

ACT 198

H.B. NO. 52

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

1. By amending subsection (b) of rule 608 to read:

“(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness’ credibility, [may,] if probative of untruthfulness, may be inquired into on cross-examination of the witness and [may], in the discretion of the court, may be [provided] proved by extrinsic evidence. When a witness testifies to the character of another witness under [paragraph] 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.”

2. By amending rule 616 to read:

“**[Rule 616] Videotaping the testimony of a child who is a victim of an abuse offense or a sexual offense.** (a) This rule applies only to a proceeding in the prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than sixteen years of age at the time of the offense, and applies only to the statements or testimony of that child.

(b) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

- (1) No attorney of either party was present when the statement was made;
- (2) The recording is both visual and aural and recorded on film or videotape or by other electronic means;
- (3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and unaltered;
- (4) The statement was not made in response to questioning calculated to lead the child to make a particular statement;
- (5) Every voice on the recording and every person present at the interview is identified;
- (6) The person conducting the interview of the child in the recording is present at the proceeding and available to testify for or be cross-examined by either party and every other person present at the interview is available to testify;
- (7) The defendant or the attorney for the defendant is afforded discovery of the recording before it is offered into evidence; and
- (8) The child is present to testify.

(c) If the electronic recording of the statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

(d) On the motion of the attorney for any party, 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 equipment in the courtroom to be viewed by the court, the prosecuting attorney, defense attorney, the defendant, and the trier of fact in the proceeding. During the child's testimony, persons necessary to operate the equipment and such other persons as determined by the court shall be present in the room with the child. Attorneys for the defendant and for the State may be present in the room with the child. Only the attorneys or the judge may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during the child's testimony, but does not permit the child to see or hear them. The court shall supervise the video monitoring to ensure that the defendant can see the victim while testifying, but that the defendant's presence is not unduly emphasized to the child.

(e) If the court orders the testimony of the child to be taken under subsection (d) the child may not be required to testify in court at the proceeding for which the testimony was taken.] **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.”

3. By amending rule 804 to read:

**“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; [or]
- (2) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; [or]
- (3) Testifies to a lack of memory of the subject matter of the declarant’s statement; [or]
- (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 [man] 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;
  - [(6)] (7) 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."

SECTION 2. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

(Approved June 10, 1993.)