ACT 191

S.B. NO. 2228

A Bill for an Act Relating to the Hawaii Rules of Evidence.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to update the Hawaii Rules of Evidence pursuant to some of the less controversial recommendations made in the Final Report of the Committee on Hawaii Rules of Evidence. This Act does not include the report's more substantial and controversial recommendations, which are contained in separate vehicles.

SECTION 2. Section 626-1, Hawaii Revised Statutes, is amended as follows:

1. By amending rule 412 to read:

"Rule 412 [Rape] Sexual assault 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 [rape or] sexual assault [under any of the provisions of chapter 707, part V of the Hawaii Penal Code], reputation or opinion evidence of the past sexual behavior of an alleged victim of such [rape or] sexual assault is not admissible[.] to prove the character of the victim in order to show action in conformity therewith.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of [rape or] sexual assault [under any of the provisions of chapter 707, part V of the Hawaii Penal Code], evidence of [a] an alleged victim's past sexual behavior other than reputation or opinion evidence is [also] not admissible[,] to prove the character of the victim in order to show action in conformity therewith, unless such evidence [other than reputation or opinion 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 [rape or] sexual assault is alleged.

(c) (1) If the person accused of committing [rape or] sexual assault 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 such evidence not later than fifteen days before the date on which the trial in which such 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 such 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 such evidence is admissible. At such 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 which 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 such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

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

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which [rape or] sexual assault is alleged."

2. By amending rule 503 to read:

"**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 [from him].

(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 [himself] the client or [his] the client's representative and [his] the lawyer or [his] the lawyer's representative, or (2) between [his] the lawyer and the lawyer's representative, or (3) by [him] the client or [his] the client's representative or [his] the lawyer or a representative of [his] 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, [his] 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 [or obtained], 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; [or]

(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; [or]

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

[(4)] (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; [or]

[(5)] (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."

3. By amending rule 506 to read:

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

(1) A ["clergyman"] "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 [person consulting him.] 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 [clergyman] member of the clergy in [his] the latter's professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the [person, by his guardian,[1] or conservator, or by his personal representative if he is deceased.] communicant or by the communicant's guardian, conservator, or personal representative. The [clergyman] member of the clergy may claim the privilege on behalf of the [person.] communicant. [His authority] Authority so to do is presumed in the absence of evidence to the contrary."

4. By amending rule 511 to read:

"Rule 511 Waiver of privilege by voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if [he or his predecessor], 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."

5. By amending rule 602 to read:

"Rule 602 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [he] the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony [of the witness himself]. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses."

6. By amending rule 608, subsection (b), to read:

"(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking [or supporting] the witness' credibility, [other than conviction of crime as provided in rule 609 and bias, interest, or motive as provided in rule 609.1, may not be proved by extrinsic evidence. They] may, [however, in the discretion of the court,] if probative of [truthfulness or] untruthfulness, be inquired into on cross-examination of the witness [(1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.] and may, in the discretion of the court, be provided by extrinsic evidence. When a witness testifies to the character of another witness under paragraph (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."

7. By amending rule 702 to read:

"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."

8. By amending rule 802.1 to read:

"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 [the declarant;] 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."

9. By amending rule 902 to read:

"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 [his] the official capacity of an officer or employee of an entity included in paragraph (1) hereof, 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 [his] 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) of this rule 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."

10. By amending the definition of "writings and recordings" in rule 1001 to read:

"(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."

SECTION 3. The revisor of statutes is directed to print, together with the Hawaii Rules of Evidence enacted by this Act, the commentary to these rules prepared by the Judiciary's Committee on Hawaii Rules of Evidence in the appropriate 1992 supplement to the Hawaii Revised Statutes; provided that if the commentary cannot be included in such supplement due to substantive defects reported to the legislature pursuant to paragraph (4) of this section, or because of the unavailability of the entire commentary, the revisor shall print the Hawaii Rules of Evidence without the commentary; provided further that if the commentary is not published in the 1992 supplement, it shall be published in the 1993 supplement.

In printing the commentary, or in connection with such printing, the revisor shall:

(1) Print the appropriate segments or portions of the commentary under the appropriate or corresponding rule of the Hawaii Rules of Evidence;
(2) Update the commentary by inserting, where necessary or where these citations are incomplete, the most current or the final citations to the Hawaii Reports, the Pacific Reporter (Second Series), and other regional or case law reporters which may have been cited in the commentary;
(3) Make any corrections or changes which may be necessary and which the revisor is authorized to make under section 23G-15, Hawaii Revised Statutes; and
(4) Report to the 1993 Regular Session of the legislature any substantive or other problems and defects in or relating to the commentary which must or should be corrected or remedied by the legislature itself, such report to include, but not be limited to specific recommendations, including specific recommended language in the form of a bill or resolution, to correct or remedy such problems or defects; provided that in preparing the report, the revisor may consult with Professor Addison Bowman of the University of Hawaii School of Law who assisted the legislature in drafting the commentary and with other appropriate persons as necessary.

SECTION 4. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 12, 1992.)

Note

1. So in original.