witness testified that witness remembered the incident, that the statement was in witness' writing, contained witness' signature, and that witness wrote the report the day following the incident. 127 H. 91, 276 P.3d 660 (2012).

No merit to State's argument that complainant's videotaped statements were admissible into evidence as exception to hearsay rule under paragraph (2), where complainant was never subjected to cross-examination concerning statements and statements could not be offered into evidence under rule 613(c). 9 H. App. 414, 844 P.2d 1 (1992).

Complainant's prior inconsistent statement inadmissible where record failed to establish that complainant was "subject to cross-examination concerning the subject matter of the statement" pursuant to this rule. 80 H. 469 (App.), 911 P.2d 104 (1996).

Declarant's signed, written prior statement properly admitted under paragraph (1) where statement was offered in compliance with rule 613(b), declarant was subject to cross-examination concerning subject matter of prior statement, and statement was inconsistent with declarant's testimony. 84 H. 203 (App.), 932 P.2d 340 (1997).

An uncorroborated prior inconsistent statement of a family or household member offered under rule 613 and this rule as substantive evidence of the facts stated therein may be sufficient, if believed, to establish physical abuse and the manner in which such abuse was inflicted in a prosecution for physical abuse of a family or household member under §709-906. 84 H. 253 (App.), 933 P.2d 90 (1997).

While the requirement that "the declarant is subject to cross-examination concerning the subject matter of the declarant's statement" is foundational under paragraph (2), it is not a requirement under rule 613(c); thus, while social worker's recounting of the allegation of sexual assault made by victim during an unrecorded interview may not have been admissible for its substance under paragraph (2), it was admissible to rehabilitate the victim's credibility under rule 613(c). 103 H. 373 (App.), 82 P.3d 818 (2003).

Hearsay testimony of officer properly admitted under paragraph (3); there is no requirement that a declarant vouch for the accuracy of a hearsay statement attributed to the declarant in order to qualify as an exception to hearsay under paragraph (3). 104 H. 285 (App.), 88 P.3d 657 (2004).

Where record showed that (1) complainant testified on direct examination about the incidents involving defendant; (2) parts of the testimony were inconsistent with portions of complainant's first statement; (3) complainant admitted on cross-examination that complainant wrote the first statement and signed it; and (4) the prior inconsistent statements were offered in compliance with the foundational requirements of rule 613(b), trial court erred in failing to admit as substantive evidence at trial pursuant to paragraph (1)(B) portions of complainant's first statement that were inconsistent with complainant's testimony at trial. 116 H. 403 (App.), 173 P.3d 550 (2007).

Mentioned: 74 H. 85, 839 P.2d 10 (1992).

" **Rule 803 Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Admissions.

(1) Admission by party-opponent. A statement that is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth.

(2) Vicarious admissions. A statement that is offered against a party and was uttered by (A) a person authorized by the party to make such a statement, (B) the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or (C) a co-conspirator of the party during the course and in furtherance of the conspiracy.

(3) Admission by deceased in wrongful death action. A statement by the deceased, offered against the plaintiff in an action for the wrongful death of that deceased.

(4) Admission by predecessor in interest. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it

would be if offered against the declarant in an action involving that right, title, or interest.

(5) Admission by predecessor in litigation. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

(b) Other exceptions.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Reserved.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or

a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless the circumstances indicate lack of trustworthiness.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. In proving character or a trait of character under rules 404 and 405, reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the exceptions in this paragraph (b) but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse

party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [L 1980, c 164, pt of §1; gen ch 1985; am L 2002, c 134, §4]

RULE 803 COMMENTARY

This rule differs from Fed. R. Evid. 803 in several respects. It eliminates federal rule 803(5), recorded recollection, which is treated in Rule 802.1 supra, and incorporates the general provisions of federal rule 801(d)(2), party admissions, which are treated here, in paragraph (a), as exceptions to the hearsay rule rather than as non-hearsay. In addition, three of the present admission rules, 803(a)(3), (4), and (5), contain hearsay exceptions not found in the federal rules: statements by decedents in wrongful death actions, admissions by predecessors in interest, and admissions by predecessors in litigation. Also, the federal rules formulation of the exception for regularly conducted activity, 803(6), is expanded here to include all forms of regularly conducted activity whose records are regularly and reliably prepared and maintained, rather than just "business activity." Finally, non-substantive changes are effected in Rule 803(b)(21) and (24).

As the title of Rule 803 suggests, the various exceptions to the hearsay ban collected in this rule do not depend upon the present status or whereabouts of the declarant. The rationales for paragraphs (a) and (b) of this rule differ markedly, but the current availability of the declarant as a witness is in all instances immaterial to the question of admissibility. This factor is the principal distinguishing characteristic between this rule and Rule 804 infra.

Paragraph (a): This paragraph includes those statements categorized as "admission[s] by party-opponent[s]" in Fed. R. Evid. 801(d)(2) and several additional categories, paragraph (a)(3), (4) and (5), based upon the Cal. Evid. Code. The subject matter of admissions was recently addressed by the Hawaii Supreme Court in Kekua v. Kaiser Foundation Hosp., 61 H. 208, 217, 601 P.2d 364, 371 (1979): "The extrajudicial statements of a party-opponent, when offered against the same, are universally deemed admissible at trial as substantive evidence of the fact or facts stated." As the Kekua court recognized, there are two conditions of admissibility under this paragraph: (1) that the statement was made by a party to the litigation, and (2) that the statement now be offered against that party. The rationale, according to the Advisory Committee's Note to Fed. R. Evid. 801(d)(2), is that admissions

are "the result of the adversary system.... No guarantee of trustworthiness is required in the case of an admission." In other words, it has always seemed essentially fair to allow the use against a party of his previous statements concerning the subject matter of the current litigation. For this reason, the Advisory Committee's Note commends "generous treatment of this avenue to admissibility."

The adversary justification for admissions serves to explain the absence of any requirement that these statements be against interest when made. The only requirement is that they be relevant, see Rule 401. The Hawaii Supreme Court pointed out in Kekua v. Kaiser Foundation Hosp., supra, 61 H. at 216 n. 3, 601 P.2d at 370 n. 3:

> The expression "admissions against interest" is a misnomer. Appellants have apparently confused "party admissions"... with "statements against interest." [See Rule 804(b)(3) infra.] ... [P]arty admissions, unlike statements against interest, need not have been against the declarant's interest when made, need not be based on the declarant's personal knowledge, may be in the form of an opinion, and are admissible at trial regardless of whether the declarant is unavailable.

Paragraph (a)(1): The "admission by party-opponent" defined in this paragraph is the classic form of an admission, see Kekua v. Kaiser Foundation Hosp., supra; Christensen v. State Farm Mutual Auto Ins. Co., 52 H. 80, 83-84, 470 P.2d 521, 524 (1970). "[A]ny statement made by a party to an action, and which reasonably tends to prove or disprove a material fact in the case, is competent to be put in evidence against him in the trial of that action," Bonacon v. Wax, 37 H. 57, 61 (1945). Statements or confessions made by and offered against accused in criminal cases are actually admissions under this rule, see Territory v. Palakiko, 38 H. 490 (1950).

Regarding adoptive admissions under subparagraph (a)(1)(B), the issue for determination by the court under Rule 104 is whether the party "manifested his adoption or belief" in the truth of a statement made in his presence. Express assent or agreement presents no problem. When, however, will silence constitute adoption of the statement? The Advisory Committee's Note to Fed. R. Evid. 801(d)(2)(B) supplies the answer: "When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior." In other words, statements made in the presence of a person who is now a party are not invariably "adopted" by that person; the issue is whether, in context, the statement was of such a nature that the

person would reasonably have been expected to deny the statement if it were untrue. In criminal cases, "adoptive" admissions by defendants in custody are generally ruled out by Doyle v. Ohio, 426 U.S. 610 (1976); but see State v. Alo, 57 H. 418, 558 P.2d 1012 (1976).

Paragraph (a)(2): The treatment in this paragraph of vicarious admissions by agents, servants, and co-conspirators follows that of Fed. R. Evid. 801(d)(2)(C), (D), and (E). Regarding servants, the common-law criterion was whether the making of the statement was within the scope of the agent's employment. However, "since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement." Fed. R. Evid. 801(d)(2)(D), Advisory Committee's Note. The present rule admits the agent's or servant's statement so long as it concerns "a matter within the scope of his agency or employment."

Hawaii courts have routinely admitted the statements of co-conspirators as admissions against all the members of the conspiracy. "[E]vidence of acts and declarations done or made in furtherance of the common purpose during the existence of the conspiracy, though subsequent to the offense charged, is admissible against all of the conspirators," State v. Yoshino, 45 H. 206, 214, 364 P.2d 638, 644 (1961).

Paragraph (a)(3): This paragraph, admitting statements by decedents in wrongful death actions, is based upon Cal. Evid. Code §1227, which provides the following commentary: "The plaintiff in a wrongful death action ... stands in reality so completely on the right of the deceased ... person that such person's admissions should be admitted against the plaintiff, even though (as a technical matter) the plaintiff is asserting an independent right."

Paragraph (a)(4): This paragraph, governing admissions by predecessors in interest, has a solid foundation in Hawaii case law. "Privity between a declarant and a party renders a declaration of the former admissible against the latter," Tanaka v. Mitsunaga, 43 H. 119, 126 (1959). This rule is similar to Cal. Evid. Code §1225.

Paragraph (a)(5): This paragraph is identical with Cal. Evid. Code §1224, which provides the following commentary:

> Much of the evidence within this section is also covered by [the rule] which makes declarations against interest admissible. However, to be admissible [as a declaration against interest] the statement must have been against the declarant's interest when made; this requirement is not stated in [this rule]....
>
> [This rule] refers specifically to "breach of duty" in order to admit statements of a declarant whose breach of

duty is in issue without regard to whether that breach gives rise to a liability of the party against whom the statements are offered or merely defeats a right being asserted by that party.

Paragraph (b): The exceptions to the hearsay ban collected in this paragraph track the exceptions found in Fed. R. Evid. 803. Both the hearsay rule and the various exceptions involve the issue of trustworthiness of extrajudicial statements. Hearsay, even though relevant, is excluded because its trustworthiness is suspect. Each of the exceptions in this paragraph, however, is thought to be characterized by a degree of trustworthiness and reliability sufficient to warrant admitting the hearsay regardless of the current availability of the declarant. See the Advisory Committee's Note to Fed. R. Evid. 803: "The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." Compare the "unavailability" requirement of Rule 804 infra.

Paragraph (b)(1) and (2): These rules governing the receipt of present sense impressions and excited utterances are identical with Fed. R. Evid. 803(1) and (2). Hawaii courts have admitted excited utterances under the broad aegis of res gestae, see Territory v. Kinoshita, 38 H. 335 (1949). "A declaration to be part of the res gestae need not be strictly contemporaneous with the transaction or event to which it relates; it is enough that it was a spontaneous utterance engendered by the excitement of the main event made immediately after and under the influence of the occurrence and so connected with it as to characterize or explain it." Anduha v. County of Maui, 30 H. 44, 51 (1920). Note, however, that exception (2) requires only that the statement relate to the event, while exception (1) is limited to statements that describe or explain the event.

Both exceptions rely on spontaneity to assure the trustworthiness of the statements. The requirement of contemporaneousness for present sense impressions further assures reliability by precluding errors caused by memory defects. Excited utterances, which need not be strictly contemporaneous, are considered trustworthy because made "under the stress of excitement." As a final safeguard, a statement admitted under either exception will usually have been made to someone present at the event, who would therefore have been in good position to challenge inaccuracies in describing or recounting the event. See McCormick §298.

Paragraph (b)(3): This rule is identical with Fed. R. Evid. 803(3) which, according to the Advisory Committee's Note, is a special application of the present sense impressions exception.

Hawaii courts have recognized this hearsay exception. In Teixeira v. Teixeira, 37 H. 64, 71 (1945), the court observed: "Intentions are purely mental. The condition of a person's mind ... may only be judged by his former acts and conduct.... Of necessity to ascertain his state of mind or his condition of mind at and prior to his performance of the jural act under investigation [an alleged deed of gift], resort may be had to the usual and ordinary human manifestations of intention and of condition of mind, viz., his conduct and statements and declarations made by him in relation to the subject matter involved." The Teixeira court cited approvingly Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), which admitted a direct statement of intent as evidence of the probable future performance of the act intended. The Hillmon rule is also incorporated in exception (3).

If a statement reflects state of mind only circumstantially, e.g., Territory v. Duvauchelle, 28 H. 350 (1925), where a murder victim's statement that his fishpond had been robbed was admitted as evidence of his probable intent to guard the pond, it may be admitted as non-hearsay. See the comment to Rule 801 supra. However, as one authority points out: "[T]here does not seem to be a single practical consequence that may or may not ensue according to whether the evidence is received as original [non-hearsay] or received by way of exception to the hearsay rule," Cross, Evidence 475 (3d ed. 1967).

Paragraph (b)(4): This exception, which is identical with Fed. R. Evid. 803(4), liberalizes the common-law rule that admitted only statements made for the purpose of medical treatment, see, e.g., Cozine v. Hawaiian Catamaran, 49 H. 77, 412 P.2d 669 (1966). Statements made for purposes of treatment are admitted "in view of the patient's strong motivation to be truthful." Fed. R. Evid. 803(4), Advisory Committee's Note. Statements made for diagnostic purposes only, while not similarly motivated, would be recited in any event by a testifying physician under Rule 703. Were these statements not substantively admissible, a limiting instruction would be necessary, and "[t]he distinction thus called for [is] one most unlikely to be made by juries." Advisory Committee's Note, supra. This difficulty is avoided by providing for substantive admissibility of all "reasonably pertinent" statements made for purposes of treatment or diagnosis.

On the question whether a statement is "reasonably pertinent to diagnosis or treatment," the Advisory Committee's Note to Fed. R. Evid. 803(4) suggests: "Thus a patient's statement that

he was struck by an automobile would qualify but not his statement that the car was driven through a red light."

Paragraph (b)(6) and (7): These exceptions are based upon Fed. R. Evid. 803(6) and (7) and a prior statute, Hawaii Rev. Stat. §622-5 (1976) (repealed 1980) (originally enacted as L 1941, c 218, §§1, 2, 3; am L 1972, c 104, §2(e)). However, both the federal rules and the prior Hawaii statute limited admissibility to records of regularly conducted business activities, while the present rule has no such limitation. On the other hand, both the federal rule and the prior statute defined "business" very broadly as including businesses, professions, occupations, and even nonprofit institutions. See, e.g., State v. Torres, 60 H. 271, 589 P.2d 83 (1978) (hospital business). The modification is therefore not a substantial one. In any event, the hallmark of reliability in this area is not the nature of the business or activity but rather its "regularity and continuity which produce habits of precision, [the] actual experience of business in relying upon [the records], [and the] duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803(6), Advisory Committee's Note. A further safeguard is that preliminary determination of the trustworthiness of such records is discretionary with the court.

Hawaii judicial decisions reflect concern with these indicia of trustworthiness rather than with the nature of the "business." In holding inadmissible a series of accident reports based on accounts by bystander witnesses not employed by the institution maintaining the records, the court observed that "an entry based on facts observed and reported by one without a business duty to observe and report such facts is [not] admissible as proof of the facts," Warshaw v. Rockresorts, 57 H. 645, 650, 562 P.2d 428, 433 (1977). In ruling on the admissibility of a police report of a burglary complaint, the court held that it could be offered as a business record but only as proof that such a complaint had been made, not as proof of the correctness of facts reported in the complaint. Territory v. Makaena, 39 H. 270 (1952). These decisions are unaffected by the new rule. However, whenever a record is characterized by indicia of trustworthiness, the courts have consistently admitted it as substantive evidence. In State v. Ing, 53 H. 466, 497 P.2d 575 (1972), the court held that records of the routine and regular testing of the speedometers on police vehicles were admissible not only to prove that such tests had been made but also as evidence of the accuracy of the speedometers. So long as all informants act pursuant to a business duty, the fact that a record may contain multiple

hearsay does not affect its admissibility under this rule, compare Warshaw v. Rockresorts, supra.

Although the absence of an entry in a record is not, in and of itself, a "statement ... offered in evidence to prove the truth of the matter asserted," and is therefore technically not hearsay, it does present the issue of the correlation between non-entry in the record and nonoccurrence of the event. Most authorities have therefore treated the non-entry as a direct hearsay issue, and exception (7) resolves the problem.

Paragraph (b)(8), (9), and (10): The Advisory Committee's Note to Fed. R. Evid. 803(8) states: "Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." This justification is equally applicable to exceptions (8), (9), and (10), which are identical with Fed. R. Evid. 803(8), (9), and (10). In most instances, reliability is further assured by the same factors that justify admission under exceptions (6) and (7).

Traditional common law doctrine has consistently recognized the admissibility of public records under a hearsay exception, predicated on the same general indicia of reliability and trustworthiness as for business records, see, e.g., Rex v. Lenehan, 3 H. 714 (1876), holding that the official record of the issuance of a liquor license was admissible as proof that the license was issued. More recently the courts have tended to admit public records under the broad aegis of the business records statute, see, e.g., State v. Ing, 53 H. 466, 497 P.2d 575 (1972), holding police department speedometer test records admissible under a business records exception.

Paragraph (b)(8)(C), dealing with evaluative reports, clarifies a point about which the common-law cases were divided, see the Advisory Committee's Note to Fed. R. Evid. 803(8)(C). The Note suggests: "Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation.... (2) the special skill or experience of the official.... (3) whether a hearing was held and the level at which conducted.... (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109 (1943). Others no doubt could be added."

Exception (9) is mostly a specialized application of exception (8). The informant, if not a public official himself, is usually a physician or clergyman who reports the statistic pursuant to a legal duty. It is consistent with Hawaii Rev. Stat. §338-12 (1976), providing that vital statistics records "shall be prima facie evidence of the facts therein stated." And see Republic v. Waipa, 10 H. 442 (1896), holding that a marriage certificate was admissible to prove the fact of the

marriage of the defendant, even in the absence of proof of the actual marriage ceremony.

Exception (10) is in all respects analogous to exception (7).

Paragraph (b)(11) and (12): These exceptions are quite similar to exception (6), relating to records of regularly conducted activities, except that exception (11) "contains no requirement that the informant be in the course of the activity." Fed. R. Evid. 803(11), Advisory Committee's Note.

In Uuku v. Kaio, 21 H. 710, 723 (1913), the court noted: "[T]he facts of baptism and membership in a religious body are often recorded, with accompanying explanatory notes relating to parentage and date of birth, on books maintained for the purpose by the religious body. It is common practice for those preparing the proofs on issues of Hawaiian pedigree to inquire at the churches, or other headquarters of the religious organizations, for such records and to examine them when found for the desired information."

Paragraph (b)(13): This exception is identical with Fed. R. Evid. 803(13), and is consistent with previous Hawaii case law, see Uuku v. Kaio, 21 H. 710, 715 (1913) (leaves from a family Bible).

Paragraph (b)(14): Identical with Fed. R. Evid. 803(14), this rule accords with Hawaii Rev. Stat. §502-82 (1976), which similarly provides that "[t]he record of an instrument ... may also be read in evidence, with like force and effect as the original instrument." See also Hong Quon v. Chea Sam, 14 H. 276 (1902), which held that the record of a title deed, and the certified copy of that record, were admissible in evidence even though they were in conflict with the express terms of the original certificate of title. The Hawaii court has also affirmed the liberal rule that the fact of recordation constitutes independent prima facie evidence of delivery of title. Boteilho v. Boteilho, 58 H. 40, 564 P.2d 144 (1977).

Paragraph (b)(15): This exception is identical with Fed. R. Evid. 803(15). The general circumstances under which documents of conveyance and similar instruments are usually executed provide a strong circumstantial guarantee of trustworthiness, justifying the admissibility under a hearsay exception of facts contained in them. In Apo v. Dillingham Investment Corp., 57 H. 64, 549 P.2d 740 (1976), the court expressly cited Fed. R. Evid. 803(15) as persuasive authority for substantive admission of pedigree statements in a deed as proof of family relationship.

Paragraph (b)(16): This exception, which is identical with Fed. R. Evid. 803(16), accords generally with the common law rule admitting ancient documents as substantive evidence. However, it liberalizes the conventional requirement that the document be at least 30 years old. As the exception suggests,

ancient documents offer the dual issue of admissibility of content under a hearsay exception and authentication of the document as a whole. The hearsay exception, therefore, is made conditional upon the foundation requirement of authentication. See Rule 901(b)(8) infra. The Advisory Committee's Note to Fed. R. Evid. 803(16) suggests: "As pointed out in McCormick §298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy."

Paragraph (b)(17): This exception is identical with Fed. R. Evid. 803(17). See 6 Wigmore, Evidence §1704 (Chadbourn rev. 1976); Virginia v. West Virginia, 238 U.S. 202 (1915). The rationale for the exception is the high probability of trustworthiness of such compilations, the reliance accorded them, and the motivation of the compiler to achieve a high level of accuracy.

Paragraph (b)(18): This exception, which is identical with Fed. R. Evid. 803(18), should be read in connection with Rule 702.1(b), relating to the cross-examination of expert witnesses.

Despite the circumstantial guarantee of the trustworthiness of such evidence provided by the high standards of accuracy customarily required in the learned professions, an unqualified rule of admissibility poses certain dangers. In the absence of expert interpretation, explanation, or qualification, a lay jury might misinterpret, misapply, or give excessive weight to evidence of this nature. Consistent with the position adopted in the federal rules, this exception safeguards against these hazards by limiting substantive use of treatises to situations in which an expert is on the stand.

The Hawaii courts have closely adhered to the strict common law limitation on the use of treatises and technical materials, holding them inadmissible in the absence of an expert witness subject to cross-examination, Sherry v. Asing, 56 H. 135, 157-58, 531 P.2d 648, 663 (1975), and admitting them only for the purpose of testing the qualifications of expert witnesses, Tittle v. Hurlbutt, 53 H. 526, 497 P.2d 1354 (1972), or for impeaching them on cross-examination, Fraga v. Hoffschlaeger, 26 H. 557 (1922). This rule thus modifies prior case law, see Fraga v. Hoffschlaeger, supra, which precluded any substantive use of learned texts or treatises. The previously required limiting instruction called for a distinction of great subtlety and questionable merit. It is difficult to conceive how a statement from an authoritative treatise can be used either to support or to impeach the credibility of an expert witness absent the corollary assumption that it is substantively accurate. The present exception eliminates that logical

inconsistency while avoiding the hazards implicit in uncontrolled admissibility of such evidence.

The issue of the reliability of the authority or treatise is for the court under Rule 104.

Paragraph (b)(19): This exception is identical with Fed. R. Evid. 803(19). Admissibility of reputation evidence of pedigree and family history is one of the most venerable of the common law hearsay exceptions. In Whittit v. Miller, 1 H. 82 (139) (1852), the court recognized that the fact of a marriage could be proved by reputation evidence. In Helekahi v. Laa, 32 H. 1, 6-7 (1931), the court said: "It is definitely settled that a member of a family may testify to its ramifications based on family history and tradition handed down to him by his ancestors or by his collaterals."

Paragraph (b)(20): This exception is identical with Fed. R. Evid. 803(20). The admission of reputation evidence of land boundaries and events of general history as an exception to the hearsay rule has a firm foundation in traditional common law.

In Hawaii this form of reputation evidence, especially as it applies to property disputes, has been accorded judicial approbation and admitted as "kamaaina testimony." Based upon judicial recognition that Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice, and usage, Keelikolani v. Robinson, 2 H. 514 (1862), the courts have admitted and given great weight to "kamaaina testimony." The term itself was apparently first judicially used and expressly defined in In re Boundaries of Pulehunui, 4 H. 239, 245 (1879):

> We use the word "kamaaina" above without translation in our investigation of ancient boundaries, water rights, etc. A good definition of it would be to say that it indicates ... a person familiar from childhood with any locality.

More recently, the Hawaii Supreme Court held: "In this jurisdiction it has long been the rule ... to allow reputation evidence by kamaaina witnesses in land disputes...." Application of Ashford, 50 H. 314, 440 P.2d 76 (1968).

The present exception incorporates the Hawaii common law principle of kamaaina testimony as it applies to land disputes and extends it further to "events of general history." Such an extension of the rule is justified by the same circumstantial assurances of trustworthiness as those applicable to testimony relevant to land issues.

Paragraph (b)(21): This exception adds to Fed. R. Evid. 803(21) the phrase, "In proving character or a trait of character under Rules 404 and 405," to make it clear that this rule does not confer independent grounds for admissibility of reputation/character evidence but rather simply overcomes the hearsay objection when relevance is established under Rule 404.

Paragraph (b)(22): This exception is identical with Fed. R. Evid. 803(22), the Advisory Committee's Note to which says: "[The common law decisions] manifest an increasing reluctance to reject in toto the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it ... it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision."

Prior Hawaii law was consistent with this rule, see Asato v. Furtado, 52 H. 284, 474 P.2d 288 (1970); Territory v. Howell, 25 H. 320, 323 (1920). This rule does not confer admissibility upon judgments of conviction. Relevance and Rule 403 considerations must always be taken into account.

Paragraph (b)(23): This exception is identical with Fed. R. Evid. 803(23), the Advisory Committee's Note to which points out: "[T]he process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation."

To the extent that In re Estate of Cunha, 49 H. 273, 414 P.2d 925 (1966), is to the contrary, see Advisory Committee's Note to Fed. R. Evid. 803(23), its result is superseded by this rule.

Paragraph (b)(24): This exception is similar to Fed. R. Evid. 803(24). Consistent with the overall purpose expressed in Rule 102 of "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined," this exception provides for a measure of controlled flexibility in the judicial determination of what evidence should be admissible under this class of hearsay exceptions. The exception is not designed to open the door widely for otherwise inadmissible evidence; and to safeguard against abuse the requirements of trustworthiness and a high degree of relevance circumscribe the exercise of judicial discretion. Finally, the requirement for prior notification to the adverse party provides a protection against both excessive liberalization and unfair surprise.

RULE 803 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment expands and simplifies the means of establishing foundation requirements for the hearsay exception for records of regularly conducted activity, Rule 803(b)(6). Previously, the rule required that the foundation elements be established testimonially by the "custodian [of the records] or other qualified witness". This is a cumbersome process that the 2002 amendment alleviates by

contemplating a written certification as substitute for the viva voce record keeper. The modification comports with a recent amendment to Fed. R. Evid. Rule 803(6). The certification can be self-authenticating, Rule 902(11).

Rules of Court

Proof of official record, see HRCP rule 44.

Law Journals and Reviews

Chief Justice Moon's Criminal Past. 33 UH L. Rev. 755 (2011).

Case Notes

Absence of entry in regularly conducted activity records.

The circuit court did not abuse its discretion in determining that moped company owner's testimony regarding the lack of a rental contract was admissible under subsection (b)(7) where the court determined that the company's records bore the indicia of trustworthiness; owner testified that the records were printed with sequential numbers, the contracts dated near the time of defendant's apprehension were in sequential order and all accounted for, but that there was no contract for defendant's moped. 125 H. 417 (App.), 263 P.3d 127 (2011).

Admissions.

Statement not admissible as one against interest because there was no circumstantial guarantee of its trustworthiness. 67 H. 499, 692 P.2d 1158 (1985).

Officer's testimony regarding defendant's silence following incriminatory statement by unidentified person was inadmissible under adoptive admission exception of rule 803(a)(1). 73 H. 41, 828 P.2d 805 (1992).

A defendant need not be charged with conspiracy to admit a statement made against defendant under co-conspirator hearsay exception; circuit court not clearly erroneous in finding that co-defendant's statements were made in the course and furtherance of a conspiracy with defendant to illegally burn down nightclub for profit. 76 H. 148, 871 P.2d 782 (1994).

Plaintiff's proffer of evidence was sufficient to justify trial court's preliminary determination under rule 104 and paragraph (a)(2)(C) of the existence of conspiracies and admission of out-of-court statements where statements of other witnesses taken in context with statements of alleged co-conspirators supported allegations of a conspiracy. 89 H. 91, 969 P.2d 1209 (1998).

Where trial court did not make an adequate preliminary determination as to whether defendant had adopted relatives' statements as defendant's own and defendant's nonverbal reaction was so ambiguous that it could not reasonably be deemed sufficient to establish that defendant manifested such an adoption, evidence of statements lacked proper foundation, constituted irrelevant and inadmissible hearsay and were thus erroneously admitted. 92 H. 161, 988 P.2d 1153 (1999).

Whether a defendant has manifested an adoption of or belief in another's statement under paragraph (a)(1)(B) is a preliminary question of fact for the trial judge under rule 104(a). 92 H. 161, 988 P.2d 1153 (1999).

Where cell phone text messages qualified as statements offered by the State against defendant to show defendant's history of threats against the complainant, the messages were admissions by a party-opponent under paragraph (a)(1); thus, the actual text messages were admissible as an exception to hearsay under paragraph (a)(1), and complainant's testimony about the text messages were admissible because the text messages themselves were admissible under the exception for party admissions. 117 H. 127, 176 P.3d 885 (2008).

Although trial court erred in concluding that the admissibility of petitioner’s statement regarding having “made a big mistake” was governed by rule 409.5, and also erred by excluding the preceding words “I’m so sorry”, because those words explained the context of the “mistake” comment, the error was harmless beyond a reasonable doubt in light of petitioner’s testimony explaining the statement, and the statement was relevant and admissible as a party admission under paragraph (a)(1). 126 H. 460, 272 P.3d 1227 (2012).

Trial court did not err in allowing co-defendant/witness' testimony to be used against defendant as a defendant cannot prevent a witness from testifying as to what the witness heard defendant say simply because such testimony might force the defendant to take the stand to explain those statements. 104 H. 517 (App.), 92 P.3d 1027 (2004).

Where defendant did not include on witness list the physician as an expert witness to be called at trial and represented to the trial court at the pretrial conference that defendant would not call the physician at trial, physician's report did not fall under paragraph (a)(2)(A) as a vicarious admission by a person authorized by the party to make such a statement and report was thus inadmissible. 108 H. 89 (App.), 117 P.3d 821 (2005).

Where there was nothing in the record to suggest that defendant controlled physician in the performance of physician's medical examination of plaintiff, trial court could not have found that physician was an agent of defendant; thus, record did

not support, and trial court erred in admitting physician's report under paragraph (a)(2)(B) as a vicarious admission by a party's agent. 108 H. 89 (App.), 117 P.3d 821 (2005).

Excited utterances.

Declarant's statement not excited utterance where record indicated it was not spontaneous nor was it generated by an excited feeling extending without letup from the event described. 67 H. 499, 692 P.2d 1158 (1985).

Child relating events which occurred at least a half a day later was not an excited utterance; lay testimony on credibility, discussed. 70 H. 32, 761 P.2d 299 (1988).

Alleged victim's statements to police in family abuse case were inadmissible as excited utterances. 72 H. 469, 822 P.2d 519 (1991).

Police officer's testimony improperly admitted where declarant's statement to police not reasonably contemporaneous with event; testimony of declarant's father regarding declarant's out of court statement properly admitted under exception. Appellant's right to confrontation under article I, §14 of Hawaii constitution violated where prosecution failed to issue trial subpoena to declarant and failed to make a showing of declarant's unavailability. 74 H. 343, 845 P.2d 547 (1993).

A "very short" time interval between a startling event and an excited utterance, although a factor in the determination, is not a foundational prerequisite to admissibility of a statement under paragraph (b)(2). 82 H. 202, 921 P.2d 122 (1996).

Statement by shooting victim was made while victim was still under the stress of excitement caused by the shooting though shooting had occurred within the previous half hour; statement thus admissible. 82 H. 202, 921 P.2d 122 (1996).

Given violent nature of startling event and life-threatening nature of wife's injuries, wife's statements to police and medical personnel were made while under stress of excitement and were not product of reflective thought; statements were thus admissible as substantive evidence of husband's guilt without a limiting instruction. 83 H. 289, 926 P.2d 194 (1996).

Where the particularized and comprehensive nature of complaining witness' statement, made in response to questioning by police, exceeded a "truly spontaneous outburst", and the statement was detailed, logical and coherent, involving a lengthy narrative of the events of an entire evening, the statement was not delivered while complainant was still "under the stress of excitement"; thus, trial court erred in admitting statement under the excited utterance exception to the hearsay rule under paragraph (b)(2). 109 H. 445, 127 P.3d 941 (2006).

Looking at the totality of the circumstances, complainant's second statement was not admissible as an excited utterance where the prosecution failed to lay adequate foundation that the statement was not the product of reflective thought; although the incident was violent and the complainant was crying and appeared upset, the prosecution failed to adduce evidence regarding when the complainant made the statement, the "nature and circumstances" of the statement, and the testifying officer may have summarized a lengthy narrative rather than reiterating a discrete statement. 124 H. 130, 238 P.3d 162 (2010).

Officer's testimony regarding complainant's statement that "my boyfriend beat me up" qualified as an excited utterance because of the violent nature of the event, the short period of time between the incident and the officer's arrival, and the complainant's physical and mental state; also, the statement did not summarize a longer conversation, and the totality of circumstances indicated that complainant's statement was made under the stress of excitement. 124 H. 130, 238 P.3d 162 (2010).

Child's statement to parent detailing rape and sexual abuse made ten days after event occurred is not part of the res gestae. 2 H. App. 643, 639 P.2d 413 (1982).

Victim's statements to police in family abuse case were admissible as excited utterances. 8 H. App. 238, 798 P.2d 908 (1990).

Victim's statement that victim did not have a gun admissible under this exception where statement made while victim under stress of excitement caused by imminent threat of death and statement was related to the "startling event" of facing death. 84 H. 203 (App.), 932 P.2d 340 (1997).

Where victim's statements to 911 operator were made in the midst of being chased and rammed by a car carrying three large males whom victim believed were trying to kill victim, statements easily satisfied the requirements of paragraph (b)(2) and were thus admissible; the fact that some of the victim's statements were made in response to questions by the 911 operator did not prevent them from qualifying as excited utterances. 106 H. 517 (App.), 107 P.3d 1190 (2005).

Judgment of previous conviction.

Prohibition against admitting nolo contendere convictions under paragraph (b)(22) not applicable when offered to prove fact of previous conviction, not the facts supporting and sustaining previous conviction. 83 H. 507, 928 P.2d 1 (1996).

Learned treatises.

Trial court did not err in declining to reopen the direct testimony of physician, who was not identified as an expert witness in the medical malpractice case, to allow plaintiffs to introduce medical articles where physician did not testify that physician relied on any of the articles to assess patient's condition and there was nothing in the record to indicate that the articles were called to the attention of the expert witness upon cross-examination or relied upon by the witness in direct examination. 119 H. 136 (App.), 194 P.3d 1098 (2008).

Present sense impression.

Victim's statement that victim did not have a gun admissible under this exception where statement described victim's condition of being unarmed and statement was made in substantial contemporaneity of condition. 84 H. 203 (App.), 932 P.2d 340 (1997).

Public records.

Officer's testimony regarding declarant's statements in police form not admissible under paragraph (b)(8)(C). 83 H. 472, 927 P.2d 1355 (1996).

Redacted judgment of defendant's previous nolo contendere conviction for first degree burglary was admissible under this exception. 83 H. 507, 928 P.2d 1 (1996).

Affidavits of county administrator of leasehold conversion program fell under the public records and reports exception of paragraph (b)(8)(C) where they were a data compilation by a public agency, and the findings they set forth are purely factual, and resulted from a detailed inquiry that the agency undertook. 110 H. 39, 129 P.3d 542 (2006).

Although recitation by complainant of police report describing the cell phone text messages would have been inadmissible hearsay under rule 802.1(4) and paragraph (b)(8), where complainant could recall substantial details about the messages prior to reading the report, which suggested that complainant possessed a memory of the messages that only needed refreshment via the report, complainant properly testified about the text messages after viewing the police report pursuant to rule 612. 117 H. 127, 176 P.3d 885 (2008).

In DUI case, information on log showing breath-testing instrument had been tested for accuracy was admitted under public records and reports exception under (b)(8)(B). 9 H. App. 130, 828 P.2d 813 (1992).

Where sworn statements made by police intoxilyzer supervisor admitted into evidence pursuant to this rule as public records could not be considered "testimonial" hearsay, the statements were not subject to the requirements of the Sixth Amendment;

thus, no showing of the supervisor's unavailability nor a prior opportunity for cross-examination was required prior to admission. 114 H. 396 (App.), 163 P.3d 199 (2007).

Records of regularly conducted activity.

State did not establish a sufficient foundation to admit speed check card as a business record under paragraph (b)(6) where record did not (1) include a certification that complies with HRE rule 902(11) or other statute permitting certification, (2) reflect that officer was testifying as a custodian of the speed check card, or (3) officer's testimony did not adequately establish that there were other indicia of reliability. 122 H. 354, 227 P.3d 520 (2010).

The admission into evidence, as a business record under paragraph (b)(6), of a speed check card for which a proper foundation was established, would not have violated defendant's Sixth Amendment rights; the speed check card was created in a non-adversarial setting in the regular course of maintaining the officer's vehicle five months prior to the alleged speeding incident and was therefore non-testimonial in nature. 122 H. 354, 227 P.3d 520 (2010).

When an entity incorporates records prepared by another entity into its own records, they are admissible as business records of the incorporating entity provided that it relies on the records, there are other indicia of reliability, and the requirements of paragraph (b)(6) are otherwise satisfied. 122 H. 354, 227 P.3d 520 (2010).

Where officer testified that speed check cards were created with the understanding that they would be used in prosecuting speeding cases, the card at issue in the case was created in a non-adversarial setting about five months prior to the alleged speeding incident and was not created for the specific purpose of prosecuting defendant, the circumstances of the speed check cards' creation did not preclude its admission as a business record under paragraph (b)(6). 122 H. 354, 227 P.3d 520 (2010).

Reputation.

Officer's testimony regarding Ewa boundary of Honolulu district, being probative of facts establishing venue under §701-114, was relevant and admissible under paragraph (b)(20). 80 H. 297, 909 P.2d 1112 (1995).

Testimony of others regarding their observation and knowledge is not reputation testimony. 4 H. App. 584, 671 P.2d 1025 (1983).

Statements for purposes of medical diagnosis or treatment.

Defendant's videotaped reenactment of defendant's role in the events of the day of the murder, upon which psychologist relied for the purpose of diagnosing defendant and which psychologist testified was "good practice" in the field of forensic psychology, qualified as an exception under paragraph (b)(4). 99 H. 542, 57 P.3d 467 (2002).

Statements in ancient documents.

Where statement by son in 1872 lease that son had received the parcel of land from his father was in a document affecting an interest in property, the statement asserted the son's right to transfer the interest in that property, the lease was dated more than twenty years prior to the initiation of this case, and the authenticity of the lease was not disputed, under paragraph (b)(15) and (16), the lease was admissible as an exception to the hearsay rule. 114 H. 56 (App.), 156 P.3d 482 (2006).

Statements in documents affecting interest in property.

Circuit court did not abuse its discretion in considering recitals in deed pursuant to paragraph (b)(15); circumstances did not indicate a lack of trustworthiness regarding statement in deed. 76 H. 402, 879 P.2d 507 (1994).

Where statement by son in 1872 lease that son had received the parcel of land from his father was in a document affecting an interest in property, the statement asserted the son's right to transfer the interest in that property, the lease was dated more than twenty years prior to the initiation of this case, and the authenticity of the lease was not disputed, under paragraph (b)(15) and (16), the lease was admissible as an exception to the hearsay rule. 114 H. 56 (App.), 156 P.3d 482 (2006).

State of mind.

Declarant's out-of-court statements properly admitted where relevant to prove defendant's motive to kill girlfriend who wanted to leave relationship. 79 H. 468, 903 P.2d 1289 (1995).

Error to admit complainant's statement that complainant feared being beaten up by boyfriend if complainant was seen talking to officer since most likely inference to be drawn from that statement was that assault by defendant occurred to cause that fear. 80 H. 469 (App.), 911 P.2d 104 (1996).

Other exceptions.

Extra-judicial statements offered to explain officer's conduct during investigation, but not for their truth. 64 H. 232, 638 P.2d 335 (1981); 2 H. App. 633, 638 P.2d 866 (1982).

Evidence properly admitted under "other exceptions". 4 H. App. 222, 665 P.2d 165 (1983).

" **Rule 804 Hearsay exceptions; declarant unavailable.** (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying. Determination of unavailability as a witness pursuant to this rule does not affect the opponent's right, under rule 806, to call and to cross-examine the declarant concerning the subject matter of any statement received in accordance with this rule.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered;

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death;

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so

far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared;

(5) Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear;

(6) Statement by child. A statement made by a child when under the age of sixteen, describing any act of sexual contact, sexual penetration, or physical violence performed with or against the child by another, if the court determines that the time, content, and circumstances of the statement provide strong assurances of trustworthiness with regard to appropriate factors that include but are not limited to: (A) age and mental condition of the declarant; (B) spontaneity and absence of suggestion; (C) appropriateness of the language and terminology of the statement, given the child's age; (D) lack of motive to fabricate; (E) time interval between the event and the statement, and the reasons therefor; and (F) whether or not the statement was recorded, and the time, circumstances, and method of the recording. If

admitted, the statement may be read or, in the event of a recorded statement, broadcast into evidence but may not itself be received as an exhibit unless offered by an adverse party;

(7) Forfeiture by wrongdoing. A statement offered against a party that has procured the unavailability of the declarant as a witness;

(8) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [L 1980, c 164, pt of §1; gen ch 1985; am L 1993, c 198, §1(3); am L 2002, c 134, §5]

RULE 804 COMMENTARY

This rule differs from Fed. R. Evid. 804 in several respects. It omits from Rule 804(a)(5) a parenthetical phrase which would have required a good faith effort to depose witnesses as a requirement for a determination of unavailability under the dying declaration, declaration against interest, and declaration of pedigree exceptions. Rule 804(b)(1), dealing with former testimony, is considerably broader than its federal counterpart. Rule 804(b)(2), concerning "dying declarations," is slightly broader than its federal counterpart. The rule also adds subsection (b)(5), providing for the admissibility of statements of recent perceptions.

The scheme of this rule is that the exceptions collected in subsection (b) all depend upon a foundation requirement that the hearsay declarant be "unavailable" as that term is defined in subsection (a). The underlying theory of the Rule 804 exceptions to the hearsay ban is that they possess a degree of reliability which, while not necessarily as high as that characterizing the Rule 803(b) exceptions, justifies admission of declarants' statements provided the declarants cannot be

produced to testify. As the Advisory Committee's Note to Fed. R. Evid. 804 puts it, "The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."

Subsection (a): This subsection provides a consistent standard of "unavailability" for the purpose of determining admissibility of hearsay declarations under any of the exceptions defined in subsection (b). Traditional common law varied unavailability requirements according to the category of the hearsay exception. See generally McCormick §253. "However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform...." Fed. R. Evid. 804(a), Advisory Committee's Note.

Hawaii courts have demanded unavailability of the declarant as the basis for admission of some classes of hearsay testimony. In Tsuruda v. Farm, 18 H. 434, 437 (1907), the court admitted the former testimony of an unavailable witness, based on what the court termed the "principle of necessity." The court noted also that unavailability of a witness "may result from his death, his absence from the jurisdiction, his disappearance and inability to find him, his illness, infirmity, age or official duty preventing his attendance, insanity, loss of memory, speech or sight or disqualification by infamy," id. at 438. See also, Levy v. Kimball, 51 H. 540, 465 P.2d 580 (1970), holding that, in a civil case, the former testimony of a declarant located in New York at the time of trial was properly admitted because the witness was "without our jurisdiction" and hence unavailable under the Tsuruda rule. HRCP 32(a)(3)(B), defining "unavailability" in connection with the use of depositions in civil cases, specifies that a deponent is unavailable if he "resides on an island other than that of the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition." It is intended that the phrase "unable to procure his attendance by process or other reasonable means" in subsection (a)(5) of the present rule be construed in civil cases to allow a finding of unavailability where the declarant of an 804(b) statement resides on another island and the proponent demonstrates that procuring attendance of the declarant would work undue financial hardship, considering the personal circumstances of the proponent and the amount in controversy in the case.

Subsection (a)(5) of this rule also rejects the additional Fed. R. Evid. requirement that an effort be made to depose the declarant as a precondition to admissibility under exceptions in

804(b)(2), (3) and (4). This variation is justified on several grounds. Foremost, the pivotal issue in determination of hearsay admissibility is that of trustworthiness, see State v. Leong, 51 H. 581, 465 P.2d 560 (1970); and the deposition requirement does not relate to the circumstantial indicia of trustworthiness and reliability which characterize the hearsay exceptions. A pedigree declaration, for example, which lacks the requirement of personal knowledge, will scarcely be bolstered by a deposition. In addition, depositions are costly, time-consuming, and in many instances impractical. Depositions cannot be freely taken in criminal cases, see HRCrP 15(a). In any event, the parties are not precluded from taking depositions in appropriate circumstances under HRCP 30 and 31 and HRCrP 15.

In criminal proceedings, the determination of unavailability of a declarant raises constitutional issues. The right of an accused under the Sixth Amendment to the U.S. Constitution and Article I, §14, of the Hawaii Constitution, to confront and to cross-examine witnesses against him mandates a more rigorous showing of unavailability in criminal proceedings than in civil litigation. The Hawaii Supreme Court in State v. Adrian, 51 H. 125, 453 P.2d 221 (1969), and State v. Kim, 55 H. 346, 519 P.2d 1241 (1974), ruled that the mere absence of a witness from the state was an insufficient showing of unavailability to dispense with the defendant's right of confrontation. In Kim, the court held that the prosecution must establish, as a precondition to admission of the former testimony of an absent witness, "a good faith effort to ascertain the actual location of the witness, and thereafter, if necessary, [an] attempt to compel the witness' attendance at trial through use of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," 55 H. at 350, 519 P.2d at 1244. The Uniform Act referred to by the court is found in Hawaii Rev. Stat. ch 836 (1976). See also State v. Faafiti, 54 H. 637, 513 P.2d 697 (1973), in which the court ruled that this heightened standard of proof of unavailability had been met. The relevant federal decisions are Berger v. California, 393 U.S. 314 (1969), and Barber v. Page, 390 U.S. 719 (1968). In all cases the question of "unavailability" is addressed to the court under Rule 104.

Subsection (b): The general level of trustworthiness of Rule 804(b)'s exceptions is thought to be inferior to that of those classified in Rule 803(b) but sufficiently superior to hearsay generally to justify receipt of the evidence provided the declarant is unavailable. Therefore, each of the following exceptions depends upon a preliminary determination that "the declarant is unavailable" under subsection (a).

Subsection (b)(1): This provision differs markedly from Fed. R. Evid. 804(b)(1), which admits former testimony only "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The present rule is taken from the U.S. Supreme Court's 1972 proposal for federal rule 804(b)(1), see 28 App. U.S. Code Service, App. 6 (1975).

The only reason given by the House Judiciary Committee for its substitution of current Fed. R. Evid. 804(b)(1) for the Supreme Court's proposed rule was "that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." The present rule rejects this reasoning because: (1) none of the other exceptions in this subsection involves any cross-examination at all; and (2) the House objection does not relate to the trustworthiness and necessity factors which underlie the 804(b) exceptions generally. Former testimony and depositions, it should be remembered, necessarily involve testimony under oath subject to cross-examination, and the trustworthiness is assured by the requirement that the previous party had "motive and interest similar to those of the party against whom now offered." Present Rule 804(b)(1) assures at least as much trustworthiness as do the other exceptions in this subsection.

The present rule governs the use of testimony taken at former trials, preliminary hearings, and other like proceedings, and the use of depositions generally. Depositions of parties to the litigation may be usable as admissions under Rule 803(a)(1); as to other deponent-declarants, the requirement of unavailability and the conditions of this exception govern.

The Hawaii cases have sustained admission of depositions and former testimony on a showing of unavailability, see Levy v. Kimball, 51 H. 540, 465 P.2d 580 (1970); Kono v. Auer, 51 H. 273, 458 P.2d 661 (1969); Tsuruda v. Farm, 18 H. 434 (1907). In criminal cases the use of former testimony against the accused entails consideration of the requirements of State v. Kim, supra, Commentary to Rule 804(a).

Subsection (b)(2): This exception is similar to Fed. R. Evid. 804(b)(2), the intent of which is to abolish the common-law requirement that the exception be limited to the statements of victims in homicide prosecutions. As the Advisory Committee's Note to Fed. R. Evid. 804(b)(2) points out: "While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases." Regarding that theory, the Note recognizes that the "original religious

justification" may have diminished over the years, but asserts the rather common belief that "it can scarcely be doubted that powerful psychological pressures are present." The federal rule, however, bars the use of dying declarations in criminal cases not involving homicide, a limitation rejected in the present rule.

Hawaii cases are Territory v. Buick, 27 H. 28, 54 (1923); Provisional Government of the Hawaiian Islands v. Hering, 9 H. 181 (1893).

Subsection (b)(3): This exception is identical with Fed. R. Evid. 804(b)(3).

The present rule rejects the traditional common law limiting declarations against interest to statements that adversely affected the pecuniary or proprietary interest of the declarant. Statements against penal interest, ordinarily not admissible at common law, are included in this rule, as are statements that "render invalid a claim by [the declarant] against another." The qualification, addressed to the court under Rule 104, is that "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true."

Although the majority of jurisdictions still cling to the traditional limitation, a few states have extended it either by statute or by judicial decision. See McCormick §§277 and 278. The same logic that supports the assumption of trustworthiness for statements against pecuniary or proprietary interest applies to statements against penal interest: no reasonable man would likely make such a statement if it were untrue.

Statements against interest should be sharply distinguished from party admissions, see Rule 803(a) supra, which need not be against interest when made. This distinction was recognized by the Hawaii Supreme Court in Kekua v. Kaiser Foundation Hosp., 61 H. 208, 216 n. 3, 601 P.2d 364, 370 n. 3 (1979), and in State v. Leong, 51 H. 581, 587, 465 P.2d 560, 564 (1970). See the commentary to Rule 803(a). Leong also anticipated the present rule and extended the present hearsay exception to include statements against penal interest.

The Leong court, in holding admissible a statement against penal interest offered to exculpate a criminal defendant, made no mention of a corroboration requirement. There is good reason for incorporating such a requirement in the rule, for the reasons set forth in the Advisory Committee's Note to Fed. R. Evid. 804(b)(3): "The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic ... but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents.... The requirement

of corroboration is included in the rule in order to effect an accommodation between these competing considerations."

Subsection (b)(4): This exception is identical with Fed. R. Evid. 804(b)(4). The common law hearsay exception for statements of pedigree required that the declaration have been made ante litem motam, and that the declarant be a member of the family about which his statement was made. See McCormick §322. Even under the common law formulation, however, the first-hand knowledge requirement was omitted as impractical in some instances, such as the date of the declarant's own birth, and as self-evident in others, such as the date, place, or fact of the declarant's marriage.

The present exception liberalizes the common law rule by eliminating the ante litem motam requirement as being relevant to weight rather than admissibility, and by extending the exception to statements made by non-family members who have been "intimately associated" with the family. A number of other jurisdictions have adopted a similar rule, see, e.g., Cal. Evid. Code §§1310, 1311.

Hawaii courts have largely adhered to the traditional limitations in past decisions. In an elaborate formulation of the rule, the court in Drummond v. Makaena, 30 H. 116, 129 (1927), stated:

> By reason of their intimate acquaintance with each other and their familiarity with the subsidiary facts from which persons ordinarily gather their impressions and knowledge as to who their relatives are and by reason further of the traditions built within a family upon detached statements and acts and omissions as to what the relationships are in that family, it has come to be regarded by courts as safe and proper to admit as evidence declarations of deceased persons concerning the relationships within the family of which he [sic] was a member....

More recently, in Apo v. Dillingham Investment Corp., 57 H. 64, 549 P.2d 740 (1976), the court approved a pedigree declaration and observed that the required showing of the declarant's relationship to the family of which he speaks can be shown by the declaration itself. This is consistent with Rule 104(a) supra, and its accompanying commentary.

Subsection (b)(5): This rule has no Fed. R. Evid. counterpart, but restates the holding of Hew v. Aruda, 51 H. 451, 457, 462 P.2d 476, 480 (1969):

> [A] statement is not excluded by the hearsay rule if the declarant is unavailable as a witness and the court finds that the statement was made in good faith, upon the personal knowledge of the declarant, and while his

recollection was clear, unless other circumstances were present indicating a clear lack of trustworthiness.

Hew v. Aruda was recently cited approvingly by Chief Justice Richardson in Kekua v. Kaiser Foundation Hosp., 61 H. 208, 601 P.2d 364, 370 (1979).

Subsection (b)(6): This exception is analogous in scope and purpose to its companion exception, 803(b)(24) supra.

RULE 804 SUPPLEMENTAL COMMENTARY

The Act 198, Session Laws 1993 amendments added the last sentence in subsection (a) and supplied a new hearsay exception, subsection (b)(6).

The right of cross-examination of an "unavailable" declarant, according to the Hawaii Supreme Court's Final Report of the Committee on Hawaii Rules of Evidence 36 (1991), is inserted to assure opponent's cross-examination of a hearsay declarant who "testifies to a lack of memory" concerning the subject matter of the hearsay statement and thus becomes unavailable under subsection (a)(3) of this rule. The amendment also confirms the entitlement contained in the last sentence of Rule 806.

The new child-declarant hearsay exception, subsection (b)(6), was also recommended by the Hawaii Supreme Court in its Final Report of the Committee on Hawaii Rules of Evidence 37-38 (1991): "What is needed is a hearsay exception that will provide sufficient safeguards to allow for receipt of reliable hearsay statements in cases where child declarants become 'unavailable' through inability to remember or to communicate.... The committee has carefully constructed proposed Rule 804(b)(6) with Justice O'Connor's Idaho v. Wright [497 U.S. 805 (1990)] analysis in mind. We have specified the relevant circumstances ... and have articulated the bottom-line reliability criterion: '[T]hat the time, content, and circumstances of the statement provide strong assurances of trustworthiness.'" Idaho v. Wright disapproved, as offensive to the Confrontation Clause, hearsay accusations made by a two and a half year old sexual abuse complainant under circumstances that failed to evidence the constitutionally required level of reliability and trustworthiness. The new criterion, "strong assurances of trustworthiness", is intended to countenance only those hearsay statements that are "so reliable that cross-examination does not appear necessary", see Conference Committee Report No. 11.

The Act 134, Session Laws 2002 amendment adds subsection (b)(7), "Forfeiture by wrongdoing", to the Rule 804 hearsay exceptions. The Federal Rules of Evidence and Uniform Rules of Evidence have similarly adopted "forfeiture by wrongdoing"

exceptions to Rule 804. The comment to Fed. R. Evid. 804(b)(6) explains: "This recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of Justice itself.'... The wrongdoing need not consist of a criminal act." See, e.g., United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (murder of declarant, applying FRE 804(b)(6) and collecting cases applying forfeiture-by-misconduct rule to accused who procured witnesses' absence by means of threats, violence, or murder).

Case Notes

Trial court did not abuse its discretion in excluding declarant's out-of-court statement where declarant's equivocation cast doubt on trustworthiness of statement. 66 H. 448, 666 P.2d 169 (1983).

Hearsay statements excluded because of the lack of corroborating circumstances of trustworthiness. 70 H. 343, 771 P.2d 509 (1989).

Confrontation clause not violated by admission of declarant's former testimony under subsection (b)(1) where prosecution established declarant's unavailability, that it had made good faith efforts to secure declarant's presence, and reliability of statement was shown. 82 H. 202, 921 P.2d 122 (1996).

Confrontation clause violated as prosecution witness not "unavailable" under subsection (a)(5); prosecution's good faith efforts require a search equally as vigorous as that which it would undertake to find a critical witness if it had no prior testimony to rely upon in the event of unavailability. 83 H. 267, 925 P.2d 1091 (1996).

Where corroborating circumstances and evidence proffered by defendant was too weak to clearly indicate the trustworthiness of declarant's confessions under subsection (b)(3), trial court did not err in excluding them from the evidence at trial. 88 H. 407, 967 P.2d 239 (1998).

As there is no exception under subsection (b)(8) for pending or anticipated litigation, such that statements by victim-wife would have been admissible even if a divorce proceeding had actually been underway, trial court did not abuse discretion in determining hearsay statements were trustworthy; however, trial court abused discretion in admitting statements in violation of defendant's constitutional right to confront and cross-examine adverse witnesses. 103 H. 89, 79 P.3d 1263 (2003).

Declarant's statements inadmissible because not trustworthy. 6 H. App. 83, 712 P.2d 1136 (1985).

Trial court did not err in excluding witness from testifying about statements defendant's nephew made to witness during a

pretrial interview where nephew's interview statements failed to satisfy the basic requirement of subsection (b)(3) that the statements be against nephew's interest and also were not admissible because they were inherently untrustworthy. 110 H. 386 (App.), 133 P.3d 815 (2006).

Kumu hula's affidavit stating that a certain person (Kamokulewa) was the son of father and mother (Apaa and Kekue) was admissible to show family relationships, pursuant to this rule. 114 H. 56 (App.), 156 P.3d 482 (2006).

" **Rule 805 Hearsay within hearsay.** Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. [L 1980, c 164, pt of §1]

RULE 805 COMMENTARY

This rule is identical with Fed. R. Evid. 805. Because the principal concern in determining the admissibility of hearsay evidence is the assurance of trustworthiness, multiple hearsay creates a multi-level requirement for such assurance. However, if each level of hearsay independently meets the requirements for admissibility under an applicable hearsay exception, the circumstantial guarantee of trustworthiness for such a statement is as great as for single-level hearsay.

Instances of multi-level hearsay evidence are by no means uncommon. For example, former testimony of an unavailable witness, which qualifies for admissibility under Rule 804(b)(1), might contain testimony of an excited utterance, a statement against interest, or an admission by a party-opponent. Business records evidence presents multiple hearsay problems in cases where informants are not under a business duty, see the commentary to Rule 803(b)(6) supra. As long as each level meets the requirement of independent qualification, this type of evidentiary complexity offers no unique problem.

" **Rule 806 Attacking and supporting credibility of declarant.** When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party

against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 806 COMMENTARY

This rule is identical with Fed. R. Evid. 806 except that the phrase, "or a statement defined in Rule 801(d)(2)(C), (D), or (E)," is omitted as superfluous, inasmuch as these categories of party-opponent admissions are treated in these rules as hearsay exceptions under Rule 803(a) supra. As the Advisory Committee's Note to Fed. R. Evid. 806 puts it: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified."

"ARTICLE IX.
AUTHENTICATION AND IDENTIFICATION

Rule 901 Requirement of authentication or identification. (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based

upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by statute or by other rules prescribed by the supreme court. [L 1980, c 164, pt of §1]

RULE 901 COMMENTARY

This rule is identical with Fed. R. Evid. 901, except for the substitution, in subsection (b)(10), of the words, "statute or by other rules prescribed by the supreme court," for the federal rule language, "Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority." As the Advisory Committee's Note to Fed. R. Evid. 901 points out: "Authentication and identification represent a special aspect of relevancy.... Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved." The note also makes clear that Rule 901's requirement "falls in the category of relevancy dependent upon fulfillment of a condition

of act and is governed by the procedure set forth in Rule 104(b)."

Subsection (a): Although the general provision speaks of a "matter in question" and the above example is a telephone conversation, the requirement of authentication is addressed principally to real evidence, that is, tangible objects and things offered in proof. McCormick asserts: "[W]hen real evidence is offered an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident [being litigated]." Simply stated, the authentication requirement forces the proponent to prove, usually by means of extrinsic evidence, that an object is the very thing it purports to be. Exceptions to the requirement of extrinsic evidence are collected in Rule 902 infra.

The requirements of authentication may vary according to the type of evidence offered and the purposes for which it is offered. Authentication may require not only proof of identity but also evidence that the item remains unaltered, McCormick §212. This second requirement may require proof of an unbroken "chain of custody," see State v. Vance, 61 H. 291, 303, 602 P.2d 933, 942 (1979) (drugs and chemicals require chain of custody up to the point of laboratory testing); compare State v. Olivera, 57 H. 339, 344, 555 P.2d 1199, 1202 (1976) (positive identification of inked fingerprint card obviated need for chain of custody).

A different kind of authentication problem arises with respect to photographs, maps, charts, sketches, models, duplicates, or replicas. Authentication for evidence of this kind usually does not address itself to the issue of the identity or source of the item itself but rather to its representational authenticity, requiring foundation testimony or other proof that it is a substantially accurate representation of the thing being depicted. McCormick §213. "On the other hand," continues McCormick, "if there is an absence of testimony that the object to be illustrated ever existed the introduction of a 'duplicate' may foster a mistaken impression of certainty and thus merit exclusion." For this proposition McCormick cites the case of Young v. Price, 50 H. 430, 442 P.2d 67 (1968), which ruled out the replica not because of an "absence of testimony" but because of a substantial question, based on conflicting testimony, about the existence of the original object.

The requirement of authentication applies to documents and writings, see Fed. R. Evid. 901(a), Advisory Committee's Note: "Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification.... However, the need for suitable methods of proof still remains, since criminal

cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur."

Subsection (b): The examples incorporated in this subsection derive largely from traditional common law forms of authentication, and are illustrative rather than exclusive. Because the common law has evolved few special-category rules for authentication of chattels, see 7 Wigmore, Evidence §2086 (3d ed. 1942), these examples apply most frequently to authentication of documents, writings, data compilations, and voice communications; however, they may be applicable to other forms of evidence as well.

It should be noted that compliance with the threshold requirement of authentication does not provide an automatic assurance of the admissibility of evidence. A number of other bars, such as hearsay, privilege, or danger of prejudice or confusion, may exclude it.

Subsection (b)(1): The most direct method of authentication of evidence is by testimony of a witness who has some basis extrinsic to the item itself for asserting its authenticity. The foundation requirement for this mode of authentication is proof of the basis for the witness' knowledge. The Advisory Committee's Note to Fed. R. Evid. 901(b)(1) points out that this example "contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody...." Regarding the custody requirement, see State v. Vance, 61 H. 291, 303, 602 P.2d 933, 942 (1979). In Territory v. Hays, 43 H. 58, 65-66 (1958), the court held that a photograph can be authenticated by a witness other than the photographer, upon testimony that "the witness is familiar with the scene and ... that the photograph correctly represents the scene."

Subsection (b)(2): This example, according to the Advisory Committee's Note to Fed. R. Evid. 901(b)(2), "states conventional doctrine as to lay identification of handwriting." See Goo Kim Fook v. Hee Fat, 27 H. 491, 501 (1923); Territory v. Fong Yee, 25 H. 309 (1920).

Subsection (b)(3): This example supersedes a statute, Hawaii Rev. Stat. §622-2 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §63; am L 1972, c 104, §2(b)), which required that the exemplars be "proved to be genuine to the satisfaction of the court." The Advisory Committee's Note to Fed. R. Evid. 901(b)(3), discussing statutes of this sort, says: "While explainable as a measure of prudence ... in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high

standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situation, e.g., ballistics comparison by jury ... and no reason appears for its continued existence in handwriting cases. Consequently example (3) ... treats all comparison situations alike, to be governed by Rule 104(b)."

Subsection (b)(4): "The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety," suggests the Advisory Committee's Note to Fed. R. Evid. 901(b)(4). See Territory v. Witt, 27 H. 177 (1923), where, in a case of receiving stolen goods, the court admitted into evidence 15 tires found in the possession of the defendant or in the possession of persons who had recently purchased them from the defendant. In the absence of direct proof that they were the tires stolen, the court admitted them on the basis of distinctive characteristics: they were identical in number, size, and make to those stolen from a warehouse, and tires of that size and make were unobtainable at that time from Honolulu dealers.

Subsection (b)(5): See the Advisory Committee's Note to Fed. R. Evid. 901(b)(5): "Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting." See State v. Clyde, 47 H. 345, 388 P.2d 846 (1964), in which the court ruled that admission of a telephone conversation on the basis of voice identification alone was proper if the witness was acquainted with the voice.

Subsection (b)(6): As the Advisory Committee's Note to Fed. R. Evid. 901(b)(6) suggests, "The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under subsection (b)(4) supra, or voice identification under subsection (b)(5), may furnish the necessary foundation." The foundation for outgoing calls is treated in subparagraphs (A) and (B).

Subsection (b)(7): The Advisory Committee's Note to Fed. R. Evid. 901(b)(7) points out that "[p]ublic records are regularly authenticated by proof of custody, without more." See In re Title of Pa Pelekane, 21 H. 175 (1912).

Subsection (b)(8): The traditional common law ancient documents rule is liberalized to include data compilations other than documents, e.g., computer data, electronically stored data, and microfilms. In addition, the common law period of 30 years is reduced to 20 years, consistent with the trend in a number of other jurisdictions, see 7 Wigmore, Evidence §2143 (3d ed. 1942). This represents a change in Hawaii law, see Hulihee v. Heirs of Hueu, 57 H. 312, 315, 555 P.2d 495, 498 (1976). Compare the ancient documents exception to the hearsay rule, Rule 803(b)(16) supra, and the provision for presumptive authenticity of certain documents, Rule 303(c)(12) supra.

Subsection (b)(9): The Advisory Committee's Note to Fed. R. Evid. 901(b)(9) points out that this example "is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance."

Subsection (b)(10): A number of statutes and rules of court provide expressly for methods of authentication or for presumptions of prima facie authenticity, e.g., HRCP 44. This rule in no way supersedes such statutory or procedural rules and methods of authentication.

Case Notes

Witnesses' combined testimony provided "enough foundation" to identify State's exhibit as knife defendant used to stab victims. 83 H. 335, 926 P.2d 1258 (1996).

No abuse of discretion in receiving exhibit, purported assignment of lease, into evidence. 77 H. 320 (App.), 884 P.2d 383 (1994).

There was sufficient evidence to authenticate the 911 recording and establish its admissibility where the 911 dispatcher testified that the dispatcher received the call, the recording equipment was working properly, the State's exhibit was an accurate recording of the call, and that the female voice on the call was dispatcher's voice, and victims testified that they made the call, described certain statements they made during the call, and that recording accurately reflected what happened after victims made the 911 call. 106 H. 517 (App.), 107 P.3d 1190 (2005).

Evidence admitted under rule 106 is subject to the authentication requirement under this rule. 108 H. 89 (App.), 117 P.3d 821 (2005).

Trial court did not abuse its discretion by requiring defendant to produce testimony from physician or physician's custodian of records that physician's report was in fact made by physician and by refusing to admit physician's report for lack

of authentication required under this rule where witness' testimony did not authenticate report, there was a lack of evidence attesting to physician's signature on the report, and lack of testimony about any distinctive characteristics of the report. 108 H. 89 (App.), 117 P.3d 821 (2005).

Where exhibit was not authenticated by a citation to a verified source, and without this certification, the document was hearsay and did not fall under any hearsay exception, by applying rules 801 and 902 and this rule, the exhibit was inadmissible and could not be considered by the trial court. 114 H. 56 (App.), 156 P.3d 482 (2006).

" **Rule 902 Self-authentication.** Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or

legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any statute or rule prescribed by the supreme court.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under statutes. Any signature, document, or other matter declared by statute to be presumptively or prima facie genuine or authentic.

(11) Certified records of regularly conducted activity. The original or a duplicate of a domestic or foreign record of regularly conducted activity that would be admissible under rule 803(b)(6), if accompanied by a written declaration of its custodian or other qualified person, certifying that the record was:

(A) Made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) Kept in the course of the regularly conducted activity; and
(C) Made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to a criminal penalty under the laws of the state or country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of that intention to all adverse parties, and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(9); am L 2002, c 134, §6]

RULE 902 COMMENTARY

This rule is identical with Fed. R. Evid. 902 except for the substitution, in paragraph (4), of the words, "statute or rule prescribed by the supreme court," for the federal language, "Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority," and the substitution, in paragraph (10), of "statute" for "Act of Congress." "Self-authentication," as the name implies, denotes a finding of identity or authenticity of an item based on its mere purport, without recourse to extrinsic evidence. The present rule restates a number of superseded statutes. As the Advisory Committee's Note to Fed. R. Evid. 902 points out, "In no instance is the opposite party foreclosed from disputing authenticity."

Paragraph (1): The Advisory Committee's Note to Fed. R. Evid. 902(1) says: "Whether theoretically based in whole or in part upon judicial notice the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain."

Paragraph (2): In the case of public documents not under seal, as the Advisory Committee's Note to Fed. R. Evid. 902(2) explains, the potential for forgery is greater than in the case of sealed documents. "Hence this paragraph of the rule calls for authentication by an officer who has a seal."

Paragraph (3): This provision extends the presumption of authenticity to foreign documents that have been attested or certified. Compare HRCP 44(a)(2) and Ewing v. Janion, 1 H. 79 (134), (136) (1852).

Paragraph (4): Consistent with the practice in most jurisdictions, Hawaii has long recognized the procedure of authenticating public records by certification. A variety of statutes establish certification procedures for specific types of public records, see, e.g., Hawaii Rev. Stat. §§502-81, 572-13(c) (1976, Supp. 1979). Court procedural rules are in accord, see HRCP 44(a); HRCrP 27.

The requirement for proper certification of copies of such records has been affirmed by the Hawaii courts. See, e.g., Territory v. Branco, 42 H. 304 (1958), in which the court barred admission of photostatic copies of the minutes of the board of public lands because the accompanying certificate of authenticity was not signed by the officer who had legal custody of the records.

It should be noted that certifications are, in themselves, documents requiring authentication independently of the records to which they are appended. They may be received as self-authenticating when prepared and offered in conformity with paragraph (1), (2), or (3) of this rule, or when they are accorded a presumption of authenticity by statute, consistent with paragraph (10) of this rule.

Paragraph (5): This rule consolidates the provisions of a number of superseded Hawaii statutes. As the Advisory Committee's Note to Fed. R. Evid. 902(5) points out, this paragraph "does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility."

Paragraph (6): The circumstantial guarantee of authenticity of newspapers and periodicals is sufficiently great to justify a preliminary assumption of admissibility. In Territory v. Sur, 36 H. 332, 340 (1952), the court approved admission of newspaper accounts of football games for the purpose of proving that the games were played on a specific date.

Paragraph (7): The issue of self-authentication of mercantile labels, inscriptions, and trademarks has not been addressed in Hawaii; however, it has found increasing support in other jurisdictions, see Fed. R. Evid. 902(7), Advisory Committee's Note, and the circumstantial guarantee of authenticity of such evidence is great.

Paragraph (8): See Fed. R. Evid. 902(8), Advisory Committee's Note: "In virtually every state, acknowledged title documents are receivable in evidence without further proof.... If this

authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved."

Paragraph (9): This provision affirms the authentication provisions for negotiable instruments and commercial paper, as defined in the Uniform Commercial Code. Pertinent statutes include Hawaii Rev. Stat. §490:1-202, which provides that various types of commercial documents issued by a third party are prima facie evidence of both their own authenticity and of the facts stated in them; §490:3-307, which establishes the presumption that signatures on a negotiable instrument are genuine or authorized; and §490:3-510, which establishes self-authenticating evidence of dishonor of a negotiable instrument. See Akamine and Sons, Ltd. v. American Security Bank, 50 H. 304, 440 P.2d 262 (1968).

Paragraph (10): Consistent with the parallel provision in Rule 901(b)(10) supra, this paragraph affirms the validity of other statutory provisions for self-authentication. Nothing in this rule should be construed to supersede such provisions.

RULE 902 SUPPLEMENTAL COMMENTARY

The Act 134, Session Laws 2002 amendment adds paragraph (11) to the collection of self-authenticating documents of Rule 902, and thus implements the certification procedure established in the 2002 amendment to Rule 803(b)(6) ("records of regularly conducted activity"). The Federal Rules of Evidence and Uniform Rules of Evidence have similarly modified Rule 902.

Case Notes

Records of regularly conducted activity.

State did not establish a sufficient foundation to admit speed check card as a business record under HRE rule 803(b)(6) where record did not (1) include a certification that complies with paragraph (11) or other statute permitting certification, (2) reflect that officer was testifying as a custodian of the speed check card, or (3) officer's testimony did not adequately establish that there were other indicia of reliability. 122 H. 354, 227 P.3d 520 (2010).

Where exhibit was not authenticated by a citation to a verified source, and without this certification, the document was hearsay and did not fall under any hearsay exception, by applying rules 801 and 901 and this rule, the exhibit was inadmissible and could not be considered by the trial court. 114 H. 56 (App.), 156 P.3d 482 (2006).

" **Rule 903 Subscribing witness' testimony unnecessary.** The testimony of a subscribing witness is not necessary to authenticate a writing. [L 1980, c 164, pt of §1]

RULE 903 COMMENTARY

This rule is similar to Fed. R. Evid. 903, except that the present rule eliminates the clause, "unless required by the laws of the jurisdiction whose laws govern the validity of the writing." It supersedes a statute, Hawaii Rev. Stat. §622-1 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §62; am L 1972, c 104, §2(a)), which provided: "It shall not be necessary to prove an instrument by the attesting witness if attestation was not required in order for the instrument to be valid...."

"ARTICLE X.
CONTENTS OF WRITINGS,
RECORDINGS, AND PHOTOGRAPHS

Rule 1001 Definitions. For purposes of this article the following definitions are applicable:

(1) "Writings and recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) A "public record" means any writing, memorandum, entry, print, representation, report, book or paper, map or plan, or combination thereof, that is in the custody of any department or agency of government. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(10)]

RULE 1001 COMMENTARY

This rule is identical with Fed. R. Evid. 1001, except that paragraph (5), defining "public records," is original and has no Fed. R. Evid. counterpart. Article X is concerned generally with the so-called "best evidence rule," which emerged in common law during the early part of the eighteenth century, see McCormick §231. The best evidence rule initially applied only to documentary evidence, but modern technology has introduced a wide variety of data collection and storage systems to which the rule is equally relevant. The definitions in this rule are designed to clarify terms that have been the subject of extensive judicial controversy, see McCormick §232.

Paragraph (1): This definition extends the traditional concept of "documents" to include not only "writings" but also such data systems as computers, photographic systems, and other technological developments. For this purpose, microfilm, microfiche, and similar photographic data storage processes are "recordings" rather than "photographs." See Fed. R. Evid. 1001(1), Advisory Committee's Note: "Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments."

Paragraph (2): This definition includes all photographic and videographic processes, including microphotographs, and medical and industrial x-rays. However, when such a process is used for recording and storage of letters, words, or numbers, it is a "recording," see paragraph (1) supra, rather than a "photograph."

Paragraph (3): What may be considered an "original" for evidentiary purposes is not always clear-cut, see McCormick §235. This definition avoids the problem of "the chronology of creation," McCormick, id., or the issue of which of two or more counterparts is the "original" by adopting a functional criterion. A writing or recording is determined to be "original" on the basis of the intention of the person who produced or issued it. By this standard, a carbon copy of a contract, receipt, letter, or other writing, if issued or

dispatched as the primary operative communication, will be considered the "original."

Paragraph (4): The essential characteristic of a duplicate is its fidelity to the original; for this reason, manually produced copies are not duplicates within the meaning of this rule. Because the fidelity of a duplicate renders the possibility of error highly unlikely, the duplicate in most instances may be admitted into evidence in lieu of the original, see Rule 1003 infra.

Paragraph (5): This paragraph, which has no Fed. R. Evid. counterpart, supplies the operative definition of "public record" as that term is employed in Rule 1005 infra. It was adapted from Hawaii Rev. Stat. §92-50 (1976), which defines "public records" for public inspection purposes. The present definition is broad enough to include any document that is in the custody of a public agency.

RULE 1001 SUPPLEMENTAL COMMENTARY

The Act 191, Session Laws 1992 amendment added "sounds" to the definition of "writings and recordings," Rule 1001(1). The intent of this paragraph, as originally approved in 1980, was to extend the reach of the original document requirement, Rule 1002, to include not only documents but also the storage and output mechanisms of "computers, photographic systems, and other modern developments," see the original commentary. The 1992 amendment makes clear that sound recordings are included within the definition of "writings and recordings." The policy of the original document rule--to require the original so as to minimize fraud and mistake--applies equally to words and data stored in sound recordings.

" **Rule 1002 Requirement of original.** To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. [L 1980, c 164, pt of §1]

RULE 1002 COMMENTARY

This rule is identical with Fed. R. Evid. 1002 except that "statute" is substituted for "Act of Congress." Rule 1002 states the so-called "best evidence rule," requiring the production of the original document whenever the proponent seeks to prove the document's contents. See, e.g., Ripley v. Kapiolani Estate, 22 H. 86 (1914). The present rule applies

this requirement to writings, recordings, and photographs as those terms are defined in Rule 1001.

Note that this rule applies only when the effort is to "prove the content of a writing." The Advisory Committee's Note to Fed. R. Evid. 1002 addresses this point: "Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered." Cf. Brown v. Equitable Life Assurance Soc'y, 14 H. 80 (1902).

Case Notes

Although this rule would ordinarily have precluded the admission of testimony about cell phone text messages because such testimony was not an "original", the testimony was admissible because rule 1004(1) applied to the text messages such that other evidence could be admitted to prove the content of the text messages; as complainant no longer had the actual text messages because complainant no longer had the cell phone or cell phone service, for purposes of rule 1004(1), the original text messages were "lost or destroyed". 117 H. 127, 176 P.3d 885 (2008).

" **Rule 1003 Admissibility of duplicates.** A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. [L 1980, c 164, pt of §1]

RULE 1003 COMMENTARY

This rule is identical with Fed. R. Evid. 1003. It restates a prior statute, Hawaii Rev. Stat. §622-3 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §44; am L 1945, c 17, §1; am L 1972, c 104, §2(c)), which similarly provided for liberal use of facsimile copies in lieu of originals. See Territory v. Morgenstein, 39 H. 602 (1952). "Duplicate" is defined in Rule 1001(4) supra.

Case Notes

Trial court's denial of an objection to the admissibility of a duplicate under this rule is reviewed under abuse of discretion standard. 83 H. 50 (App.), 924 P.2d 544 (1996).

" **Rule 1004 Admissibility of other evidence of contents.** The original or a duplicate is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 1004 COMMENTARY

This rule is similar to Fed. R. Evid. 1004, except that the words "or a duplicate" are added to the first sentence of this rule. The change is not substantive. The rule specifies the exceptions to Rule 1002, and effects no change in existing law, see Chu Chung v. Jellings, 30 H. 784 (1929) (destroyed); Rex v. Lenehan, 3 H. 714 (1876) (possession of opponent).

As the Advisory Committee's Note to Fed. R. Evid. 1004 points out, the "rule recognizes no 'degrees' of secondary evidence." Thus, when this rule is satisfied, there is no preference for one form of secondary evidence over another.

Case Notes

Although rule 1002 would ordinarily have precluded the admission of testimony about cell phone text messages because such testimony was not an "original", the testimony was admissible because paragraph (1) applied to the text messages such that other evidence could be admitted to prove the content of the text messages; as complainant no longer had the actual text messages because complainant no longer had the cell phone or cell phone service, for purposes of paragraph (1), the

original text messages were "lost or destroyed". 117 H. 127, 176 P.3d 885 (2008).

" **Rule 1005 Public records.** The contents of a public record, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. [L 1980, c 164, pt of §1]

RULE 1005 COMMENTARY

This rule is similar to Fed. R. Evid. 1005 in intent. The "public records" covered are those specified in Rule 1001(5) supra. Since production of original public records would be burdensome to both proponents and public officials, numerous statutes, e.g., Hawaii Rev. Stat. §502-82 (1976) (recorded instruments of conveyance) dispense with such a requirement. In this instance, however, a distinct preference for certified or compared copies is expressed.

Case Notes

Redacted judgment of conviction properly authenticated and admitted under this rule where prosecution submitted certified copy of the full judgment for identification, along with redacted judgment, and witness identified defendant as person to whom redacted judgment referred. 83 H. 507, 928 P.2d 1 (1996).

" **Rule 1006 Summaries.** The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. [L 1980, c 164, pt of §1]

RULE 1006 COMMENTARY

This rule is identical with Fed. R. Evid. 1006, the Advisory Committee's Note to which says: "The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury."

Case Notes

Summary and opposing party's opportunity to review underlying documents, discussed. 77 H. 320 (App.), 884 P.2d 383 (1994).

" **Rule 1007 Testimony or written admission of party.** Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original. [L 1980, c 164, pt of §1; gen ch 1985]

RULE 1007 COMMENTARY

This rule is identical with Fed. R. Evid. 1007. It requires that the admission of the party-opponent be in the form of testimony or in writing, and thus follows the suggestion contained in McCormick §242. In addition, as the Advisory Committee's Note to Fed. R. Evid. 1007 points out, "[t]he limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004 supra."

" **Rule 1008 Functions of court and jury.** When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (1) whether the asserted writing ever existed, or (2) whether another writing, recording, or photograph produced at the trial is the original, or (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. [L 1980, c 164, pt of §1]

RULE 1008 COMMENTARY

This rule is identical with Fed. R. Evid. 1008. Most preliminary questions of fact are addressed to the court under Rule 104(a). The issues reserved for the jury by this rule are considered to be related to "the merits of the controversy," see

Fed. R. Evid. 1008, Advisory Committee's Note. See Rule 104(b) supra.

"ARTICLE XI.
MISCELLANEOUS RULES

Rule 1101 Applicability of rules. (a) Courts. These rules apply to all courts of the State of Hawaii except as otherwise provided by statute.

(b) Proceedings. These rules apply generally to civil and criminal proceedings.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Small claims. Proceedings before the small claims division of the district courts. [L 1980, c 164, pt of §1]

RULE 1101 COMMENTARY

This rule resembles Fed. R. Evid. 1101 with appropriate modifications.

Subsections (a) and (b): The intent is to posit the applicability of the Hawaii Rules of Evidence in all state courts and in all proceedings, except as provided in subsection (d).

Subsection (c): There are no exceptions to the privilege rules except as specifically set forth in Article V.

Subsection (d): Paragraph (1) simply restates the point made in the last sentence of Rule 104(a), and the matter is treated in the commentary to that rule. Paragraph (2) follows the lead of Fed. R. Evid. 1101(d)(2) in excepting grand jury proceedings from the requirements of the rules. There is no intent,

however, to disturb rulings such as State v. Layton, 53 H. 513, 497 P.2d 559 (1972), and State v. Joao, 53 H. 226, 491 P.2d 1089 (1971), where the Hawaii Supreme Court has imposed supervisory and due process limitations on the kinds of evidence that can be presented to grand juries. "Miscellaneous proceedings," exempted in paragraph (3), include "preliminary examination in criminal cases," by which is meant those hearings specified in HRCrP 5(c). Other pretrial motions and proceedings in criminal and civil cases are not exempted. The exemption for small claims courts is consistent with Hawaii Rev. Stat. §633-32 (1976).

Rules of Court

Probate proceedings, see HPR rule 18.
Small claims division, see RSCD rule 9.

" **Rule 1102 Jury instructions; comment on evidence prohibited.** The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses. [L 1980, c 164, pt of §1]

RULE 1102 COMMENTARY

This rule, which has no Fed. R. Evid. counterpart, replaces two prior statutes, Hawaii Rev. Stat. §§635-15, 635-17 (1976) (repealed 1980) (originally enacted as L 1892, c 56, §1; am L 1932 2d, c 24, §1; am L 1972, c 89, §2B(e); and L 1932 2d, c 24, §2). §635-15 authorized the court to "charge the jury whether there is or is not evidence, indicating the evidence, if any, tending to establish or rebut any specific fact involved in the case." §635-17 authorized the court, "in a criminal case, [to] make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." The present rule precludes "comment upon the evidence" in all cases. This of course is not intended to restrict the court's function set forth in Article II (judicial notice) and Article III (presumptions).

Case Notes

Plain language of this rule establishes that the prohibition against judicial comment on the evidence is not limited to jury

instructions; thus, rule applied to trial court's interjected comment; however, where trial court's jury instructions cured the impropriety, court's comment on the evidence was not prejudicial to defendant. 103 H. 38, 79 P.3d 131 (2003).

Where petitioner argued that the court erred in instructing the jury solely on accomplice liability as to petitioner's passenger, and thus commented on the evidence in violation of this rule, petitioner waived any objection to the court's instructions under this rule; at trial, petitioner did not object to the court's instructions or argue that the court's instructions constituted a comment on the evidence under this rule and petitioner did not request any additional instructions reflecting petitioner's position that although petitioner's passenger was only charged as an accomplice, the passenger was solely responsible for the robbery. 131 H. 353, 319 P.3d 272 (2013).

Court's reference in jury instructions to witness as "the victim" was improper comment on the evidence, as whether witness had been abused was a question to be decided by the jury. 79 H. 413 (App.), 903 P.2d 718 (1995).

Trial court's inclusion of the word "significant" in the extreme mental or emotional disturbance jury instruction did not constitute a "comment upon the evidence" prohibited by this rule; by inserting the word, the trial court was in fact fulfilling its duty under this rule to "instruct the jury regarding the law applicable to the facts of the case". 107 H. 452 (App.), 114 P.3d 958 (2005).

" **§626-1 Enactment.** The Hawaii Rules of Evidence as set forth in this section is enacted:

" **§626-2 Effective date; applicability to future cases and pending cases.** This chapter shall take effect on January 1, 1981.

The Hawaii Rules of Evidence in section 626-1 shall apply to actions, cases, and proceedings brought on or after January 1, 1981; provided that the rules shall also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary rules or principles shall apply. [L 1980, c 164, pt of §1]

" **§626-3 Inconsistent laws.** If any other provision of law, including any rule promulgated by the supreme court, is inconsistent with this chapter, this chapter shall govern unless this chapter or such inconsistent provision of law specifically provides otherwise. [L 1980, c 164, pt of §1]