I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

An insurer must respond with reasonable promptness, and in no more than fifteen working days, to communications, and adequately address the concerns of the communication. H.R.S. § 431:13-103(11)(B). While failure to do so constitutes an unfair claims settlement practice, Chapter 431 is only enforceable by the insurance commissioner and not a statute granting private remedies to individuals. *Genovia v. Jackson Nat’l Life Ins. Co.*, 795 F. Supp. 1036 (Haw. 1992).

For accident and health or sickness insurance providers, uncontested claims shall be reimbursed not more than thirty days after receiving the claim. H.R.S. § 431:13-108(c). An uncontested claim filed electronically must be reimbursed within fifteen days. *Id.*

The insurer contesting, denying, or reviewing claims, shall notify the insured within fifteen days, or seven days after receipt of an electronically filed claim. *Id.*

For Personal Injury Protection (PIP) benefits under motor vehicle policies, the payments must generally be made within thirty days after receipt of reasonable proof of the benefits accrued. H.R.S. § 431:10C-304(3). Full or partial denial of claims must be made in writing within thirty days. *Id.*

B. Standards for Determinations and Settlements

An insurer commits unfair claims settlement practices by committing the following:

a. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

b. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

c. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
d. Failing to offer payment within thirty calendar days of affirmation of liability, if the amount of the claim has been determined and is not in dispute;

e. Failing to provide the insured, or when applicable the insured’s beneficiary, with a reasonable written explanation for any delay, on every claim remaining unresolved for thirty calendar days from the date it was reported; Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

f. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;

g. Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application;

H.R.S. § 431:13-103(11). As noted above, enforcement of Chapter 431 is limited to the insurance commissioner and does not create a private right of action.

C. **State Privacy Laws, Rules and Regulations**

Chapter 431:3A, Privacy of Consumer Financial Information, Hawai‘i Revised Statutes (HRS), embodies Hawai‘i’s privacy law. This chapter was enacted in 2001 and is based on the National Association of Insurance Commissioners Model Regulations. Chapter 431:3A “requires an insurance licensee to provide its customers with notice of its privacy policies and procedures before disclosing nonpublic personal financial information about the customer to a nonaffiliated third party and of the customer’s right to ‘opt out’ of the sharing of the customer’s information.” S. Conf. Comm. Rep. No. 31, at 2 (2001).

II. **PRINCIPLES OF CONTRACT INTERPRETATION**

Because an insurer’s duty to defend its insureds is contractual in nature, one must look to the language of the policy involved to determine the scope of that duty. *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co.*, 76 Haw. 166, 873 P.2d 230 (1994).

All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured. *Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd.*, 76 Haw. 277, 875 P.2d 894 (1994).

However, this rule of construction is not for application whenever the insurer and the insured simply disagree over the interpretation of the terms of the policy. *Hawaii Ins. &

When ambiguity exists, the rule of construction is applied, only when the policy taken as a whole is reasonably subject to differing interpretation. Hawaiian Ins & Guar., supra 68 Haw. at 341

Absent an ambiguity, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech. Hawaiian Ins. & Guar., supra 68 Haw at 342.

Exclusion clauses found in insurance policies are narrowly construed against the insurer. Retherford v. Kama, 52 Haw. 91, 470 P. 2d 517 (1970). First Insurance Co. of Hawaii v. Continental Casualty Co., 466 F. 2d 807 (9th Cir. 1972)

The insurer bears the burden of proof that the exclusionary clause applies. Sentinel Insurance Company, Ltd. v. First Insurance Company of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994)

Lastly, the Hawaii Supreme Court recently held in Willis v. Swain, 2013 WL 2459880 (Hawaii) that an insurer’s extracontractual duty of good faith is owed even to a person to whom it did not issue an insurance policy.

III. CHOICE OF LAW

The choice of law in Hawaii requires a two-part inquiry. “The first part of the choice of law inquiry is best understood as determining if there is an actual or real conflict between the potentially applicable laws.” Hammersmith v. TIG Ins. Co., 480 F.3d 220, 230 (9th Cir.2007). “If two jurisdictions’ laws are the same, then there is not conflict at all, and a choice of law analysis is unnecessary.” Id. See also Hawaiian Telecom Comm’n v. Tata Am. Int’l. Corp., 2010 WL 2594482, at *5 (D. Haw. May 24, 2010).

Federal courts sitting in diversity must apply “the forum state’s choice of law rules to determine the controlling substantive law.” Patton v. Cox, 276 F. 3d 493, 495 (9th Cir. 2002)

“Hawaii resolves its conflict of laws issues by deciding which State has the strongest interest in seeing its law applied to a particular case.” Lemen v. Allstate Ins. Co., 938 F. Supp 640, 643 (D. Haw. 1995); See also Mikelson, 107 Haw. at 198, 111 P. 3d at 607 (“This court has moved away from the traditional and rigid conflicts-of-laws rules in favor of the modern trend towards a more flexible approach looking to the state with the most significant relationship to the parties and subject matter.”) “The interests of the states and applicable public policy reasons should determine whether Hawaii law or another state’s law should apply.” Mikelson, 107 Haw. at 198, 111 P.3d at 607. In making this determination, courts “look to factors such as (1) where relevant events occurred, (2) the residence of the parties, and (3) whether any of the parties had any

IV. **EXTRA CONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES**

A. **Bad Faith**

Hawai`i recognizes a cause of action for bad faith in the insurance context. *Best Place, Inc. v. Penn America Ins. Co.*, 82 Hawai`i 120, 132; 920 P.2d 334, 346 (1996). The court held that there is a “legal duty implied in a first-and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action.” *Id.* at 132; 920 P.2d at 346.


Even if there is no coverage liability on the underlying policy, an insurer may still be liable for bad faith in the manner in which it denies the claim. *Enoka v. AIG Hawai`i Ins. Co.*, 109 Hawai`i 537. 552, 128 P.3d 850 (2006).

Under the *Best Place* test for bad faith, the “insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. An unreasonable delay in payment of benefits will warrant recovery ….” *Id.* at 133, 920 P.2d at 347. *See also Catron v. Tokio Marine Management, Inc*, 90 Haw. 407, 409, 978 P.2d 845, 847 (1999).

B. **Fraud**

For a finding of fraud, a plaintiff must show that:

1. false representations were made by defendants;
2. with knowledge of their falsity (or without knowledge of their truth or falsity);
3. in contemplation of plaintiff’s reliance upon these false representations;
4. actual reasonable reliance by plaintiff upon defendant’s representations.

The question of whether one has acted reasonably under the circumstances is one for the trier of fact to determine. Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai`i 494, 503, 880 P.2d 169, 178 (1994) (citing Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 387, 742 P.2d 377, 384 (1987)). Plaintiffs suing in fraud are required to show both that they suffered actual pecuniary loss and that such damages are definite and ascertainable, rather than speculative since “[t]he aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded.” Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai`i 309, 320, 47 P.3d 1222, 1233 (2002). In the context of insurance coverage, a claim is fraudulent if it was falsely made, or caused to be made, with the intent to deceive. Kawaihae v. Hawaiian Ins. Companies, 1 Haw. App. 355, 360, 619 P.2d 1086 (1980).

C. Intentional or Negligent Infliction of Emotional Distress

Intentional Infliction of Emotional Distress

In order to state a valid cause of action for intentional infliction of emotional distress, the following elements must be present:

1) that the act allegedly causing the harm was intentional or reckless,

2) that the act was outrageous, and

3) that the act caused

4) extreme emotional distress to another.


Intentional or reckless conduct is that which exceeds all bounds usually tolerated by decent society and which is of a nature especially calculated to cause, and does cause, mental distress of a very serious kind. Hac at 106, 73 P.3d at 60. (citing Restatement (Second) of Torts). An outrageous act is one which is without just cause or excuse and beyond all bounds of decency. Ross v. Stouffer Hotel Co. (Hawai`i) Ltd., Inc., 76 Haw. 454, 465, 879 P.2d 1037, 1048 (1994) (distinguished by United States EEOC v. NCL Am., Inc., 535 F. Supp. 2d 1149, 1171-1172 (Haw. 2008)(observing that the “Hawaii Supreme Court was carving out a narrow exception to the general requirement of physical injury for NIED claims.”)

Extreme emotional distress is defined as “mental suffering, mental anguish, mental or nervous shock [and] ... includ[ing] all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.” Hac, 102 Haw. at 106, 73 P.3d at 60 (citing Restatement (Second) of Torts).
Negligent Infliction of Emotional Distress

In *Miller v. Hartford Life Ins. Co.*, 126 Haw. 165, 268 P.3d 418 (Haw. 2011), the Hawaii Supreme Court held that if a first party insurer commits bad faith, an insurer commits bad faith, an insured need not prove the insured suffered economic or physical loss caused by the bad faith in order to recover emotional distress damages caused by the bad faith. In summary, *Best Place* and the subsequent case law evidence an intent to provide the insured with a vehicle for compensation for all damages incurred as a result of an insurer’s misconduct, including damages for emotional distress, without imposing a threshold requirement of economic or physical loss. *Best Place*, 82 Haw. 132, 920 P.2d at 346.

The Hawaii Supreme Court recognized a claim for emotional distress in *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970). In *Rodrigues*, the court stated that “serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” *Id.*

Hawaii Jury Instruction number 8.5 defines emotional distress as mental worry, anxiety, anguish, suffering, and grief, where they are shown to exist.

D. **State Consumer Protection Laws, Rules and Regulations**

Hawai`i Revised Statutes Chapter 431 provides for the insurance commissioner to enforce standards on insurer conduct. Hawai`i Revised Statutes Sections 431:13-103 outline unfair or deceptive trade practices, in pertinent part, as follows:

The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

1. Misrepresentations and false advertising of insurance policies. Making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:

   (A) Misrepresents the benefits, advantages, conditions, or terms of an insurance policy;

   (B) Misrepresents the dividends or share of the surplus to be received on any insurance policy;

   (C) Makes any false or misleading statement as to the dividends or share of surplus previously paid on any insurance policy;

   (D) Is misleading or is a misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates;
(E) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(F) Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy;

(G) Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy;

(H) Misrepresents any insurance policy as being shares of stock;

(I) Publishes or advertises the assets of any insurer without publishing or advertising with equal conspicuousness the liabilities of the insurer, both as shown by its last annual statement; or

(J) Publishes or advertises the capital of any insurer without stating specifically the amount of paid-in and subscribed capital.

Haw. Rev. Stat. Section 431:13-103 further defines the following as unfair or deceptive acts or practices in the business of insurance: false information and advertising; defamation; boycotting, coercion, and intimidation; false financial statements; stock operations and advisory board contracts as bribery; except as otherwise expressly provided by law; refusing to provide or limiting coverage available to an individual because the individual may have a third-party claim for recovery of damages. Section 431:13-103 also provides:

(7) Unfair Discrimination.

(A) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract;

(B) Making or permitting any unfair discrimination in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, or expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charge therefore, or in the benefits payable or in any rights or privilege accruing thereunder;

(C) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk; unless:
1. The refusal, cancellation, or limitation is for a business purpose which is not a mere pretext for unfair discrimination;

2. The refusal, cancellation, or limitation is required by law or regulatory mandate;

(D) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a residential property risk, or the personal property contained therein, because of the age of the residential property, unless – The refusal, cancellation, or limitation is for a business purpose which is not a mere pretext for unfair discrimination; or

(ii) The refusal, cancellation, or limitation is required by law or regulatory mandate;

(E) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex or marital status of an individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits;

(F) Terminating or modifying coverage, or refusing to issue or renew any property or casualty policy or contract of insurance solely because the applicant or insured or any employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health or sickness insurance sold by a casualty insurer; provided further that this subparagraph shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract;

(G) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual based solely upon the individual’s having taking a human immunodeficiency virus (HIV) test prior to applying for insurance; or

(H) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because the individual refuses to consent to the release of information which is confidential as provided in section 325-101; provided that nothing in this subparagraph shall prohibit an insurer from, obtaining and using the results of a test satisfying the requirements of the commissioner, which was taken with the consent of an applicant for insurance; provided further that any applicant for insurance who is tested for HIV infection shall be afforded the opportunity to obtain the test results, within a reasonable time after being tested, and that the
confidentiality of the test results shall be maintained as provided by section 325-101.

…

(10) Refusing to provide or limiting coverage available to an individual because the individual may have a third-party claim for recovery of damages; provided that:

(A) Where damages are recovered by judgment or settlement of a third-party claim, reimbursement of past benefits paid shall be allowed pursuant to section 663-10;
(B) This paragraph shall not apply to entities licensed under chapter 386 or 431:10C; and
(C) For entities licensed under chapter 432 or 432D:
   (i) It shall not be a violation of this section to refuse to provide or limit coverage available to an individual because the entity determines that the individual reasonably appears to have coverage available under chapter 386 or 431:10C; and
   (ii) Payment of claims to an individual who may have a third-party claim for recovery of damages may be conditioned upon the individual first signing and submitting to the entity documents to secure the lien and reimbursement rights of the entity, and providing information reasonably related to the entity’s investigation of its liability for coverage.

Any individual who knows or reasonably should know that the individual may have a third-party claim for recovery of damages, and who fails to provide timely notice of the potential claim to the entity, shall be deemed to have waived the prohibition against refusal or limitation of coverage. “Third-party claim” for purposes of this paragraph means any tort claim for monetary recovery or damages that the individual has against any person, entity, or insurer, other than the entity licensed under chapter 432 or 432D.

…

(12) Failure to maintain complaint handling procedures. Failure of any insurer to maintain a complete record of all the complaints which it has received since the date of its last examination under section 431:2-302. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. For the purposes of this section, “complaint” means any written communication primarily expressing a grievance.
E. **State Class Actions**

Hawai‘i Rules of Civil Procedure (HRCP) Rule 23 provides:

a. **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

b. **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition, (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

c. **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.** (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or before the decision on the merits. (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specific date; (B) the judgment, whether favorable or not, will include all members who do
not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel. (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether not favorable to the class, shall include and specify or describe those to whom notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

d. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (I) determining the course of proceedings or prescribing measures to prevent undue repetition or complications in the presentation of evidence or argument; (2) requiring, for the protection of members of the class or otherwise for the fair conduct of the action, that notice be given in such manner, as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders maybe combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

e. Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The party seeking to establish a class has the burden of proving that the class certification requirements of subsection of HRCP Rule 23 have been met, Life of the Land v. Land Use Comm'n of the State of Hawai'i, 63 Haw. 166, 180-181, 623 P.2d 431, 443 (citing Life of Land v. Burns, 59 Haw. 244, 253, 580 P.2d 405, 411(1978)). The circuit court has broad discretion in determining whether to certify a class. Levi v University of Hawai'i, 67 Haw. 90, 93, 679, P.2d 129, 131 (1984). Determination of a class must be made before any decision can be had on the merits. Koolaulea Welfare Rights Group v. Chang, 65 Haw. 341, 343, 652 P.2d 185, 187 (1982).
In a class action under HRCP Rule 23(b)(2), plaintiff may obtain declaratory, injunctive and monetary relief, *Jacober v. Sunn*, 5 Haw. App. 20, 25, 674 P.2d 1024, 1027-28 (1984). “By Rule 23 of the Hawai‘i Rules of Civil Procedure, we have extended the permissible use of this procedural device to all civil litigation in the circuit courts of Hawai‘i. Its pragmatic objectives include economies of time, effort, and expense, as well as uniformity of decision for persons similarly situate. *See Advisory Committee’s Note*, 39 F.R.D. 98, 102-103 (1966). But the desirable economies and uniformity are not procurable at the expense of fairness to absentees. *Id.* And a concern for due procedure is as relevant as considerations of convenience, expense, and uniformity in the allowance or disallowance of class actions.” *Life of the Land* at 179, 623 P.2d at 442 (1981).

F. **State Privacy Laws, Rules and Regulations**

1. **Criminal Sanctions**

   (1) Wiretapping - Hawaii has an updated communication interception statute, augmented by an extensive privacy statute.

   (A) Hawaii is an “one party consent” state with regard to interception of communication, meaning that a person can legally record or otherwise intercept a wire, oral or electronic communication if he or she is a party to the communication, or has received prior consent from one of the parties engaged in the communication.

   (B) Regarding surveillance of other persons, Hawaii has an extensive violation of privacy section, that regulates a broad spectrum of instances, from observing or recording other persons under circumstances that justify expectation of privacy or distributing private recordings of other persons without their consent, to trespassing or peeping into windows.

   (2) Impact of law

   (A) In Hawaii, an individual can legally record conversations where either he is a party to the conversation or at least one of the engaged parties has consented to the recording. As a common way of illegal eavesdropping, the law specifically addresses installing and using mobile tracking devices. Such applications can only be used by the owner or with the consent of the owner of the target device. The privacy statute also specifically references protected media such as email, web hosting, multimedia messaging services, making Hawaii one of the most specific states with regard to privacy laws.
i. References to Physical TSCM

1. Hawaii eavesdropping statute references any electronic, mechanical, or other device capable of intercepting any wire, oral, or electronic communication, when it transmits a signal through cable or radio connection. Pen registers and trap and trace devices are also mentioned as illegal if used without a court order.

2. The privacy law also mentions “any means or device for observing, recording, amplifying, or broadcasting”, which can be interpreted to include all covert surveillance devices.

ii. References to Cyber TSCM

1. The law specifically mentions the unlawful installation of mobile tracking devices without consent from the owner of the targeted device. Further, the law defines “electronic communication system” as “including email, web hosting, multimedia messaging services, and remote storage services offered by an electronic communication service provider”. We can then assert that intrusions upon these media by cyber means of attack are also subject of the law.

(2) Criminal implications

(A) Violations of Hawaii eavesdropping statute are class C felonies, punishable by up to five years imprisonment and fines of up to $10,000\(^1\).

(B) Violation of privacy in the first degree is also a class C felony and the same punishment applies. Violation of privacy in the second degree is a misdemeanor, punishable by fines up to $2,000 and up to one year of imprisonment\(^2\).

(3) Civil implications

(A) Anyone whose communications have been intercepted in violation to the state’s statute, is entitled to a civil action against the perpetrator and to recover damages comprised of the greater of the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, or statutory
damages of the greater of $100 a day for each day of violation or $10,000 and also attorney’s fees and other litigation costs.


(A) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

i. Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any wire, oral, or electronic communication when:

1. Such a device is affixed to, or otherwise transmits a signal through, a wire, cable, or other similar connection used in wire communication; or

2. Such a device transmits communications by radio, or interferes with the transmission of such communication;

3. Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this part;

4. Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this part;

5. Intentionally installs or uses a pen register or a trap and trace device without first obtaining a court order; or

6. Intentionally installs or uses a mobile tracking device without first obtaining a search warrant or other order authorizing the installation and use of such device, unless the device is installed by or with
consent of the owner of the property on which the device is installed;

(5) Shall be guilty of a class C felony.

(A) It shall not be unlawful under this part for a person not acting under color of law to intercept a wire, oral, or electronic communication when the person is a party to the communication or when one of the parties to the communication has given prior consent to the interception […]


(A) A person commits the offense of violation of privacy in the first degree if, except in the execution of a public duty or as authorized by law:

i. The person intentionally or knowingly installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity in that place;

ii. The person knowingly discloses an image or video of another identifiable person either in the nude, as defined in section 712-1210, or engaging in sexual conduct, […]

(7) Violation of privacy in the first degree is a class C felony. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section.

(A) Haw. Rev. Stat. 711-1111[^5] - A person commits the offense of violation of privacy in the second degree if, except in the execution of a public duty or as authorized by law, the person intentionally:

i. Trespasses on property for the purpose of subjecting anyone to eavesdropping or other surveillance in a private place;

ii. Peers or peeps into a window or other opening of a dwelling or other structure adapted for sojourn or overnight accommodations for the purpose of spying on the occupant thereof or invading the privacy of another person with a lewd or unlawful purpose, under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed;
iii. Installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any means or device for observing, recording, amplifying, or broadcasting sounds or events in that place other than another person in a stage of undress or sexual activity;

iv. Installs or uses outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein;

v. Covertly records or broadcasts an image of another person’s intimate area underneath clothing, by use of any device, and that image is taken while that person is in a public place and without that person’s consent;

vi. Intercepts, without the consent of the sender or receiver, a message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately;

vii. Divulges, without the consent of the sender or the receiver, the existence or contents of any message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately, if the accused knows that the message or photographic image was unlawfully intercepted […]

viii. “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

ix. “Electronic communication system” means any wire, radio, electromagnetic, photo-optical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications,
including email, web hosting, multimedia messaging services, and remote storage services offered by an electronic communication service provider.

“Public place” means an area generally open to the public, regardless of whether it is privately owned, and includes but is not limited to streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, buses, tunnels, buildings, stores, and restaurants.

(8) Violation of privacy in the second degree is a misdemeanor.


i. Any person whose wire, oral, or electronic communication is accessed, intercepted, disclosed, or used in violation of this part shall (1) have a civil cause of action against any person who accesses, intercepts, discloses, or uses, or procures any other person to access, intercept, disclose, or use the communications, and (2) be entitled to recover from any such person:

(B) The greater of (i) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, or (ii) statutory damages of the greater of $100 a day for each day of violation or $10,000;

(C) Punitive damages, where appropriate; and

(D) A reasonable attorney’s fee and other litigation costs reasonably incurred.

Hawaii Revised Statutes §711-1111 Violation of privacy in the second degree.

(1) A person commits the offense of violation of privacy in the second degree if, except in the execution of a public duty or as authorized by law, the person intentionally:

(a) Trespasses on property for the purpose of subjecting anyone to eavesdropping or other surveillance in a private place;

(b) Peers or peeps into a window or other opening of a dwelling or other structure adapted for sojourn or overnight accommodations for the purpose of spying on the occupant thereof or invading the privacy of another person with a lewd or unlawful purpose, under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed;

(c) Trespasses on property for the sexual gratification of the actor;

(d) Installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any means or device for observing, recording, amplifying, or broadcasting sounds or events in that place other than another person in a stage of undress or sexual activity; provided that this paragraph shall not prohibit a person from making a video or audio recording or taking a photograph of a law enforcement officer while the officer is in the performance of the officer's duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy and the person is not interfering with the officer's ability to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order;

(e) Installs or uses outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein;

(f) Covertly records or broadcasts an image of another person's intimate area underneath clothing, by use of any device, and that image is taken while that person is in a public place and without that person's consent;

(g) Intercepts, without the consent of the sender or receiver, a message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately; but this paragraph does not apply to:
i. Overhearing of messages through a regularly installed instrument on a telephone party line or an extension; or

ii. Interception by the telephone company, electronic mail account provider, or telephone or electronic mail subscriber incident to enforcement of regulations limiting use of the facilities or incident to other operation and use;

(h) Divulges, without the consent of the sender or the receiver, the existence or contents of any message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately, if the accused knows that the message or photographic image was unlawfully intercepted or if the accused learned of the message or photographic image in the course of employment with an agency engaged in transmitting it; or

i. Knowingly possesses materials created under circumstances prohibited in section 711-1110.9.

(2) This section shall not apply to any dissemination, distribution, or transfer of images subject to this section by an electronic communication service provider or remote storage service in the ordinary course of its business. For the purpose of this subsection:

“Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

“Electronic communication service” means any service that provides to users thereof the ability to send or receive wire or electronic communications.

“Electronic communication service provider” means any person engaged in the offering or sale of electronic communication services to the public.

“Electronic communication system” means any wire, radio, electromagnetic, photo-optical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications, including e-mail, web hosting, multimedia messaging services, and remote storage services offered by an electronic communication service provider.

“Remote storage service” means the provision to the public of computer storage or processing services by means of an electronic communication system.

(3) For the purposes of this section:
“Intimate areas” means any portion of a person's underwear, pubic area, anus, buttocks, vulva, genitals, or female breast.

“Intimate areas underneath clothing” does not include intimate areas visible through a person's clothing or intimate areas exposed in public.

“Public place” means an area generally open to the public, regardless of whether it is privately owned, and includes but is not limited to streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, buses, tunnels, buildings, stores, and restaurants.

(4) Violation of privacy in the second degree is a misdemeanor. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. [L 1972, c 9, pt of §1; gen ch 1993; am L 1999, c 278, §2; am L 2003, c 48, §4; am L 2004, c 83, §3; am L 2006, c 230, §48; am L 2012, c 59, §1; am L 2016, c 164, §2]

(5) Revision Note: In subsection (2), definitions rearranged pursuant to §23G-15.

(6) Cross References: Electronic eavesdropping, see chapter 803, part IV.

(7) COMMENTARY ON HRS §711-1111:

(a) This section is provided on the theory that in an era of increasing use of electronic eavesdropping devices, criminal sanctions should be used to protect an individual's right of privacy. Wiretapping is contrary to federal law, but it is right that state law should also be on record against it. Therefore, in addition to simple trespassory, nonmechanical eavesdropping, covered in subsection (1)(a), §711-1111 forbids any sort of electronic or mechanical eavesdropping or surveillance whether done through some physical connection with the place under surveillance or not. Thus subsection (1)(b) forbids installation or use of eavesdropping equipment in a "private place" (defined in §711-1100) whereas subsection (1)(c) forbids the use anywhere of equipment designed to receive sounds originating in a private place and normally inaudible or incomprehensible outside. Physical contact with the private place is not necessary. Subsection (1)(d) generally forbids wiretapping, but does not apply to listening in on a party line or extension phone (these are risks known to all telephone users and are not of the magnitude of a wiretap), nor does it apply to interception by the telephone company or a subscriber seeking to ascertain that the telephone is not being put to improper use. Thus a company with a telephone switchboard would not be guilty of a crime if it ordered an employee to monitor calls in order to assure that instructions limiting use of the telephone to business calls were being followed. Subsection (1)(e) forbids anyone to divulge the existence or contents of a telephone call, telegram, or letter, which he knows was
unlawfully intercepted, or which he learned of in the course of his employment by a transmitting agency, without the consent of the sender or the receiver. Since subsection (1)(d) has the exceptions noted, subsection (1)(e) would not cover the party line eavesdropper who reveals what he has overheard.

(b) Previous Hawaii law in this area was limited to violations of privacy resulting from interception or recordation of telephone and wire communications.[1] The Code, therefore, is broader in its overall scope than prior law. However, as applied to telephone and wire interceptions or recordations, the Code would limit criminal liability to situations where the conduct was engaged in without the consent of both parties (sender and receiver) to the conversation or communication. If one of the parties to the communication authorizes its interception or recordation (e.g., in an attempt to trace obscene or extortionary telephone calls), criminal sanctions ought not to result.

(8) SUPPLEMENTAL COMMENTARY ON §711-1111

(a) Act 278, Session Laws 1999, amended this section, more specifically, by making the offense of violation of privacy in the second degree a misdemeanor. The offense does not include the installation of any device for, among other things, videotaping or filming another person in a state of undress or sexual activity, which is covered under §711-1110.9. The knowing possession of materials created under circumstances prohibited in §711-1110.9 is included as an offense under this section.

(b) Act 48, Session Laws 2003, amended this section to update the crime of violation of privacy in the second degree to punish “video voyeurism” in public places. The legislature found that through technological advancements, recording and broadcasting devices are easily concealed. Incidents of "video voyeurism" in public places have occurred but are not chargeable under existing laws. Changing the offense of violation of privacy would address the growing concern for the offensive practice of “upskirt photography.” Senate Standing Committee Report No. 637, House Standing Committee Report No. 1316

(c) Act 83, Session Laws 2004, amended this section to include photographic images among the types of private communications that may not be intercepted or divulged without the consent of the sender or receiver, except when the images are disseminated, distributed, or transferred by electronic communication service providers or remote storage services in the ordinary course of business. Act 83 also defined the terms "electronic communication," "electronic communication service," "electronic communication service provider," "electronic communication system," and "remote storage service." Act 83 made statutory amendments to the
existing privacy law in order to prohibit the inappropriate use of new
digital technologies, such as cellular phones, that are capable of taking
digital photographs and transmitting those images. House Standing
Committee Report No. 826-04, Conference Committee Report No. 43-04.

(d) Act 230, Session Laws 2006, amended subsection (1) to add peering or
peeping into windows and trespassing on property for sexual gratification
to the offense of violation of privacy in the second degree. House
Standing Committee Report No. 665-06.

(e) Act 59, Session Laws 2012, amended this section to exclude the
surveillance of another in a stage of undress or sexual activity as such acts
are covered by violation of privacy in the first degree. The legislature
found that existing law regarding a violation of privacy in the second
degree, a misdemeanor, as it pertains to a person in a stage of undress or
sexual activity was also covered by the felony offense of violation of
privacy in the first degree. According to testimony submitted, case law
required that a violator be charged under the lesser charge in order to
avoid constitutional due process and equal protection issues. Act 59
would resolve that conflict by excluding the behavior from the lesser
second degree offense, thereby allowing violators to be charged under the
felony offense. House Standing Committee Report No. 664-12, Senate
Standing Committee Report No. 3199.

(f) Act 164, Session Laws 2016, amended this section to establish an
exception to the offense of violation of privacy in the second degree for a
person making a video or audio recording or photograph of a law
enforcement officer while the officer is in the performance of duties in a
public place or under circumstances in which the officer has no reasonable
expectation of privacy; provided that the officer may take reasonable
action to maintain safety and control, secure crime scenes and accident
sites, protect the integrity and confidentiality of investigations, and protect
the public safety and order. The legislature found that with the popularity
and widespread use of smart phones with video or audio recording and
photographing capabilities, recordings and photos of law enforcement
officers who are exercising their duties have been used as evidence in
police conduct matters or widely disseminated via social media. However,
such recordings and photographs may be seen as obstructing government
operations or an invasion of privacy. Act 164 established an exception
under certain circumstances to enable a person to record or photograph a
law enforcement officer exercising the officer's duties without violating
the law. Senate Standing Committee Report No. 2525, Conference
Committee Report No. 129-16. Law Journals and Reviews: Don't Smile,
Your Image Has Just Been Recorded on a Camera-Phone: The Need For
Privacy in the Public Sphere. 27 UH L. Rev. 377 (2005). H.R.S. §711-
H.R.S. §711-1110.9 Violation of privacy in the first degree.

(a) A person commits the offense of violation of privacy in the first degree if, except in the execution of a public duty or as authorized by law, the person intentionally or knowingly installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity in that place.

(b) Violation of privacy in the first degree is a class C felony. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. [L 1999, c 278, §1; am L 2003, c 48, §3; am L 2004, c 83, §2]

i. Act 278, Session Laws 1999, added this section to make it a felony to take sexual photographs or videotapes of a person without that person's consent and when the person expects privacy. The legislature found that current laws criminalizing a violation of privacy do not distinguish between surreptitious recording of any events and sounds in a private place, and the more egregious offense of installing a hidden device to surreptitiously record or observe persons while they are undressed or engaging in sexual activity. The legislature believed that using a hidden device to record someone while engaged in very personal acts merits a higher penalty than simply using a hidden device to record any events in a private place. Senate Standing Committee Report No. 1579, Conference Committee Report No. 87.

ii. Act 48, Session Laws 2003, amended this section to update the crime of violation of privacy in the first degree to punish "video voyeurism" in public places. The legislature found that through technological advancements, recording and broadcasting devices are easily concealed. Incidents of "video voyeurism" in public places have occurred but are not chargeable under existing laws. Changing the offense of violation of privacy would address the growing concern for the offensive practice of "upskirt photography". Senate Standing Committee Report No. 637, House Standing Committee Report No. 1316.

iii. Act 83, Session Laws 2004, amended this section to clarify that the offense of violation of privacy in the first degree included the use or installation, or both, in any private place and without the consent of the person or persons entitled to privacy therein, of any device for observing, recording, amplifying, or broadcasting
another person in a stage of undress or sexual activity in that place.
House Standing Committee Report No. 1174-04.

(10) Employee Privacy: Hawaii

(a) Individual privacy is protected by the Hawaii State Constitution. This constitutional provision limits an employer’s ability to engage in surveillance and drug testing of employees.

(b) State government employees may review and copy their personnel records, request amendment or correction of their records, and restrict disclosure of their records.

(c) Hawaii generally prohibits employers from using lie detector tests to screen applicants or from requiring employees to take lie detector tests during the course of employment.

(d) Employers may use security cameras or surveillance videos in common areas of the workplace, but may not make audio recordings without prior written from the employees involved in the recording.

(e) Credit checks may only be performed in certain circumstances, and can only be conducted after an offer of employment is given.

(f) Medical testing may be conducted after an offer of employment is given. However, the employer must provide the examiner with a written job description and copies of any relevant regulations.

(g) Drug and alcohol testing, other than those governed by federal regulations, must comply with the Hawaii Substance Abuse Testing Act.

(h) Hawaii prohibits employers from discriminating or making any employment decisions based on an employee’s arrest and court record. Convictions may be considered after an employment offer, under limited circumstances.

(i) Release of information on AIDS, ARC or HIV infection is prohibited unless authorized by the individual in question. Violations may result in criminal prosecution.

(j) Employers are required to safeguard employee medical information, social security numbers and other personal information.

2. The Standards of Compensatory and Punitive Damages

HAWAII CASE LAW

Furthermore, the Restatement (Second) of Torts §§ 652A-E (1977), recognizes a tort of invasion of privacy. The Restatement categorizes the tort into four types: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) false light. "As it has developed in the courts, the invasion of the right of privacy has been a complex of four distinct wrongs." Restatement (Second) of Torts § 652A comment b. Thus, invasion of privacy, as a general tort action, should be construed as a "suit at common law."


Hawai‘i precedent on punitive damages is generally as follows:

[Actions] of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. Such damages may be awarded in cases where the defendant “has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations”; or where there has been “some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences”. In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them.

Bright v. Quinn, 20 Haw. 504, 511–12 (1911) (citations omitted).

Kaopuiki v. Kealoha, 104 Hawai‘i 241, 256, 87 P.3d 910, 925 (App, 2003). The court in Kaopuiki went on to state: Succinctly stated,

[the] proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for [the] prior award of damages against [the tortfeasor] and (2) the amount of money required to punish [the tortfeasor] considering [his or her] financial condition.


Id. at 258, 87 P.3d at 927 (footnote omitted) (emphasis added).
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Jury Instruction No. 14, which both parties agreed to, provides as follows:

The law which applies to this case authorizes an award of nominal damages. If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Doc. No. 459 at 15. This instruction follows the commonly held view that nominal damages are to be awarded where an invasion of privacy is proven but no compensatory damages are established. See, e.g., Rohrbaugh v. Wal-Mart Stores, Inc., 572 S.E.2d 881, 886-88 (W. Va. 2002); Doe v. High-Tech Institute, Inc., 972 P.2d 1060, 1066 (Colo. App. 1998); Sabrina W. v. Willman, 540 N.W.2d 364, 371 (Neb. Ct. App. 1995); Trevino v. Southwestern Bell Tel. Co., 582 S.W.2d 582, 584-85 (Tex. App. 1979); see also Am. Jur. 2d Damages § 18 (2011); cf. Restatement (Second) of Torts § 652H cmt. c.

In sum, because the jury found for O’Phelan on her invasion of privacy claim, but also found that O’Phelan failed to prove compensatory damages, O’Phelan is entitled to an award of nominal damages of not more than one dollar, as mandated by Jury Instruction No. 14. Failure to award such damages constitutes plain error. Accordingly, the Court grants O’Phelan’s motion for judgment as a matter of law and awards her one dollar ($1.00) in nominal damages.


In Hawaii punitive damages may be awarded only in cases where the wrong-doer has acted wantonly, oppressively, or with such malice as implies spirit of mischief or criminal indifference to civil obligations, or where there has been such willful misconduct or entire want of care as would raise presumption of conscious indifference to consequences. Quedding v. Arisumi Brothers, Inc., 66 Hawaii 335, 240, 661 P.2d 706, 710 (1983); Kang v. Harrington, 59 Hawaii 652, 660-661, 587 P.2d 285,
293 (1978). The proper measure of damages is based upon the degree of malice, oppression or gross negligence which forms the basis for the award and the amount of money required to punish the defendant, considering his financial condition. Kang, 59 Hawaii at 652, 587 P.2d 285; Howell v. Associated Hotels, Ltd., 40 Hawaii 492, 501 (1954). Moreover claims for punitive damages must be proven by "clear and convincing evidence." Masaki v. General Motors Corporation, 780 P.2d 566, 575 (September 20, 1989).

... 

This court finds that the standard established by Hawaii law is sufficient to apprise potential defendants and juries of both the nature of the conduct which may expose one to punitive damage liability as well as what level of award is appropriate under the circumstances. Moreover due process is further guaranteed as, if a jury does award such damages, the court may, pursuant to a proper motion, examine the award. Thus there is no constitutional violation in the application of Hawaii law in imposing punitive damage liability. See Vollert v. Summa Corp., 389 F.Supp. 1348, 1350 (D.Hawaii 1975).


Article I, section 6 of the Hawai‘i Constitution is entitled “Right to Privacy,” and it provides, “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.” In the context of patient medical records, this court has issued three decisions construing article I, section 6 on petitions for writ of mandamus: Brende v. Hara, 113 Hawai‘i 424, 153 P.3d 1109 (2007) (per curiam); Naipo v. Border, 125 Hawai‘i 31, 251 P.3d 594 (2011) (per curiam); and Cohan v. Ayabe, 132 Hawai‘i 408, 322 P.3d 948 (2014).

Brende, Cohan, and Naipo all provide strong privacy protection over patient medical records. In Brende, this court held, “Petitioners’ health information is ‘highly personal and intimate’ information that is protected by the informational prong of article I, section 6. The constitutional provision protects the disclosure outside of the underlying litigation of petitioners’ health
information produced in discovery.” 113 Hawai‘i at 430, 153 P.3d at 1115 (footnote omitted). This holding was reaffirmed in Cohan. See 132 Hawai‘i at 410, 322 P.3d at 950 (“[T]he privacy provision of the Hawai‘i Constitution, article I, section 6, protects [the petitioner's] health information against disclosure outside the underlying litigation.”)

The holding in Brende and Cohan applies to situations in which a party to litigation seeks to limit and/or prohibit the disclosure, outside of discovery, of his or her own patient medical records. While that is not the situation in the present case (where non-parties seek to prohibit the use and disclosure of their patient medical records), we turn to Brende and Cohan for their exploration of the constitutional history behind article I, section 6. Brende noted that the framers viewed the Hawai‘i constitutional right to privacy as follows:

[...]he [article I, section 6] right of privacy encompasses the common law right of privacy or tort privacy. This is a recognition that the dissemination of private and personal matters, be it true, embarrassing or not, can cause mental pain and distress far greater than bodily injury. For example, the right can be used to protect an individual from invasion of [the individual's] private affairs, public disclosure of embarrassing facts, and publicity placing the individual in a false light. In short, this right of privacy includes the right of an individual to tell the world to “mind your own business.”


So inviolable is this right that the framers sought to shield individuals from “possible abuses in the use of highly personal and intimate information in the hands of government or private parties. ...” Comm. Whole Rep. No. 15, in Proceedings, at 1024 (emphasis added). In this way, article I, section 6 provides Hawaii's people with powerful protection against any infringement of their right to privacy, by state and private actors. In fact, we have previously noted that the framers “equated privacy in the informational sense” with the “common law right of privacy,” so that “[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” State of Hawai‘i Organization of Police
Officers ("SHOPO") v. Soc'y of Prof'l Journalists, 83 Hawai'i 378, 398, 927 P.2d 386, 406 (1996) (citing Stand. Comm. Rep. No. 69, Proceedings, at 674; and Restatement (Second) of Torts § 652D, 383 (1977)); there is no requirement that the one invading another individual's privacy be a state actor. See, e.g., SHOPO, 83 Hawai'i 378, 927 P.2d 386 (analyzing whether a non-state actor's, e.g., an organization of journalists, access to police officer disciplinary records would violate the officers' constitutional privacy rights).

Article I, section 6 generally provides greater privacy to Hawaii's people than its federal analogs. The Hawai'i constitutional right to privacy is a "fundamental right for purposes of constitutional analysis." Cohan, 132 Hawai'i at 415, 322 P.3d at 955 (quoting Comm. Whole Rep. No. 15, in Proceedings, at 1024). We view article I, section 6 as "afford[ing] much greater privacy rights than the federal right to privacy...." Janra Enters., Inc. v. City & Cty. of Honolulu, 107 Hawai'i 314, 320, 113 P.3d 190, 196 (2005) (citation omitted).

Article 1, section 6 also provides more stringent protection over patient medical records than does HIPAA. This conclusion was implicit in Cohan, where a provision in a Stipulated Qualified Protection Order that provided that the defendant hotel could use a tort plaintiff's health information in its internal reviews was invalidated under article I, section 6, yet we noted that "[a]n analysis under HIPAA arguably may lead to a different result." 132 Hawai'i at 419, 419 n.18, 322 P.3d at 959, 959 n.18.

In Cohan, we held, "To allow [a party's medical] information to be used outside the litigation, regardless of whether it is de-identified or not, would reach beyond what the Hawai'i Constitution permits in the absence of a showing of a compelling state interest." 132 Hawai'i at 419, 322 P.3d at 959. In Cohan, we noted that the de-identification process under HIPAA is "extremely complex and problematic," and that, "[a]part from these technical considerations, there is the very complicated issue as to whether a patient has a legitimate basis for being concerned about what happens to their personal health information once it is de-identified." 132 Hawai'i at 417, 418, 322 P.3d at 957, 958 (footnote omitted). We quoted the following observation from the Seventh Circuit Court of Appeals with approval: "Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would still be an invasion of privacy." Cohan, 132 Hawai'i at 418, 322 P.3d at 958 (citing Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir.2004)). Such
an invasion could produce undesirable effects upon patient health care, including “social and psychological harm through embarrassment, economic harm through job discrimination and job loss, patient difficulty in obtaining health insurance, health care fraud, and patient reluctance to share sensitive information with their doctors or pharmacists.” 132 Hawai‘i at 418, 322 P.3d at 958 (quoting Christopher R. Smith, Somebody's Watching Me: Protecting Patient Privacy in Prescription Health Information, 36 Vt. L. Rev., 931, 943 (2012) ).

3. **Insurance Regulations to Watch**

   None at this time.

4. **State Arbitration and Mediation Procedures**

   1. **HAWAII ARBITRATION RULES (RULES GOVERNING THE COURT ANNEXED ARBITRATION PROGRAM) CAAP:**

   Rule 1. THE COURT ANNEXED ARBITRATION PROGRAM.

   The Court Annexed Arbitration Program (the Program) is a mandatory, non-binding arbitration program, as hereinafter described, for certain civil cases in the State of Hawai‘i.

   Rule 2. INTENT OF PROGRAM AND APPLICATION OF RULES.

   (A) The purpose of the Program is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters to be designated by the Judicial Arbitration Commission.

   (B) These rules shall not be applicable to arbitration by private agreement or to other forms of arbitration under existing statutes, policies and procedures.

   (C) These arbitration rules are not intended, nor should they be construed, to address every issue which may arise during the arbitration process. The intent of these rules is to give considerable discretion to the arbitrator, the Arbitration Administrator, the Arbitration Judge, and the Judicial Arbitration Commission. Arbitration hearings are intended to be informal, expeditious and consistent with the purposes and intent of these rules.

   *(Amended April 16, 1987, effective May 1, 1987; further amended effective March 20, 1997.)*

   Rule 3. THE ARBITRATION JUDGE.
(A) The Arbitration Judge for the Program in each judicial circuit shall be a Circuit Court Judge who shall be appointed by the Chief Justice. The Arbitration Judge may delegate his or her powers and duties under these rules to another Circuit Court Judge as may be needed for the efficient operation of the Program.

(B) The Arbitration Judge shall determine all disputed issues under these rules as hereinafter set forth, including, but not limited to, all disputed issues concerning the arbitrability of cases and the qualifications and acts of arbitrators.

(Amended April 16, 1987, effective May 1, 1987; further amended November 3, 1994 and November 14, 1994, effective January 2, 1995.)

Rule 4. THE JUDICIAL ARBITRATION COMMISSION.

(A) The Chief Justice shall establish a Judicial Arbitration Commission which will have the responsibility to develop, monitor, maintain, supervise and evaluate the Program for the State of Hawai‘i.

(B) The Judicial Arbitration Commission shall include the Arbitration Judges of each judicial circuit and a representative to be designated by the President of the Hawai‘i State Bar Association. The chairperson shall be designated by the Chief Justice. Additional members shall be appointed at the discretion of the Chief Justice. The Chief Justice may also appoint advisors to the Judicial Arbitration Commission, who shall not have the right to vote.

(C) The Judicial Arbitration Commission shall be responsible for the selection and training of arbitrators.

(D) The Judicial Arbitration Commission shall be responsible for the supervision and evaluation of the Arbitration Administrator in each judicial circuit.

(E) The Judicial Arbitration Commission shall interpret these rules prior to the appointment of an arbitrator in any case under the Program.

(F) The Judicial Arbitration Commission may recommend the adoption or amendment of rules and regulations to the Supreme Court for the implementation and administration of the program.

(Amended April 16, 1987, effective May 1, 1987; further amended November 3, 1994 and November 14, 1994, effective January 2, 1995.)

Rule 5. THE ARBITRATION ADMINISTRATOR.

The Arbitration Administrator for the Program in each judicial circuit shall be appointed by the Chief Justice and shall be responsible for the operation and management of the Program, as hereinafter set forth.
Rule 6. MATTERS SUBJECT TO ARBITRATION.

(A) All tort cases having a probable jury award value, not reduced by the issue of liability and not in excess of One Hundred Fifty Thousand Dollars ($150,000.00), exclusive of interest and costs, may be accepted into the Program at the discretion of the Judicial Arbitration Commission.

(B) Any other civil case, regardless of the monetary value or the amount in controversy, may be submitted to the Program upon the agreement of all parties and the approval of the Arbitration Judge.

(C) Parties to cases submitted or ordered to the Program may agree at any time to be bound by any arbitration ruling or award.

(D) The Arbitration Judge may accept into, or remove from, the Program any action where good cause for acceptance or removal is found. The Court's decision in this regard is non-reviewable.

Rule 7. RELATIONSHIP TO CIRCUIT COURT JURISDICTION AND RULES; FORM OF DOCUMENTS.

(A) Cases filed in, or removed to, the Circuit Court shall remain under the jurisdiction of that court for all phases of the proceedings, including arbitration.

Except for the authority to act or interpret these rules expressly given to the arbitrator, the Arbitration Administrator, the Judicial Arbitration Commission, or the Arbitration Judge, all issues shall be determined by the Circuit Court with jurisdiction.

Before a case is submitted or ordered to the Program, and after a Notice of Appeal and Request for Trial De Novo is filed, all applicable rules of the Circuit Court and of civil procedure apply. After a case is submitted or ordered to the Program, and before a Notice of Appeal and Request for Trial De Novo is filed, or until the case is removed from the Program, these rules apply.

The calculation of time and the requirements of service of pleadings and documents under these rules shall be the same as under the Hawai‘i Rules of Civil Procedure, except that service under these rules by the Arbitration Administrator may be made by facsimile transmission.
Circuit Court Rule 12(q), and all rules of court or of civil procedure requiring the filing of pleadings, remain in effect notwithstanding the fact that a case is under the Program.

All dispositive motions shall be made to the Circuit Court as required by law or rule notwithstanding the fact that a case is under the Program.

All documents required to be utilized or filed under these rules shall be in a form designated by the Arbitration Judge.

Once a case is submitted or ordered to the Program all parties subsequently joined in the action shall be parties to the arbitration unless dismissed by the Arbitration Judge.

(Amended November 3, 1994 and November 14, 1994, effective January 2, 1995; clerical correction to circuit court rule reference in subparagraph (E) pursuant to July 26, 1990 amendment renaming Circuit Court Rule 12(a)(17) as 12(q).)

Rule 8. DETERMINATION OF ARBITRABILITY.

(A) The court shall view all tort cases as arbitration eligible and automatically “in” the Program unless plaintiff certifies that his or her case has a value in excess of the $150,000 jurisdictional amount of the Program. Plaintiff shall file a request for exemption at the time the complaint is filed and such a request shall include a summary of facts that support plaintiff's contentions.

(B) Where exemptions from arbitration have been requested, the Arbitration Administrator shall review the contentions and evidence available and determine eligibility. The Arbitration Administrator may require a party to submit additional evidence to support the party’s contentions. The Arbitration Administrator shall render a decision on the request for exemption, which may be appealed to the Arbitration Judge. Any appeal to the Arbitration Judge from the decision of the Arbitration Administrator shall be filed with the Arbitration Judge and served on all parties within ten (10) days from the date the decision is served. Any issue or information presented to the Arbitration Judge on appeal that was not presented to the Arbitration Administrator, will not be considered by the Arbitration Judge on appeal unless such issue or information could not have been presented to the Arbitration Administrator before the Arbitration Administrator rendered the decision. The Arbitration Judge’s decision on appeal is non-reviewable.

(C) Subsequent to the filing of the complaint, any party who believes a case should be removed from, admitted or readmitted to the Program, shall file a request to remove, admit or readmit, with the Arbitration Judge. The request shall include a summary of the facts that support the party’s contentions, and shall be served on all parties. The Arbitration Judge’s decision on the request is non-reviewable.
(D) The Arbitration Judge shall make all final determinations regarding the arbitrability of a case when that issue is disputed by any party, and may hold a conference on the issue of arbitrability at the judge’s discretion.

(E) The Arbitration Judge may, at the judge’s discretion, impose sanctions of reasonable costs and attorney’s fees against any party who without good cause or justification attempts to remove a case from the Program.


Rule 9. ASSIGNMENT TO ARBITRATOR.

(A) Parties may select and stipulate to a private arbitrator(s), who is an arbitrator not on the panel of the Program, or one who is on the panel but who has agreed to serve on a private basis. Such stipulation must be made within twenty (20) days after the appearance of defense counsel and must include a statement signed by the arbitrator(s) expressing his or her express willingness to arbitrate under the rules and procedures of the Court Annexed Arbitration Program and a duly signed arbitrator's oath.

(B) Any and all fees or expenses related to the use of a private arbitrator(s) shall be borne by the parties.

(C) Unless the Arbitration Administrator is notified of a stipulation for a private arbitrator(s) within the above twenty (20) day period, one (1) arbitrator will be assigned. If the assigned arbitrator is disqualified, another arbitrator shall be assigned.

(D) Any party may object, for good cause, to the assigned arbitrator. The objection, which shall be made in writing and state the specific grounds for the objection, shall be filed with the Arbitration Administrator and served on all parties within ten (10) days from the date of the assignment of the arbitrator. Any response to the objection shall be filed with the Arbitration Administrator and served on all parties within three (3) days after service of the objection. The Arbitration Administrator shall render a decision on the objection, which may be appealed to the Arbitration Judge. Any appeal to the Arbitration Judge from the decision of the Arbitration Administrator shall be filed with the Arbitration Judge and served on all parties within ten (10) days from the date the decision is served. Any issue or information presented to the Arbitration Judge on appeal that was not presented to the Arbitration Administrator, will not be considered by the Arbitration Judge on appeal unless such issue or information could not have been presented to the Arbitration Administrator before the Arbitration Administrator
rendered the decision. The Arbitration Judge’s decision on the appeal is non-reviewable.

(E) Where an Arbitrator is assigned to a case and subsequent thereto, an additional party is added, the party may object, for good cause, to the assigned arbitrator within ten (10) days from the appearance of the party in the case. Except as otherwise provided herein, the provisions of section (D) of this rule shall govern any objection, response, and appeal filed under this section (E).

(F) The above described method of selection of an arbitrator shall be followed in all the Judicial Circuits.


Rule 10. QUALIFICATIONS OF ARBITRATORS.

(A) The Judicial Arbitration Commission shall create and maintain a panel of arbitrators consisting of attorneys licensed to practice in the State of Hawai‘i and, in its discretion, qualified non-attorneys.

(B) Attorneys serving as arbitrators shall have substantial experience in civil litigation, and shall have been licensed to practice law in the State of Hawai‘i for a period of five (5) years, or can provide the Judicial Arbitration Commission with proof of equivalent qualifying experience.

(C) Arbitrators shall be required to complete an orientation and training program following their selection to the panel and other additional training sessions or classes scheduled by the Judicial Arbitration Commission or Arbitration Administrator.

(D) Arbitrators shall be sworn or affirmed by the Chief Justice or his designee to uphold these rules of the Program, the laws of the State of Hawai‘i, and the Code of Ethics of the American Arbitration Association.

(E) Arbitrator who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct shall immediately resign or be withdrawn as an arbitrator,

(F) Any issue concerning the qualification of a person to serve as an arbitrator on the panel of arbitrators shall be referred to the Judicial Arbitration Commission for a final, non-reviewable determination.
(Amended April 16, 1987, effective May 1, 1987; further amended effective March 20, 1997.)

Rule 11. AUTHORITY OF ARBITRATORS.

(A) Arbitrators shall have the general powers of a court and may hear cases in accordance with established rules of evidence and procedure, liberally construed to promote justice and the expeditious resolution of disputes. These include, but are not limited to, the power:

1. To administer oaths or affirmations to witnesses;

2. To relax all applicable rules of evidence and procedure to effectuate a speedy and economical resolution of the case without sacrificing a party's right to a full and fair hearing on the merits;

3. To decide procedural issues arising before or during the arbitration hearing, except issues relating to his or her qualifications as an arbitrator;

4. To invite or order, with reasonable notice, the parties to submit pre-hearing or post-hearing briefs;

5. To examine, after notice to the parties, any site or object relevant to the case;

6. To issue subpoenas for the attendance of witnesses or production of documentary evidence;

7. To determine the place, time and procedure to hear all matters;

8. To interpret these rules in all proceedings before him or her;

9. To find witnesses or parties in contempt and to impose sanctions as provided by the laws of the State of Hawai‘i; and

10. To attempt, with the consent of all parties in writing, to aid in the settlement of the case.

(B) Any challenge to the authority or the act of an arbitrator shall be made to the Arbitration Administrator in writing and state the specific grounds for the challenge. The challenge shall be filed with the Arbitration Administrator and served on the arbitrator and all parties within ten (10) days of the challenged act. Any response to the challenge shall be filed with the Arbitration Administrator and served on the arbitrator and all parties within three (3) days after service of the challenge. The Arbitration Administrator shall render a decision on the challenge, which may be appealed to the Arbitration Judge. Any appeal to the
Arbitration Judge from the decision of the Arbitration Administrator shall be filed with the Arbitration Judge and served on the arbitrator and all parties within ten (10) days from the date the decision is served. Any issue or information presented to the Arbitration Judge on appeal which was not presented to the Arbitration Administrator, will be not considered by the Arbitration Judge on appeal unless such issue or information could not have been presented to the Arbitration Administrator before the Arbitration Administrator rendered the decision. The Arbitration Judge shall have the non-reviewable power to uphold, overturn or modify the decision of the Arbitration Administrator, including the power to stay any proceeding.

(Amended April 16, 1987, effective May 1, 1987; further amended April 8, 2004, effective July 1, 2004.)

Rule 12. STIPULATIONS.

Any stipulation between the parties relating to the conduct of the arbitration proceeding, or any factual matter therein, shall be in writing and signed by the counsel or parties, and filed with the arbitrator.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 13. RESTRICTIONS ON COMMUNICATIONS.

(A) Neither counsel nor parties may communicate directly with the arbitrator regarding the merits of the case, except in the presence of, or with reasonable notice to, all of the other parties.

(B) No disclosure of any offer or demand of settlement made by any party shall be made to the arbitrator prior to the filing of an award without the agreement of all other parties.

Rule 14. DISCOVERY.

(A) Once a case is submitted or ordered to the Program, the extent to which discovery is allowed, if at all, is at the sole discretion of the arbitrator, except as provided in section (B) of this rule. Types of discovery shall be those permitted by the Hawai‘i Rules of Civil Procedure, but these may be modified in the discretion of the arbitrator to save time and expense.

(B) A party may at anytime: (1) serve on other parties the standard form interrogatories and requests for production of documents, which the Judicial Arbitration Commission has approved; and (2) conduct, by agreement, additional formal or informal discovery. Any dispute arising out of the discovery permitted by this section (B) shall be determined by the arbitrator upon his or her assignments.
Rule 15. SCHEDULING OF HEARINGS; PRE-HEARING CONFERENCES.

(A) All arbitrations shall take place and all awards filed no later than nine (9) months from the date of service of the complaint to all defendants, or the Order of Arbitration by the Arbitration Judge, unless said time is modified by the Arbitration Judge pursuant to this rule. Arbitrators shall set the time and date of the hearing within this period.

(B) The arbitration hearing date may be advanced or continued by the arbitrator for good cause upon written request from either party; however, a request for a continuance of the hearing beyond the above nine (9) month period may not be granted by the arbitrator until said arbitrator obtains an extension of the above nine (9) month period. Any request for extension of the above nine (9) month period must be made in writing to the Arbitration Judge by the arbitrator.

(C) Consolidated actions shall be heard on the date assigned to the latest case involved.

(D) Arbitrators and/or the Arbitration Administrator may, at their discretion, conduct pre-arbitration hearings or conferences. However, arbitrators shall conduct a pre-hearing conference within thirty (30) days from the date a case is assigned to an arbitrator.

(E) The arbitrator shall give immediate written notification to the Arbitration Administrator of any change of the arbitration date, any settlement or change of counsel.

Rule 16. PREHEARING STATEMENT.

(A) At least thirty (30) days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a Prehearing Statement. The Prehearing Statement shall state that the party submitting the statement will be ready to proceed with the hearing upon completion of the inspection and/or copying permitted in section (B) of this rule. The statement shall also contain, wherever applicable, the following information:

(1) Information about the party submitting the statement, including, at minimum:
(i) The name, address, telephone number, age, marital status and occupation of such party;

(ii) The name, address, telephone number, and place of registration, if such party is a general or limited partnership; or

(iii) The name, address, telephone number, and place of incorporation, if such party is a corporation.

(2) A statement of the facts which the party submitting the statement reasonably believes will be established at the hearing by such party;

(3) The name, address, telephone number and field of expertise of each expert, including all doctors, whom the party submitting the statement intends to call as a witness or use in any other manner at the hearing, and copies of their reports;

(4) The name, address and telephone number of all other witnesses the party submitting the statement intends to call at the hearing;

(5) A statement of the party's position on general damages;

(6) A statement of the party's position on special damages and an itemized list of all special damages claimed or disputed by such party; and

(7) A list of exhibits and documentary evidence anticipated to be introduced at the hearing by the party submitting the statement.

(B) Each party shall provide copies of all exhibits and documentary evidence to the arbitrator and upon request shall make all exhibits and documentary evidence available for inspection and copying by other parties, at least twenty (20) days prior to the date of the hearing.

(C) A party failing to comply with this rule, or failing to comply with any discovery order, may not present at the hearing a witness or exhibit required to be disclosed or made available, except with the permission of the arbitrator.

(D) Each party shall furnish the arbitrator at least twenty (20) days prior to the arbitration hearing copies of any pleadings and other documents contained in the court file which that party deems relevant.

(Amended November 3, 1994 and November 14, 1994, effective January 2, 1995.)

Rule 17. CONDUCT OF THE HEARING.
(A) The arbitrator shall have complete discretion over the mode and order of presenting evidence and the conduct of the hearing.

(B) No transcription or recording shall be permitted of the arbitration proceedings.

(Amended April 16, 1987, effective May 1, 1987.)

Rule 18. ARBITRATION IN THE ABSENCE OF A PARTY.

An arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain a continuance. The arbitrator shall require the party present to submit such evidence as he or she may require for the making of an award, and may offer the absent party an opportunity to appear at a subsequent hearing.

Rule 19. FORM AND CONTENT OF AWARD.

(A) Awards by the arbitrator shall be in writing and signed by the arbitrator. Awards may be on standard award forms approved by the Judicial Arbitration Commission or may be in a form the arbitrator determines appropriate for the case.

(B) The arbitrator shall determine all issues raised by the pleadings that are subject to arbitration under the Program, including a determination of comparative negligence, if any, damages, if any, and costs. The amount of damages that can be awarded is not limited to the jurisdictional amount for arbitration.

(C) Findings of Fact and Conclusions of Law are not required.

(D) After an award is made, the arbitrator shall return all exhibits to the parties who offered them during the hearing.

(Amended effective March 20, 1997; further amended November 23, 2007, effective January 1, 2008.)

Rule 20. FILING OF AWARD.

(A) Within seven (7) days after the conclusion of the arbitration hearing, or thirty (30) days after the receipt of the final authorized memoranda of counsel, the arbitrator shall file the award with the Arbitration Administrator, who shall then serve copies of said award upon all parties. Application by the arbitrator to the Arbitration Administrator must be made for an extension of these time periods.

(B) Within the seven day period for filing an award, the arbitrator may file with the Arbitration Administrator an amended award to correct an obvious error in the award. Subsequent to this time, the arbitrator must obtain the approval of the Arbitration Administrator to file an amended award. The arbitrator’s written request to the Arbitration Administrator shall state the reason(s) for the request,
include the proposed amended award, and be served on all parties. Except as provided under section (C) of this rule, the arbitrator may not file an amended award that changes the arbitrator’s decision on the merits. An amended award filed pursuant to this section (B) may modify an award only to correct an inadvertent miscalculation or description, or to adjust the award in a matter of form rather than substance.

(C) To file an amended award that includes any modification of substance, the arbitrator must obtain the approval of the Arbitration Judge. The arbitrator’s written request to the Arbitration Judge shall state the reason(s) for the request, include the proposed amended award, and shall be served on the Arbitration Administrator and all parties.

(D) The Arbitration Administrator shall serve any amended award upon all parties.

COMMENTARY:

The December 21, 2004 amendment clarifies that Rule 20 authorizes the arbitrator to request and obtain leave of the Arbitration Administrator or Arbitration Judge to file an amended award. The rule is not intended to authorize parties to request modification of an arbitration award by the Arbitration Administrator or Arbitration Judge.

(Amended April 16, 1987, effective May 1, 1987; rule further amended and commentary added December 21, 2004, effective January 1, 2005.)

Rule 21. JUDGMENT ON AWARD.

If, after twenty (20) days after the award is served upon the parties, no party has filed a written Notice of Appeal and Request for Trial De Novo, the clerk of the court shall, upon notification by the Arbitration Administrator, enter the arbitration award as a final judgment of the court. This period may be extended by written stipulation, filed with the Arbitration Administrator within twenty (20) days after service of the award upon the parties, to a period no more than forty (40) days after the award is served upon the parties. Said award shall have the same force and effect as a final judgment of the court in a civil action, but may not be appealed.


Rule 22. REQUEST FOR TRIAL DE NOVO.

(A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial De
Novo of the action. This period may be extended, to a period of no more than forty (40) days after the award is served upon the parties, by stipulation signed by all parties remaining in the action and filed with the Arbitration Administrator within twenty (20) days after service of the award upon the parties.

(B) After the filing and service of the written Notice of Appeal and Request for Trial De Novo, the case shall be set for trial pursuant to applicable court rules.

(C) Demand For Jury Trial.

(1) If any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the decision exempting or removing the case from the Program is served upon the parties, the trial shall include a jury if a demand for jury trial is served upon the parties not later than ten (10) days after service of the decision exempting or removing the case from the Program or by the deadline set forth in the Hawai‘i Rules of Civil Procedure, whichever is later, and the demand is filed in accordance with the Hawai‘i Rules of Civil Procedure. The demand for jury trial fee shall be paid as provided by law.

(2) If any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the Notice of Appeal and Request for Trial De Novo is served upon the parties, the trial de novo shall include a jury if a demand for jury trial is served upon the parties not later than ten (10) days after service of the Notice of Appeal and Request for Trial De Novo, and the demand is filed in accordance with the Hawai‘i Rules of Civil Procedure. The demand for jury trial fee shall be paid as provided by law.

(3) In the case of an action admitted or readmitted to the Program after being exempted or removed, if any issue in the action is triable of right by a jury and a jury trial is not demanded by the date the Notice of Appeal and Request for Trial De Novo is served upon the parties, subsection (C)(2) of this rule shall govern.

(D) After a written Notice of Appeal and Request for Trial De Novo has been filed and served, it may not be withdrawn except by stipulation of all remaining parties or by order of the Arbitration Judge. The Arbitration Judge shall not allow withdrawal of a Notice of Appeal and Request for Trial De Novo over objection of any non-appealing party but may order that an objecting party be deemed an appealing party for purposes of these rules. The Arbitration Judge in allowing a withdrawal may do so upon such terms and conditions as the Court deems proper, including an order that the appealing party pay the attorneys’ fees and costs incurred by non-appealing parties after service of the Notice of Appeal and Request for Trial De Novo. In the event a Notice of Appeal and Request for Trial De Novo is withdrawn pursuant to this rule and no other Notice of Appeal
and Request for Trial De Novo remains, judgment shall be entered in accordance with Rule 21.


Rule 23. PROCEDURES AT TRIAL DE NOVO.

(A) Clerk shall seal any arbitration award if a trial de novo is requested. The jury will not be informed of the arbitration proceeding, the award, or about any other aspect of the arbitration proceeding. The sealed arbitration award shall not be opened until after the verdict is received and filed in a jury trial, or until after the judge has rendered a decision in a court trial.

(B) All discovery permitted during the course of the arbitration proceedings shall be admissible in the trial de novo subject to all applicable rules of civil procedure and evidence. The court in the trial de novo shall insure that any reference to the arbitration proceeding is omitted from any discovery taken therein and sought to be introduced at the trial de novo.

(C) No statements or testimony made in the course of the arbitration hearing shall be admissible in evidence for any purpose in the trial de novo.

Rule 24. SCHEDULING OF THE TRIAL DE NOVO.

Every case transferred to the Program shall maintain the approximate position on the civil trial docket as if the case had not been so transferred, unless at the discretion of the court, the docket position is modified.

Rule 25. THE PREVAILING PARTY IN THE TRIAL DE NOVO; COSTS.

(A) The "Prevailing Party" in a trial de novo is the party who (1) appealed and improved upon the arbitration award by 30% or more, or (2) did not appeal and the appealing party failed to improve upon the arbitration award by 30% or more. For the purpose of this rule, "improve" or "improved" means to increase the award for a plaintiff or to decrease the award for the defendant.

(B)

(C) The "Prevailing Party" under these rules, as defined above, is deemed the prevailing party under any statute or rule of court. As such, the prevailing party is entitled to costs of trial and all other remedies as provided by law, unless the Court otherwise directs.

COMMENTARY:
The July 1, 1999 amendment makes clear that the allowance of costs to the prevailing party is not mandatory. The amendment is intended to vest the trial court with discretion in awarding taxable costs to avoid inequitable results. In weighing the equities, the trial court may consider factors such as the nature of the case, the conduct of the parties throughout the litigation, including arbitration proceedings, the amount and timing of settlement offers made by the parties, the amount of the judgment, and other relevant factors.

For example, when a defendant appeals an Arbitration Award and the plaintiff obtains a judgment which is 30% less than the award, based on the circumstances and equities of the case, the court may award taxable costs to the plaintiff although the defendant would be considered the "prevailing party" under Section (A).

As another example, when a plaintiff appeals a "zero" Arbitration Award and obtains a "nominal" or "insignificant" judgment, based on the circumstances and equities of the case, the court may award taxable costs to the defendant although the plaintiff would be considered the "prevailing party" under Section (A). Whether a judgment is "nominal" or "insignificant" is left to the sound discretion of the court.

(Amended November 3, 1994, November 14, 1994 and December 21, 1994, effective February 1, 1995; amended effective July 1, 1999.)

Rule 26. SANCTIONS FOR FAILING TO PREVAIL IN THE TRIAL DE NOVO.

(A) After the verdict is received and filed, or the court's decision rendered in a trial de novo, the trial court may, in its discretion, impose sanctions, as set forth below, against the non-prevailing party whose appeal resulted in the trial de novo.

(B) The sanctions available to the court are as follows:

(1) Reasonable costs and fees (other than attorneys' fees) actually incurred by the party but not otherwise taxable under the law, including, but not limited to, expert witness fees, travel costs, and deposition costs;

(2) Costs of jurors;

(3) Attorneys' fees not to exceed $15,000;

(C) Sanctions imposed against a plaintiff will be deducted from any judgment rendered at trial. If the plaintiff does not receive a judgment in his or her favor or the judgment is insufficient to pay the sanctions, the plaintiff will pay the amount of the deficiency. Sanctions imposed against a defendant will be added to any judgment rendered at trial.
In determining sanctions, if any, the court shall consider all the facts and circumstances of the case and the intent and purpose of the Program in the State of Hawai‘i.

(Amended November 3, 1994, November 14, 1994, and December 21, 1994, effective February 1, 1995.)

Rule 27. EFFECTIVE DATE.

These rules become effective as of February 15, 1986 for the circuit court of the first circuit; as of October 1, 1987 for the circuit court of the third circuit; as of October 15, 1987 for the circuit court of the second circuit; and as of November 1, 1987 for the circuit court of the fifth circuit.

(Amended September 28, 1987, effective October 1, 1987.)

Rule 28. SANCTIONS FOR FAILURE TO MEANINGFULLY PARTICIPATE IN ARBITRATION HEARING.

The Arbitration Judge, on the motion of any party filed and served within thirty (30) days after the arbitration award is served upon the parties by the Arbitration Administrator, shall have the power to award sanctions against any party or attorney for failure to participate in the arbitration hearing in a meaningful manner. Sanctions may include costs, expert fees and attorneys' fees reasonably incurred by all other parties for the arbitration hearing and in the prosecution of the motion for sanctions. These sanctions are independent of sanctions under Rule 26. The court may hold hearings as deemed appropriate. If the court determines that the motion was brought without good cause, it may award costs and attorney fees against the movant.

(Added November 3, 1994, amended November 14, 1994, effective February 1, 1995.)

Rule 29. DELETED.

(Master Mediation Pilot Project added November 22, 1994, effective April 1, 1995; amended and effective September 7, 1995; further amended effective April 1, 1996; further amended effective May 22, 1996; further amended effective March 20, 1997; further amended effective April 1, 1998; further amended effective March 31, 1999; expired by its terms on April 1, 2000.)

Rule 30. DELETED.


2. HAWAII REVISED STATUTES §658A: UNIFORM ARBITRATION ACT

§658A-1 Definitions. In this chapter:
"Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

"Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

"Court" means any district or circuit court of competent jurisdiction in this State, unless otherwise indicated. In cases involving arbitration subject to chapter 89, chapter 377, or the National Labor Relations Act, "court" means the circuit court of the appropriate judicial circuit.

"Knowledge" means actual knowledge.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [L 2001, c 265, pt of §1; am L 2006, c 72, §2]

§658A-2 Notice.

(a) Except as otherwise provided in this chapter, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications. [L 2001, c 265, pt of §1]

§658A-3 When chapter applies.

(a) Except as provided in subsection (c), this chapter governs an agreement to arbitrate made on or after July 1, 2002.

(b) This chapter governs an agreement to arbitrate made before July 1, 2002, if all the parties to the agreement or to the arbitration proceeding so agree in a record. If the parties to the agreement or to the arbitration do not so agree in a record, an
agreement to arbitrate that is made before July 1, 2002, shall be governed by the law specified in the agreement to arbitrate or, if none is specified, by the state law in effect on the date when the arbitration began or on June 30, 2002, whichever first occurred.

(c) After June 30, 2004, this chapter governs an agreement to arbitrate whenever made. [L 2001, c 265, pt of §1; am L 2002, c 50, §1]

Revision Note: "July 1, 2002" substituted for "the effective date of this chapter".

Case Notes

Where appellant was already bound by an arbitration agreement executed on February 24, 2000, and therefore the post-July 1, 2002 arbitration agreement was not a "new" arbitration agreement that would dictate the application of this chapter to the arbitration proceedings, subsection (a) was inapplicable to the case. 113 H. 127, 149 P.3d 495 (2006).

Where arbitration proceeding commenced prior to June 30, 2004, subsection (c) was inapplicable to the case; thus, under the circumstances of the case and the plain language of subsection (b), the governing law applicable to the arbitration proceeding was chapter 658. 113 H. 127, 149 P.3d 495 (2006).

Where the agreement to arbitrate was executed on February 24, 2000 and the arbitration proceeding commenced on February 18, 2004, that is, prior to June 30, 2004 but after June 30, 2002, pursuant to the plain reading of the alternative stated in the second sentence of subsection (b), the governing law applicable to the arbitration proceeding was the law that was in effect on June 30, 2002, i.e., chapter 658. 113 H. 127, 149 P.3d 495 (2006).

To the extent that there may be a conflict between the jurisdictional provisions of this chapter and chapter 89, chapter 89 takes precedence over this chapter. 132 H. 492 (App.), 323 P.3d 136 (2014).

§658A-4 Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this chapter to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement shall not:

(1) Waive or agree to vary the effect of the requirements of section 658A-5(a), 658A-6(a), 658A-8, 658A-17(a), 658A-17(b), 658A-26, or 658A-28;
(2) Agree to unreasonably restrict the right under section 658A-9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under section 658A-12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under section 658A-16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this chapter, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding shall not waive, or the parties shall not vary the effect of, the requirements of this section or section 658A-3(a) or (c), 658A-7, 658A-14, 658A-18, 658A-20(d) or (e), 658A-22, 658A-23, 658A-24, 658A-25(a) or (b), or 658A-29. [L 2001, c 265, pt of §1; am L 2002, c 16, §27]

§658A-5 Application for judicial relief.

(a) Except as otherwise provided in section 658A-28, an application for judicial relief under this chapter shall be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this chapter shall be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion shall be given in the manner provided by law or rule of court for serving motions in pending cases. [L 2001, c 265, pt of §1]

§658A-6 Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding
may continue pending final resolution of the issue by the court, unless the court otherwise orders. [L 2001, c 265, pt of §1]

Case Notes: Circuit court erred in determining that petitioner's claim that the arbitration provision in question was unconscionable on several grounds were beyond the scope of its review in deciding on a motion to compel arbitration; unconscionability is a generally applicable contract defense and is within the scope of the circuit court's review on the question of whether a valid and enforceable agreement to arbitrate exists. 130 H. 437, 312 P.3d 869 (2013).

The circuit court should have granted the petitioner's motion to compel arbitration because there was an arbitration agreement between the parties that clearly and unmistakably left the issue of arbitrability to the arbitrator. 132 H. 426, 322 P.3d 966 (2014).


§658A-7 Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it shall not, pursuant to subsection (a) or (b), order the parties to arbitrate.

(d) The court shall not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section shall be made in that court. Otherwise a motion under this section shall be made in any court as provided in section 658A-27.
If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim. [L 2001, c 265, pt of §1]

Case Notes: Cited, where the court found that third-party defendant, assignee and nonsignatory to a lease containing a valid arbitration clause, could move to compel arbitration of additional rent due. 515 F. Supp. 2d 1141 (2007).

Although public workers' union was not engaged in arbitration proceedings at the time of the other public union's motion to compel consolidated arbitration pursuant to this section, as the core purpose of the other public union's motion was to compel arbitration, appeals court had jurisdiction under §658A-28 over other public union's appeal from order denying motion for consolidated arbitration. 124 H. 372 (App.), 244 P.3d 609 (2010).

Where public workers' union and the State had a valid agreement to arbitrate disputes that arose between the State and the union workers, but the agreement did not contemplate arbitration for disputes with the other public union, a nonsignatory to the agreement, circuit court did not err in refusing to compel tripartite arbitration. 124 H. 372 (App.), 244 P.3d 609 (2010).

Upon a disputed motion to compel arbitration, where there are genuine issues of material fact as to the existence of an arbitration agreement, a trial court must resolve those issues through an evidentiary hearing; at minimum, where live witness testimony or cross examination of affiants would meaningfully promote resolution of factual disputes, such evidence should be received, as disputed factual issues cannot be resolved on the basis of an under-developed record. 130 H. 517 (App.), 312 P.3d 1224 (2013).

§658A-8 Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the
effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action;

(2) A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or (b). [L 2001, c 265, pt of §1]

§658A-9 Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under section 658A-15(c) before the beginning of the arbitration hearing, by appearing at the hearing the person waives any objection to lack of or insufficiency of notice. [L 2001, c 265, pt of §1]

Case Notes: This section is not limited to persons asserting a claim; the plain language of this section sets forth the requirements for initiating an arbitration proceeding by a person who is a party to an arbitration agreement. 107 H. 386, 114 P.3d 892 (2005).

§658A-10 Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in subsection (c), upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation. [L 2001, c 265, pt of §1]

Case Notes: Circuit court did not err in declining to order consolidated arbitration where there were no separate pending arbitration proceedings to consolidate. 124 H. 372 (App.), 244 P.3d 609 (2010).

§658A-11 Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral. [L 2001, c 265, pt of §1]

§658A-12 Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.
(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section 658A-23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under section 658A-23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 658A-23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 658A-23(a)(2). [L 2001, c 265, pt of §1]

§658A-13 Action by majority.

If there is more than one arbitrator, the powers of an arbitrator shall be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under section 658A-15(c). [L 2001, c 265, pt of §1]

§658A-14 Immunity of arbitrator; competency to testify; attorney's fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by section 658A-12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring
during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under section 658A-23(a)(1) or (2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation. [L 2001, c 265, pt of §1]

§658A-15 Arbitration process.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the
arbitrator may adjourn the hearing from time to time as necessary but shall not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with section 658A-11 to continue the proceeding and to resolve the controversy. [L 2001, c 265, pt of §1]

§658A-16 Representation by lawyer.

A party to an arbitration proceeding may be represented by a lawyer. [L 2001, c 265, pt of §1]

§658A-17 Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take
action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State. [L 2001, c 265, pt of §1]

Case Notes: Where employer argued that arbitrator exceeded arbitrator's authority in awarding union thirty hours of attorney's fees to prepare its motion for discovery sanctions and union claimed that the fees were sanctions in the form of attorney's fees, it was within the arbitrator's authority to impose discovery sanctions. 131 H. 82 (App.), 315 P.3d 233 (2011).

§658A-18 Judicial enforcement of pre-award ruling by arbitrator.

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under section 658A-19. A prevailing party may make a motion to the court for an expedited order to confirm the award under section 658A-22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under section 658A-23 or 658A-24. [L 2001, c 265, pt of §1]

§658A-19 Award.

(a) An arbitrator shall make a record of an award. The record shall be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.
An award shall be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award. [L 2001, c 265, pt of §1]

§658A-20 Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in section 658A-24(a)(1) or (3);

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) shall be made and notice given to all parties within twenty days after the movant receives notice of the award.

(c) A party to the arbitration proceeding shall give notice of any objection to the motion within ten days after receipt of the notice in subsection (b).

(d) If a motion to the court is pending under section 658A-22, 658A-23, or 658A-24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in section 658A-24(a)(1) or (3);

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to sections 658A-19(a), 658A-22, 658A-23, and 658A-24. [L 2001, c 265, pt of §1]

§658A-21 Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the
evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under section 658A-22 or for vacating an award under section 658A-23.

(d) An arbitrator’s expenses and fees, together with other expenses, shall be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief. [L 2001, c 265, pt of §1]

Case Notes: The plain language of subsection (b) and its related commentary from the Uniform Arbitration Act established that awards of attorneys’ fees can be valid and authorized based on a party agreement, even if the resulting award exceeds the twenty-five per cent of the judgment limitation included in §607-14. 123 H. 476, 236 P.3d 456 (2010).

Where the determination of the reasonableness of the attorneys' fees was clearly within the scope of the arbitrator's authority and could not be vacated or modified by a reviewing court simply based on the argument that the award was unreasonable, the arbitrators' award of attorneys' fees well in excess of twenty-five per cent of the principal and interest amount of the award was not unreasonable and the arbitrators did not exceed their powers. 121 H. 110 (App.), 214 P.3d 1100 (2009).


§658A-22 Confirmation of award.

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 658A-20 or 658A-24 or is vacated pursuant to section 658A-23. [L 2001, c 265, pt of §1]
Case Notes: Although insurer contended that because award had already been paid, motion to confirm the award had been rendered moot, as the plain language of this section requires the circuit court to confirm an award unless the award has been vacated, modified, or corrected, circuit court did not err in confirming the arbitration award. 122 H. 393 (App.), 227 P.3d 559 (2010).

§658A-23 Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

   (A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

   (B) Corruption by an arbitrator; or

   (C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 658A-15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 658A-15(c) not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 658A-9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.
(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as that provided in section 658A-19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending. [L 2001, c 265, pt of §1]

Case Notes: Plaintiff contended that district court erred in granting defendant's motion to confirm and denying plaintiff's motion to vacate the arbitration award because the arbitrator was biased against plaintiff and failed to follow the law; confirmation of the arbitration award and denial of the motion to vacate the award, affirmed. 603 F.3d 676 (2010).

In the narrow circumstances of the case, perjury may constitute a basis for vacating an arbitration award. 126 H. 99 (App.), 267 P.3d 683 (2011).

Where defendant failed to allege or establish that the arbitration award itself--i.e., awarding damages in favor of plaintiff--violated any public policy, and alleged that the arbitrator's findings and conclusions were tainted by plaintiff's perjury, the statutory grounds embodied in subsection (a) provided sufficient recourse to vacate awards for fraud, including perjury, and the public policy exception was inapplicable to the case. 126 H. 99 (App.), 267 P.3d 683 (2011).

Section provides authority for relief from an arbitration award, but not from a final judgment on an order confirming an arbitration award. 131 H. 301 (App.), 318 P.3d 591 (2013).

The arbitrator was expressly authorized by the collective bargaining agreement to award "back pay to compensate the teacher wholly ... for any salary lost" and interpreted the provision to allow interest for the time that the teacher was without pay. Even if the arbitrator incorrectly construed the agreement or misinterpreted applicable law, the arbitrator acted within the arbitrator's power to interpret the agreement and fashion a remedy in accordance with the arbitrator's interpretation. 131 H. 301 (App.), 318 P.3d 591 (2013).

§658A-24 Modification or correction of award.

(a) Upon motion made within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, the court shall modify or correct the award if:
There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

If a motion made under subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award. [L 2001, c 265, pt of §1]

§658A-25 Judgment on award; attorney's fees and litigation expenses.

Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

A court may allow reasonable costs of the motion and subsequent judicial proceedings.

On application of a prevailing party to a contested judicial proceeding under section 658A-22, 658A-23, or 658A-24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award. [L 2001, c 265, pt of §1]

Case Notes: Subsection (a), which enumerates the appeals that may be taken from a court order concerning an arbitration proceeding, does not represent an exclusive list of appealable orders; thus, although not listed in subsection (a), order compelling arbitration was sufficiently final under the collateral order doctrine to be appealable under §641-1. 129 H. 378, 301 P.3d 588 (2013).

Under subsection (c), union-appellant, representative of real party in interest city worker, was not entitled to an award of attorney's fees incurred during a proceeding filed against worker's employer to enforce an uncontested judgment confirming an arbitration award. 119 H. 201 (App.), 194 P.3d 1163 (2008).

§658A-26 Jurisdiction.
(a) A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this chapter. [L 2001, c 265, pt of §1]

Case Notes: To the extent that there may be a conflict between the jurisdictional provisions of this chapter and chapter 89, chapter 89 takes precedence over this chapter. 132 H. 492 (App.), 323 P.3d 136 (2014).


§658A-27 Venue.

A motion pursuant to section 658A-5 shall be made in the court of the circuit in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the circuit in which it was held. Otherwise, the motion may be made in the court of any circuit in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any circuit in this State. All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs. [L 2001, c 265, pt of §1]

Case Notes: The first circuit court did not err in finding that it was the proper venue for the proceedings to confirm the arbitration award where, inter alia, the collective bargaining agreement provided that the arbitrator had the authority to fix the date, time and place of the hearing, and the judge determined that the arbitration was properly held in Honolulu where the arbitrator was located. 125 H. 476 (App.), 264 P.3d 655 (2011).

§658A-28 Appeals.

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this chapter.
An appeal under this section shall be taken as from an order or a judgment in a civil action. [L 2001, c 265, pt of §1]

Case Notes: Where circuit court denied motion to confirm arbitration award and remanded to arbitrator to rehear issue of appropriate remedy, the order denying the motion was not an appealable order and the appellate court lacked appellate jurisdiction under subsection (a). 123 H. 128 (App.), 230 P.3d 428 (2010).

Where arbitrator explicitly retained jurisdiction to decide the merits of the case, stating in the arbitrator's determination that "I hereby find and conclude that the class grievance is arbitrable on its merits and this matter shall proceed to further arbitration for a determination on the merits of a class grievance", the arbitrator's determination was not an "award" pursuant to subsection (a)(3); thus, appeals court could not review the appeal from the order granting motion to confirm arbitration as the order was unappealable pursuant to subsection (a)(3). 124 H. 367 (App.), 244 P.3d 604 (2010).

Although public workers' union was not engaged in arbitration proceedings at the time of the other public union's motion to compel consolidated arbitration pursuant to §658A-7, as the core purpose of the other public union's motion was to compel arbitration, appeals court had jurisdiction under this section over other public union's appeal from order denying motion for consolidated arbitration. 124 H. 372 (App.), 244 P.3d 609 (2010).

As subsection (a) authorizes an appeal from an order confirming an award or from a final judgment entered pursuant to this chapter, given the express language and plain meaning of this section and §658A-25, appellants were authorized to appeal from either the order granting confirmation or the final judgment; thus, appellants' notice of appeal was timely with respect to the final judgment. 126 H. 179 (App.), 268 P.3d 432 (2012).

§658A-29 Relationship to Electronic Signatures in Global and National Commerce Act.

The provisions of this chapter governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229. [L 2001, c 265, pt of §1]

3. **ARBITRATION RULES, PROCEDURES & PROTOCOL OF DISPUTE PREVENTION & RESOLUTION, INC. (In effect September 1, 1995 © 1998, as revised December 31, 2015)**

**INTRODUCTION**
The Arbitration Rules, Procedures and Protocols (Rules) of Dispute Prevention & Resolution, Inc. (DPR), as amended from time to time are designed to provide a flexible, streamlined and effective set of procedures to govern the arbitration process. The Rules govern all arbitration proceedings which are administered under the auspices of DPR, except those cases in which the parties have provided for another set of established rules or created their own customized arbitration rules and procedures. Unless the parties agree in writing to some other governing law (e.g., The United States Arbitration Act), these Rules are to be interpreted and applied pursuant to and in conjunction with Hawaii Revised Statutes Section §658A, the Revised Uniform Arbitration Act or RUAA. Parties to an existing controversy or dispute may submit the dispute to DPR for resolution by creating their own submission agreement or by utilizing the following submission language:

The parties in this matter have agreed and hereby submit this dispute to binding arbitration before one/three Arbitrator(s) in accordance with the Arbitration Rules, Procedures, and Protocols of Dispute Prevention & Resolution, Inc. (Rules) now in effect. We agree that all matters in controversy between the parties are subject to this agreement and to HRS §658A. We further agree that any award rendered in this proceeding is binding upon the parties and that a judgment of any court of competent jurisdiction may be entered on the award.

Parties to a written agreement or contract may provide for arbitration as the dispute resolution mechanism for any and all future disputes by adopting the following clause in their agreement:

Any and all claims, controversies, or disputes arising out of or relating to this contract/agreement, or the breach thereof, shall be fully and finally resolved by arbitration in accordance with the Arbitration Rules, Procedures, and Protocols of Dispute Prevention & Resolution, Inc., then in effect and to HRS §658A. In the event arbitration is invoked, the parties agree that one/three Arbitrator(s) shall be appointed to hear and resolve the case. The parties further agree that the Award of the Arbitrator is binding upon the parties and that judgment on the Award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

Parties to a written agreement or contract may provide for mediation/arbitration as the dispute resolution mechanisms for any and all future disputes by adopting the following clause in their agreement:

Any and all claims, controversies or disputes arising from or relating to this contract/agreement, or the breach thereof, which remain unresolved after direct negotiations between the parties, shall first be submitted to confidential mediation in accordance with the Mediation Rules, Procedures, and Protocols of Dispute Prevention & Resolution, Inc., then in effect. If any issues, claims or disputes remain unresolved after mediation concludes, the parties agree to submit any such issues to binding arbitration before one/three Arbitrators in accordance with the Arbitration Rules, Procedures and Protocols of Dispute Prevention & Resolution, Inc., then in effect and to HRS §658A. The parties further agree that
judgment on the Award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

REVISED UNIFORM ARBITRATION ACT (RUAA) OVERVIEW
On August 3, 2000, the National Conference of Commissioners on Uniform State Laws passed major revisions to the Uniform Arbitration Act (“UAA”), the statute that forms the basis for arbitration law nationwide. These revisions are the first significant changes to the UAA in 45 years and gave rise to the new, revised statute called the Revised Uniform Arbitration Act (“RUAA”).

The primary purpose is to modernize and clarify existing provisions, and to codify important developments in case law. In addition, since arbitration is a consensual process, the autonomy of the contracting parties, a fundamental concept of arbitration, is upheld and reinforced by the RUAA.

Specifically, pursuant to Section 4, certain provisions in the RUAA are waivable while others are non-waivable. It is the responsibility of the party(s) to decide which provisions they choose to “waive or agree to vary the effect of,” if any, and agree accordingly among themselves. So, while the RUAA may appear to make arbitration look more legal-like than the founders of arbitration may have originally foreseen, the RUAA does allow the parties to deselect or vary certain provisions of the RUAA. This places the burden on the user of arbitration to be even more astute regarding the appropriateness of various RUAA provisions in a given agreement at the contract negotiation stage.

RUAA ADOPTION IN HAWAII

In Hawaii, the effective date of the Revised Uniform Arbitration Act (“RUAA”) is July 1, 2002. Notwithstanding the effective date of the RUAA, pursuant to Section 3(c) the RUAA governs all arbitration agreements regardless of the date they were entered into.

[Special attention has been taken to conform the DPR Rules to the RUAA. However, since it is outside of our role as the arbitration administrator to dispense legal advice, DPR urges all parties to secure competent legal counsel to review the RUAA as it pertains to your specific needs. To assist you in accessing the RUAA, simply click on “RUAA” on the homepage of the DPR website www.dprhawaii.com and you will be immediately taken to the verbatim text of the RUAA.]

HIGHLIGHTS OF THE RUAA

The following are some highlights from the RUAA.

- Now that electronic transmissions are fast becoming the norm in business and law, the RUAA recognizes e-documents as a viable means of creating and
transmitting arbitration agreements and related documentation. For example, the term “record” is referenced throughout the RUAA and is defined in Section 1 as “information inscribed on a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.” Thus, “record” includes the usual written letter format we have been used to for decades, as well as the more recent phenomenon of electronic documents.

- Under Section 9(a), notice to all signatories of an arbitration agreement is required – not just to the party you are filing against. Therefore, in a construction arbitration, for example, all subcontractors would need to be given notice even if a contractor is filing against only one subcontractor.

- Consolidation is allowed in Section 10, unless expressly prohibited in the contract, if certain conditions are met. The parties would file a motion with a court to order consolidation.

- Provisional remedies are covered in Section 8. Among other issues, a mechanism for enforcement of them in distant states is addressed.

- Summary dispositions are provided for in Section 15(b).

- The authority of an Arbitrator to issue and order subpoenas, depositions and discovery is addressed in Section 17. For example, mechanisms are now in place to simplify the enforcement of subpoenas so counsel will not be required to jump through multiple hoops to enforce them in other states.

- Section 21 allows but places special limits on the Arbitrator(s)’s powers regarding attorneys’ fees and punitive damages. Section 21 is a waivable provision so parties can agree in the pre-arbitration contract negotiation stage to tailor or eliminate the attorneys’ fees and punitive damages provision as they see fit. However, note that such waiver of this section on attorneys’ fees and punitive damages is not available in arbitration cases involving statutory rights, such as those involving anti-discrimination laws.

THE SERVICES OF DISPUTE PREVENTION & RESOLUTION, INC.

DPR is a full service ADR firm which designs and implements dispute prevention and resolution processes and provides administrative, financial and case management services for a broad range of dispute avoidance and adjudication processes, including: Partnering, Neutral Evaluation, Mediation, Non-Binding Arbitration, Binding Arbitration (standard arbitration, baseball arbitration, high/low, etc.) and ADR Trial Procedures (Binding Arbitration with managed discovery). DPR offers clients the unique opportunity to obtain the full range of dispute prevention and resolution services through one ADR firm and provides the following benefits:

CHOICES among many ADR processes and from a panel of highly skilled neutrals;
CONFIDENTIALITY is strictly maintained in all matters to the extent permitted by law;

ECONOMY is realized through predictable and cost-effective fees;

EXPERIENCED and efficient case management from a service-minded staff;

EXPERTISE is assured through the DPR Distinguished Panel of Neutrals;

FACILITIES are centrally located, spacious, comfortable and private;

FLEXIBILITY to help identify and utilize the most appropriate ADR process;

FULL SERVICE organization from prevention to final resolution of disputes;

INTEGRITY through an unwavering pledge to impartial and ethical conduct.

DPR'S MISSION STATEMENT DPR maintains a steadfast commitment to excellence, integrity, and impartiality through the delivery of quality service, highly skilled and professional neutrals, and user-friendly procedures. DPR's professional staff and Distinguished Panel of Neutrals bring a high degree of professionalism and decades of ADR experience to the service of DPR's clients.

ARBITRATION RULES, PROCEDURES & PROTOCOLS OF DISPUTE PREVENTION & RESOLUTION, INC.

I. DPR FEES & COSTS

Dispute Resolution Fees-Arbitration DPR and the appointed DPR neutral charge a single hourly fee on each case. In order to assure the highest degree of objectivity and independence, DPR negotiates and administers all arrangements for compensation between the parties and the appointed DPR neutral (except in those cases in which one or more of the panel members is party-appointed and prior arrangements have been made between the party(s) and their appointed panel member). The hourly fee covers (a) the compensation of the appointed neutral, (b) the administrative costs of DPR, (c) the hearing room charges, and (d) other expenses normally associated with an ADR proceeding (e. g., phone and fax charges, copying, etc.). In keeping with its mission, DPR strives to provide parties with ADR forums which are both cost-effective and economically predictable. Any out of pocket expenses incurred by the DPR appointed neutral (e. g., air fare, lodging, meals) in conjunction with a DPR proceeding are to be borne equally by the parties and shall be paid to the appointed neutral from funds deposited by the parties with DPR for that purpose. DPR will assess the required Hawaii General Excise Tax for all professional services rendered by DPR and DPR appointed neutrals.

II. ADVANCE DEPOSITS & REFUNDS
DPR policy requires that each party submit advance deposits toward the anticipated fees and expenses of the DPR appointed neutral on an equal or pro rata basis. DPR may require the parties to submit additional deposits during the pendency of the arbitration proceeding based on the expected duration of the matter. DPR and the DPR appointed neutral reserve the right to suspend their services for non-payment by any party. In the event of inadequate or non-payment of requested deposits by a party, DPR may request that the other party(s) involved in the proceeding submit additional deposits to assure that an adequate sum is available to compensate the DPR neutral.

Any unexpended funds remaining at the conclusion of the arbitration shall be promptly refunded to the parties.

III. EXEMPTION FROM LIABILITY

Neither DPR nor the DPR appointed neutral are necessary parties to any arbitral, judicial or administrative proceeding which arises from or relates to any DPR arbitration proceeding or the parties thereto. By agreeing to these Rules, the parties acknowledge that neither DPR nor the DPR appointed neutral is or shall be liable for any act or omission that occurs in relation to the administration and/or conduct of any arbitration proceeding commenced pursuant to these Rules.

IV. DPR ARBITRATION PROCEDURAL RULES

1. Applicability of DPR Rules

The Arbitration Rules, Procedures and Protocols (Rules) of Dispute Prevention & Resolution, Inc. (DPR) shall govern all arbitration matters which are administered by DPR pursuant to an agreement of the parties unless the parties agree to adopt and utilize another set of arbitration rules and procedures. The parties may modify the DPR Rules, by written agreement, provided that such modifications are consistent with the parties' agreement to arbitrate and with the laws of the State of Hawaii, and it is the duty of the parties, not DPR to ensure such consistency. Absent a change in the laws of the State of Hawaii, the DPR Rules in effect at the time a matter is submitted to DPR shall govern the proceeding.

2. DPR's Administrative Duties and Responsibilities

As a full service ADR firm, DPR shall provide complete administrative services to the parties who agree to arbitrate their disputes in accordance with the DPR Rules. DPR shall serve in an impartial capacity and shall undertake to manage the administrative, logistical, and financial aspects of all arbitration matters under its jurisdiction. DPR may designate members of its administrative staff to carry out the duties of the administrator.
3. Submission of Matters to DPR

The arbitration process may be initiated as follows:

a. In those matters in which the disputants wish to submit an existing dispute to arbitration under the auspices of DPR they may do so by filing a fully executed DPR Submission to ADR form with the DPR office. The disputants may also submit an existing dispute by way of a jointly signed submission letter or a customized ADR submission agreement.

b. In those matters in which the parties have provided for arbitration in a contract or agreement in written or electronic form, which designates DPR Rules and/or DPR administration, the initiating party shall give written notice to all other signatories to the agreement to arbitrate of its intention to arbitrate. Such arbitration action shall be commenced by the serving of a Demand for Arbitration or a detailed letter pleading which sets forth: the nature of the dispute; the preferred number of Arbitrators to be appointed (if not stated in the agreement); the remedy or relief sought; and the requested venue of the arbitration proceedings on the named Respondent(s) and all parties to the contract or agreement either by hand delivery or via U.S. Mail, first class postage prepaid. One original copy of the Demand for Arbitration (or detailed letter pleading) together with two copies of the parties’ contract or agreement containing the arbitration provision together with the contact information of the Respondents and all parties to the contract or agreement containing the arbitration provision, should be filed with DPR at the same time as it is served on the Respondent(s). Thereafter, DPR will provide, either by hand delivery or via U.S. Mail, first class postage pre-paid written notice of the arbitration proceeding to all parties, and assign a case number to the arbitration proceeding. The respondent(s) shall have 14 calendar days from the date that DPR gives written notice of the arbitration proceeding within which to file an answering statement and/or assert a counterclaim, if any. If a counterclaim is filed, it should be filed in a manner which is consistent with subsection 3(b) above. If the respondent(s) elect not to submit an answering statement or counterclaim, it will be deemed as a denial of the claim(s) asserted in the Demand for Arbitration.

4. Representation in Arbitration

Every party in an arbitration proceeding has the right to be represented by legal counsel or by another authorized representative. Any legal or other authorized representative who will be participating in an arbitration proceeding must enter an appearance in writing with DPR and the other party(s) at least thirty (30) days before the commencement of the arbitration hearing. Any person who substitutes as counsel/authorized representative during the pendency of an arbitration proceeding must notify DPR and the other party(s) in writing before making an
appearance at any proceeding relating to the arbitration. Once a party's representative has entered an appearance, DPR will only communicate with the party's representative, until such time as that party has discharged that representative, and the discharge has been made known to DPR in writing by the party.

Attorneys who are not licensed to practice law in the State of Hawaii are urged to secure Pro Hac Vice status prior to providing their clients with legal representation in any DPR administered arbitration. Notwithstanding the foregoing, neither DPR nor any DPR Arbitrator is authorized to disqualify a party’s representative because the representative is not licensed to practice law in Hawaii, as the licensing and supervision of the practice of law in Hawaii resides with the courts of the State of Hawaii.

5. Validity of Agreement to Arbitrate

Issues of arbitrability such as whether a valid agreement to arbitrate exists, whether a contract containing a valid agreement to arbitrate is enforceable, and other related issues shall be handled pursuant to the RUAA, Section 6.

6. Consolidation

Under the RUAA, Section 10, a party may file a motion with the court to order consolidation of separate arbitration proceedings unless consolidation is prohibited by the agreement of the parties. Consolidation of separate arbitration proceedings may occur if:

1. There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

2. The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

3. The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

4. Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

a. The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.
b. The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

7. Establishing the Venue of the Arbitration Proceedings

If the written agreement to arbitrate names a site to conduct the arbitration, such site shall be the venue for the arbitration, unless all parties agree otherwise. In the absence of a designated or agreed venue, the venue of all arbitration proceeding shall be Honolulu, Hawaii, subject, however to the authority of the Arbitrator to change the venue pursuant to a motion to change the venue made by any of the parties within 30 days after the deadline to file an answering statement and/or assert a counterclaim.

8. Composition of Arbitration Panel

Unless the agreement to arbitrate provides for the appointment of three Arbitrators or the parties mutually agree to the appointment of a panel of three Arbitrators, DPR shall appoint one Arbitrator to hear and determine the dispute.

9. Selection and Appointment of Neutral Arbitrator(s)

If the written agreement provides for a particular Arbitrator(s) selection procedure, that procedure shall be followed by DPR and the parties. If the written agreement is silent or provides no Arbitrator(s) selection procedure methodology, the Arbitrator(s) shall be appointed as follows: DPR shall provide the parties with a list of proposed Arbitrators and the parties shall have seven calendar days within which to attempt to agree to the appointment of one of the proposed Arbitrators. If the parties fail to stipulate to the appointment of an Arbitrator within the time specified, DPR will then proceed with the ranking selection process for choosing the Arbitrator. The parties will be given notice by DPR that they have three (3) business days to submit a confidential list of fifteen (15) DPR Panel Members ranked in order of that party’s preference with 1 being the most preferred panel member. The Panel Member who receives the lowest combined (the most preferred) score from the parties shall be selected by DPR as the Arbitrator. In the event the duly-selected Arbitrator is unable or unwilling to serve, DPR will appoint as the Arbitrator the Panel Member who received the second lowest combined score from the parties. Any party who, after notice from DPR, fails to participate in the alternative ranking selection process shall be deemed to have waived the right to participate in the alternative ranking selection process and DPR shall proceed to appoint the Arbitrator with the lowest score from the ranking list(s) returned by the other party(s). All Arbitrators appointed pursuant to this section shall file a signed acceptance of appointment with DPR before any arbitration proceedings commence. The selected Arbitrator is subject to confirmation as hereafter provided for.
9A. Disclosure Process for All Neutral Arbitrator(s)/Disqualification of Arbitrator

Pre amble

Because of its impact on both the perception of and the existence of an unbiased and impartial arbitration proceeding, DPR is committed to a disclosure process that promotes timely, accurate and complete Arbitrator disclosures. This can only take place with the committed cooperation of both the Arbitrator and the parties’ representatives. Therefore, the selection of an Arbitrator and the Arbitrator’s acceptance of that selection is conditional in nature and subject to confirmation, that confirmation being either the parties’ approval of the Arbitrator’s disclosure, or DPR’s overruling of a party’s timely objection to the continued service of the Arbitrator as the result of a disclosure.

Unless otherwise specified by the parties or their arbitration agreement, all Arbitrators appointed pursuant to these Rules shall be neutral Arbitrators. All Arbitrators appointed pursuant to these Rules shall disclose in writing any circumstance, situation, or event which is likely to affect their ability to be impartial. Arbitrators must disclose, in reasonable detail, (and under the RUAA, Section 12(b), have a continuing obligation to so disclose) any past or presently existing relationship with any of the parties, witnesses, insurers, counsel or another Arbitrator including any potential bias, any financial or personal interest in the result of the arbitration, as well as any known fact that a reasonable person would consider likely to affect the impartiality of the Arbitrator in the proceeding.

In order to promote the completeness of the Arbitrator’s disclosure, the parties should, as soon as practical after the Arbitrator’s acceptance of the appointment, or as soon as ordered by the Arbitrator provide to the Arbitrator the names of all of the then known anticipated witnesses so the Arbitrator may include matters related to these witnesses in the Arbitrator’s disclosure. The Arbitrator shall then prepare a disclosure or a supplement to an existing disclosure and submit it to DPR, whereupon, DPR shall immediately provide the disclosure, or any supplement thereof to the parties. DPR shall afford the parties an opportunity to comment in writing. The purpose of the foregoing is not intended to provide a basis to exclude witnesses for non-disclosure, but instead to avoid unnecessarily late disclosures of known anticipated witnesses whose involvement in the proceeding may cause the recusal or disqualification of an Arbitrator.

i. Should any party believe that the disclosure is insufficient, unclear or if a party is aware of an undisclosed relationship or circumstance, including the identity of any known anticipated witness, they shall, within five (5) business days of being provided with the Arbitrator’s disclosure seek a
supplemental disclosure about any such relationship or circumstance by submitting their question(s) directly to DPR. In order to ensure that no bias arises by reason of the request for a supplemental disclosure or information, DPR shall not inform the Arbitrator of the identity of the party or attorney who has sought the supplemental disclosure or information (and shall advise the Arbitrator not to inquire as to the identity of said party or attorney). The failure of a party to submit either an approval of the Arbitrator’s disclosure or an objection to the continued service of the Arbitrator shall be deemed an approval of the Arbitrator’s disclosure and a waiver of the right to object to the continued service of the Arbitrator based on the contents of the Arbitrator’s disclosure. If no party objects to the continued service of the Arbitrator, the Arbitrator’s disclosure shall be deemed approved by all parties and the Arbitrator’s appointment shall be deemed confirmed.

ii. Should any party seek supplemental information or a supplemental disclosure, then, upon the receipt of an Arbitrator’s responsive supplemental disclosure, DPR shall immediately provide the same to the parties. The parties shall, within five (5) business days submit in writing their approval of the Arbitrator, or their objection to the Arbitrator’s continued service. The failure of a party to submit either an approval of the Arbitrator’s supplemental disclosure or an objection to the continued service of the Arbitrator shall be deemed an approval of the Arbitrator’s supplemental disclosure and a waiver of the right to object to the continued service of the Arbitrator based on the contents of the Arbitrator’s supplemental disclosure. If no party objects to the continued service of the Arbitrator, the Arbitrator’s supplemental disclosure shall be deemed approved by all parties the Arbitrator’s appointment shall be confirmed.

iii. In the event that the Arbitrator determines that it is necessary to make a supplemental disclosure at any time after the Arbitrator’s appointment has been confirmed, DPR shall immediately provide the same to the parties. The parties shall, within five (5) business days submit in writing their approval of the Arbitrator’s supplemental disclosure, or their objection to the Arbitrator’s continued service.

9B: Should any party, after being given an opportunity to review an Arbitrator’s disclosure, including any supplemental disclosure, submit an objection to the continued service of the Arbitrator, DPR shall, after reviewing the parties’ contentions, issue a binding determination as to whether the Arbitrator is to be disqualified or confirmed as the Arbitrator.

9C: Notwithstanding the foregoing, once an Arbitrator has been confirmed and has issued any substantive ruling on any claim or defense based on the merits of
the dispute, DPR shall not entertain any further objection to the continued service of the Arbitrator.

9D: No party shall circumvent the disclosure process by failing to advise DPR of a known, but undisclosed fact or circumstance concerning the Arbitrator that the party believes merits disclosure prior to the confirmation of the Arbitrator and any such failure shall constitute a waiver of that party’s right to seek disqualification of the Arbitrator or otherwise attack an Arbitrator’s award. Further, no party shall engage substitute counsel, nor name or call a previously undisclosed witness for the purpose of creating a basis to seek the disqualification of an Arbitrator.

10. Selection and Appointment of Party-Appointed Arbitrators

If the parties’ agreement provides for them to directly appoint one Arbitrator, the parties must make their appointment within the time specified in the agreement. If any party fails to make such an appointment within the time specified in the agreement or, if no time is specified, then within 14 calendar days from the date DPR gives notice of the initiation of arbitration proceedings, DPR shall appoint the Arbitrator. The parties may request that DPR provide a list of proposed Arbitrators from which the party(s) may select a party-appointed Arbitrator. Each party shall notify the other party(s) and DPR in writing of the appointment of its party-appointed Arbitrator and shall provide the name, business affiliation, address, phone number, and facsimile number for their appointed Arbitrator.

The party-appointed Arbitrators may request a list of proposed Arbitrators from DPR from which the third Arbitrator may be appointed. If the agreement provides a period of time within which the third Arbitrator is to be appointed and the party-appointed Arbitrators fail to make the appointment within the time specified, DPR shall appoint the third Arbitrator. The third Arbitrator shall, in all cases, serve as the chairperson of the arbitration panel.

Unless the parties’ arbitration agreement reasonably restricts the parties’ right to receive disclosures from the Arbitrators under RUAA 12, party-appointed Arbitrators shall disclose in writing any circumstance, situation, or event which is likely to affect their ability to be impartial. Party-appointed Arbitrators must disclose any past or presently existing relationship with the parties, their witnesses, and their counsel including any bias or any financial or personal interest in the result of the arbitration. DPR shall immediately provide the parties with any disclosure given by a party-appointed Arbitrator under these Rules and shall afford the parties an opportunity to comment in writing. However, unless specifically authorized by the agreement or by stipulation of the parties, DPR shall not have the discretion nor the authority to remove a party-appointed Arbitrator for cause.

11. Incapacity of Arbitrator
If for any reason the duly-appointed Arbitrator(s) is unable to perform the functions and duties of Arbitrator, DPR shall, in accordance with the agreement and these Rules, appoint a substitute Arbitrator(s). DPR shall have the authority to appoint a qualified Arbitrator from its panel of neutrals or elsewhere. If the incapacity of the Arbitrator occurs during the pendency of the arbitration proceeding, the parties may agree to proceed with the remaining Arbitrator(s) or may agree to reduce the panel (if there are three) from multiple Arbitrators to a single neutral Arbitrator.

12. **Communication with the Arbitrator(s)**

Except for prehearing conferences, preliminary hearings, and arbitration hearings, all written and oral communications relating to the arbitration proceeding shall be directed to the neutral Arbitrator through DPR, with copies sent simultaneously to the other party(s).

Unless the agreement provides otherwise and except for prehearing conferences, preliminary hearings, and arbitration hearings, the parties shall not have ex parte or unilateral communication with their party-appointed Arbitrators after they have been officially appointed under the terms of the agreement and/or these Rules. All written and oral communications relating to the arbitration proceeding shall be directed to the party-appointed Arbitrators through DPR, with copies sent simultaneously to the other party(s).

The parties are encouraged to use electronic communications (either fax or e-mail) in all communications and submissions relative to any arbitration proceeding.

13. **Prehearing Conference and Preliminary Hearing**

At the request of any party or by direction of the Arbitrator(s), a prehearing conference may be scheduled with the parties and/or their representatives in order to: specify the issues; clarify the claim/counterclaim; stipulate to uncontested facts; identify witnesses; establish pre-hearing deadlines; and to schedule the hearings.

At the discretion of the Arbitrator(s) a preliminary hearing with the parties and/or their representatives may be scheduled prior to the commencement of the arbitration proceedings during which the Arbitrator(s) may: establish a pre-arbitration schedule; require the advance filing of exhibits; encourage and/or direct the parties to produce relevant documents and other information; direct the parties to identify any witnesses to be called; establish a pre-arbitration motion schedule; and establish a schedule for the arbitration hearings.

14. **Notice of Arbitration Hearings**
Unless the parties specifically agree otherwise (in the case of expedited proceedings), the Arbitrator shall set the date, time, and location for each arbitration hearing held in conjunction with the agreement and under these Rules. DPR shall provide written electronically transmitted notice to the parties at least seven calendar days in advance of the hearing date. Pursuant to the RUAA, Section 9(b), unless a party objects for lack or insufficiency of notice before the beginning of the hearing, by appearing at the hearing, the party waives any such objection. In cases where a party has no means to receive electronic communications, DPR will mail the notice which shall be deemed given when deposited in the U.S. Mail, 1st class postage prep-paid.

15. Attendance at Arbitration Proceedings

Any party or representative who has a direct interest in the arbitration shall have the right to attend any and all arbitration proceedings. The Arbitrator(s) shall have the authority to exclude or sequester witnesses and other persons who are not a party to the arbitration proceeding.

16. Continuances

Any party who wishes to postpone any hearing must initially seek the agreement of the other party(s), and if the other party(s) do not join in the postponement request, the party seeking the continuance must petition the Arbitrator(s) in writing. The Arbitrator(s) may continue any hearing upon a showing of good cause by a party. The Arbitrator(s) may schedule a (telephonic or in person) prehearing conference for the purpose of hearing oral argument concerning the continuance request from the parties.

17. Demands, Claims, Counterclaims, Cross Claims & Answering Statements

All demands, claims, counterclaims, cross claims and answering statements shall be made in writing and shall be filed with DPR and the other party(s). The parties should not file demands, claims, counterclaims, cross claims, or answering statements directly with the Arbitrator(s) unless specifically authorized by the Arbitrator(s) to do so. A party shall have 14 calendar days following receipt by DPR of a demand, claim, counterclaim, cross claim, or answering statement within which to file a written response with DPR. Thereafter, the Arbitrator(s) may establish a cut-off deadline after which no new or different claims may be asserted in the arbitration without the express permission of the Arbitrator(s).

18. Conduct of the Arbitration Proceedings

The Arbitrator(s) may structure the format of the hearings in any fashion which affords all parties a complete and thorough opportunity to present all evidence, testimony, exhibits, argument and other material which are deemed to be relevant
to the arbitration. To the greatest extent possible the order of the arbitration proceeding shall be discussed and agreed to during the prehearing conference. The Arbitrator(s) have the discretion to vary the order of the proceeding in the event of unforeseen scheduling problems.

Pursuant to the RUAA, Section 15(b), the Arbitrator(s) may decide a request for summary disposition of a claim or particular issue if the parties agree or if the requesting party gives adequate notice and the other party(s) has reasonable opportunity to respond.

The Arbitrator(s) shall determine the weight and relevance of all evidence offered by the parties. Unless the parties agreement otherwise provides for, the Arbitrator(s) shall not be required to apply the Rules of Evidence in the arbitration, however, any party has the right to object to the introduction of evidence offered by another party. The Arbitrator(s) may, at the request of a party and upon a showing of good cause, enforce a privilege which is asserted by a party or a witness. The Arbitrator may on his/her own initiative or upon motion by a party establish an "in camera" procedure for reviewing certain documents upon or in regard to which a privilege or other protection is being asserted.

The Arbitrator(s) may receive evidence by affidavit and/or via telephone, video conference or other electronic means of communication, however, the Arbitrator(s) shall assign to such evidence the weight that the Arbitrator(s) deem appropriate after due consideration of any objection lodged by any other party.

The Arbitrator(s) shall require all witnesses to testify under oath administered by the Arbitrator(s) or by another duly-authorized person.

19. Subpoenas

The Arbitrator(s) is empowered by law to subpoena witnesses or documents to the arbitration proceeding and may do so upon the request of any party or may do so on his/her own initiative. Any person, party, or entity who wishes to object to a subpoena must do so in writing with a copy of the written objection sent to DPR, and to the other party(s). Thereafter, the Arbitrator(s) shall issue a conclusive determination on the objection. Under the RUAA, Section 17(g), if the witness is in another state and if that state has adopted the RUAA, the party may take the subpoena from the Arbitrator(s) directly to the out-of-state court for enforcement.

20. Depositions, Discovery and Protective Orders

Under the RUAA, Section 17(b), the Arbitrator(s) may permit a deposition of a witness to be taken for use as evidence at a hearing. Under Section 17(c), the Arbitrator(s) may also permit such discovery as the Arbitrator(s) decides is appropriate in the circumstances. Under Section 17(e), the Arbitrator(s) may issue
protective orders to prevent the disclosure of privileged or confidential information.

21. Electronic Communication

In all communications under these Rules, electronic communications are acceptable for all purposes and are the preferred method of communicating with DPR. The parties are not required to serve physical copies of any documents that have been electronically transmitted except for convenience or legibility purposes.

22. Ex Parte Arbitration Proceedings

The Arbitrator(s) may proceed with any hearing in the absence of any party or representative who fails to appear and/or fails to request a continuance. Before proceeding the Arbitrator(s) shall investigate as to whether proper notice under these Rules has been provided and, if so, shall make an Award based upon the evidence, testimony, exhibits and argument offered by the party(s) who are present. If the Arbitrator(s) determine that the notice of the hearing was insufficient he/she shall continue the hearing to a new date and time and DPR shall issue written notice to all parties pursuant to these Rules.

23. Site Inspection

Any party may request and the Arbitrator(s) may direct that an inspection of the site, premise or project which is the subject of the arbitration is appropriate. The Arbitrator(s) shall set the date, time and place of the site inspection and DPR shall issue written notice to the parties. The Arbitrator(s) shall advise the parties in advance as to whether the site inspection is to be treated as an extension of the oral hearings during which testimony and other evidence will be considered or whether the site inspection is limited to a field inspection only. In either case, the parties and their representatives have the right to be present during the site inspection on the same basis as any other portion of the arbitration hearing.

24. Provisional and Interim Remedies

If the Arbitrator(s) appointment has not yet been confirmed, and if a party to an arbitration proceeding files a motion with the court, upon sufficient cause shown by a party, a court may order injunctive relief pursuant to the RUAA, Section 8.

If the Arbitrator(s) appointment has been confirmed, the Arbitrator(s) may, upon sufficient cause shown by a party, order injunctive relief including interim awards to maintain the status quo or protect the property which is the subject of the arbitration until the Award of Arbitrator(s) is rendered or the controversy is otherwise resolved to the same extent and under the same conditions as if the controversy were the subject of a civil action. Any determination rendered by the Arbitrator(s) shall be without prejudice to the rights of the parties or to the final decision.
determination of the dispute. The Arbitrator(s) may issue an interim order or decision regarding the interim relief ordered and is/are authorized to require security for the costs of measures ordered pursuant to these Rules.

Otherwise, pursuant to the RUAA, Section 8(b)(2), a party to an arbitration proceeding in which the Arbitrator(s) has been appointed may request a provisional remedy only if the matter is urgent and the Arbitrator(s) is not able to act timely or cannot provide an adequate remedy.

25. Post-Hearing Submissions

Parties may be directed by the Arbitrator(s) to file post-hearing documents and other evidence with DPR for transmittal to the Arbitrator(s). Unless otherwise directed by the Arbitrator(s), all post-hearing submissions shall be sent directly to the other party(s).

26. Close of Arbitration Hearings

The Arbitrator(s) shall formally declare the hearings closed on (a) the final day of the arbitration proceeding after the party(s) have rested their respective cases or (b) on the date that the Arbitrator(s) set receipt of the final post-hearing submission. The Arbitrator(s) through DPR shall notify the parties in writing of the date upon which the arbitration hearings were closed.

27. Reopening of Arbitration Hearings

The Arbitrator(s) shall have the discretion to reopen the arbitration hearing on his/her own initiative, or upon petition by a party, at any time prior to the issuance of the Award of Arbitrator(s). If the Arbitrator(s) determines that reopening the hearings is appropriate, he/she shall have an additional 30 days from the re-closing of the hearings within which to issue the Award of Arbitrator(s).

The Arbitrator(s) may not reopen the hearings after the issuance of the Award of Arbitrator(s) unless specifically authorized to do so by the parties or unless directed to do so by an appropriate court.

28. Deadline for Issuance of Award of Arbitrator(s)

Unless all parties agree otherwise or unless the parties' agreement specifies otherwise, the Arbitrator(s) shall issue the Award of Arbitrator(s) no later than 30 days following the latter of the date of the formal close of the arbitration hearing(s) or the Arbitrator’s receipt of the final briefs.

29. Form and Service of the Award of Arbitrator
The Arbitrator(s) shall make a record of the Award. The Award of Arbitrator(s) shall be in writing or in an electronic document signed or authenticated by the Arbitrator(s), and shall be acknowledged or proven in a like manner as a deed for the conveyance of real estate, and shall be delivered to the parties or the parties' attorneys personally or electronically via e-mail or fax. The Arbitrator(s) may authenticate an Award by e-signature. If the Arbitrator(s) provides the parties with an oral determination, the terms of the oral decision shall be reduced to writing in accordance with these Rules.

If the Arbitrator(s) awards punitive damages or other exemplary relief, the Arbitrator(s) shall include in the Award of Arbitrator(s) the basis in fact justifying and the basis in law authorizing the Award and state separately the amount of the punitive damages or other exemplary relief, as specified in the RUAA, Section 21(e).

30. Scope of Award of Arbitrator(s)

Unless the parties' agreement provides otherwise, the Arbitrator(s) must determine all issues submitted to arbitration by the parties and may grant any and all remedies that the Arbitrator(s) determine to be just and appropriate under the law. In the Award of Arbitrator(s) the Arbitrator(s) shall issue a determination on the issue of the allocation of all arbitration-related fees and costs, including: Arbitrator(s)' compensation and expenses; DPR's fees and expenses; and, attorney’s fees and costs, if provided for in the parties' agreement or the Submission to Arbitration, or authorized by law in a civil action involving the same claim.

The Arbitrator(s) may award punitive damages or other exemplary relief if the conditions of the RUAA, Section 21 are met.

The Arbitrator(s) shall have the authority, during the course of the arbitration proceeding, to issue Interim Rulings, Orders, and/or Partial Final Awards as necessary. Notwithstanding the foregoing, and except as otherwise provided by law, no Interim Ruling, Order and/or Partial Final Award shall be considered a final award subject to being confirmed pursuant to RUAA 22 and entered as a judgment by a court of competent jurisdiction pursuant to RUAA 25 nor vacated, modified and/or corrected pursuant to the provisions of RUAA 23 and 24.

Any and all Interim Rulings, Orders, Partial Final Awards, and Award of Arbitrator(s) in matters in which three Arbitrator(s) have been appointed shall be by a majority of the arbitration panel.

In the event the parties enter into a settlement at any time before the Arbitrator issues the Award of Arbitrator(s), the parties may request that the Arbitrator enter a Stipulated Award of Arbitrator(s) which sets forth the terms of their settlement.
31. Change of Award by the Arbitrator(s)

Parties may apply to the Arbitrator(s) to modify, correct or clarify an Award, pursuant to the procedures specified in the RUAA, Section 20.

32. Record of the Arbitration Proceeding

Any party may retain the services of a court reporter to maintain a stenographic record of the arbitration proceeding. The party requesting a court reporter must notify the other parties in writing no later than 72 hours before the date and time set for the initial arbitration hearing, that such a request has been made and must pay the cost of the court reporter. The parties may agree to share the cost of the court reporter.

If the parties stipulate or if the Arbitrator(s) determine that the transcript is also the official record of the proceeding, a complete copy of the transcript must be made available to all parties and to the Arbitrator(s). Under these circumstances the parties shall pay the cost of the record equally. The parties may tape record or video tape the arbitration proceeding only with the consent of the Arbitrator(s). Any audio recording or video tape of the proceeding is not considered to be the official record of the proceeding.

33. Proper Service of Notice

Except for the Award of Arbitrator(s) which shall be served either by hand-delivery, electronically via e-mail or fax or by means of Certified or Registered Mail, return receipt requested, DPR and the Arbitrator(s) shall serve notice to the parties electronically via e-mail or fax to the last known e-mail address or fax number of the party or its designated representative. In cases where the parties or their representatives have informed DPR that they do not have access to either e-mail or facsimile communications, the Arbitrator(s) and/or DPR may also utilize delivery via U.S. Mail to the last known physical address of the parties and/or their representatives.

34. Extensions of Time

The Arbitrator or DPR may grant reasonable extensions of times and deadlines established by these Rules, however, the deadline for the issuance of the Award of Arbitrator(s) may be extended only with the consent of the parties. Notwithstanding the foregoing, the failure to object to the failure of the Arbitrator to issue the award within thirty (30) days within five (5) business days after the passing of the 30th day shall constitute a waiver of the right to object to the lateness of the Arbitrator’s award.

35. Application of DPR Rules
These Rules shall be interpreted and applied in conjunction and conformity with the applicable arbitration law. Unless specified otherwise, the duly-appointed Arbitrator(s) shall have the authority to interpret and apply the meaning and intent of these Rules. In the case of any conflict between these Rules and the RUAA, the provisions of the RUAA shall control. In the case of any conflict between these Rules and the agreement of the parties, the agreement of the parties shall control, unless the provision is in conflict with the RUAA in which case the provisions of the RUAA shall control.

V. OPTIONAL PROCEDURAL PROVISIONS

In those cases where the parties agree that deadline-driven procedures and managed discovery are appropriate mechanisms for facilitating the preparation and presentation of the case, they may, at their mutual election or by previous contractual agreement, authorize the Arbitrator(s) to apply any one or combination of the following procedures:

A. Deadline-Driven Arbitration Procedures

1. Initial Prehearing Conference. The Arbitrator or the arbitration panel shall convene and conduct a prehearing conference no later than 10 calendar days following the appointment of the single neutral Arbitrator or, in the case of a panel, of the third Arbitrator.

2. Hearing Schedule. The arbitration hearings must commence not later than 45 calendar days from the date of the appointment of the single neutral Arbitrator or, in the case of a panel, from the appointment of the third Arbitrator. The arbitration hearings must conclude within 30 calendar days from the commencement of the hearing portion of the proceedings unless both parties and the Arbitrator(s) agree otherwise. The Arbitrator(s) may, at their sole discretion, limit the time within which the parties make their case presentations. In order to achieve the objectives of this arbitration process, the Arbitrator(s) may limit discovery, expert testimony, direct testimony, cross-examination, argument, and closing memoranda. The Arbitrators, at their sole discretion, may permit or require the parties to submit closing memoranda within 10 calendar days following the close of the hearing portion of the arbitration proceeding.

3. Award Deadline. The Arbitrator(s) shall issue their Final Award no later than thirty (30) calendar days from the formal close of the proceedings (the last day of testimony or the date set for receipt of the closing memoranda whichever is later).

4. Overall Arbitration Time Frame. In order to achieve prompt and cost-effective disposition of all disputes between the parties through binding arbitration, it is agreed that the overall maximum time frame to commence
and conclude an arbitration proceeding pursuant to these procedures is approximately 120 calendar days.

B. Reasonable and Managed Discovery

The duly-appointed Arbitrator(s) is duly authorized to: order the prehearing exchange of information; order the production of documents; require the parties to exchange summaries of testimony of proposed witnesses; and may order examination by deposition of parties and witnesses. The Arbitrator(s) shall have the discretion to limit discovery in any manner which is consistent with the parties' intent to conduct the arbitration proceeding in an economical and efficient manner and which does not prejudice any party's ability to adequately prepare for the arbitration process. Unresolved discovery issues may be brought to and resolved by the Arbitrator(s) in an expedited fashion.

C. Prehearing and Dispositive Motions

The Arbitrator(s) may, at the mutual request of the parties or at their sole discretion, establish a procedure and schedule for taking evidence and ruling on prehearing motions in advance of the arbitration hearings. The Arbitrator(s) may issue a decision which is dispositive of a claim or a defense in advance of the arbitration hearings provided that they are satisfied that they have heard all evidence pertinent and material to the issue(s) raised. In no instance shall the establishment of a prehearing motion procedure serve to delay the conduct of any other aspect of the arbitration proceeding.

4. **MEDIATION RULES, PROCEDURES & PROTOCOL OF DISPUTE PREVENTION & RESOLUTION, INC. (in effect July 1, 1995 © 1998)**

I. Agreement of Parties to Submit Matters to Confidential Mediation/Conciliation/Facilitation

In any matter in which the parties, by previous contractual agreement or by direct submission, have provided for mediation, neutral facilitation, conciliation or other third party settlement procedures pursuant to the Dispute Prevention & Resolution (DPR) Rules, Procedures and Protocols for Mediation, they shall be bound by these Mediation Rules, Procedures & Protocols. These Rules, Procedures & Protocols shall constitute a portion of the parties' overall agreement to participate in third party settlement procedures under the auspices of DPR.

II. Initiation & Commencement of Mediation

The parties to an existing dispute or controversy may initiate a mediation proceeding by: (a) submitting a fully executed Submission to ADR form to DPR which includes the names, addresses, telephone numbers of all parties and counsel involved in the dispute or controversy and which describes the nature of the
dispute and the remedy(s), relief sought; or (b) submitting a letter agreement or written stipulation to DPR which contains all of the above-referenced information. If no previous agreement to submit a matter to mediation exists, a party or parties may request that DPR invite the voluntary participation in a mediation/facilitation/conciliation proceeding of the other party(s). As a neutral ADR administrator, DPR will contact all relevant parties to educate them about the mediation process and seek their voluntary participation. DPR may also convene a meeting of the parties in order to provide a forum for the exploration of applicable procedures and the creation of an appropriate submission agreement.

III. Selection & Appointment of Mediator

Because selection and appointment of a qualified and objective neutral is vital to the effectiveness of any ADR proceeding, DPR provides parties with a variety of selection/appointment options: (a) parties may stipulate to the appointment of any member of DPR’s Distinguished Panel of Neutrals, or (b) parties may consider all of the names on DPR’s Distinguished Panel of Neutrals and select a neutral by way of the preference method (striking unacceptable names and rank ordering acceptable names) or the alternative strike-off procedure (alternately striking names until a single name remains), or (c) if the mediation agreement provides for the selection of a particular neutral or a specific selection methodology, that protocol shall be followed, or (d) the parties may stipulate that DPR appoint the neutral from among its Distinguished Panel of Neutrals.

IV. Protocol and Criteria for Service of DPR Mediator

Any person designated to serve as a neutral Mediator, Facilitator or Conciliator under these Rules, Procedures and Protocols shall do so in strict compliance with "Guidelines for Hawai'i Mediators" as endorsed by the Supreme Court of the State of Hawai’i in their "Resolution Endorsing the Guidelines for Hawai’i Mediators" dated July 11, 2002. Any person designated to serve as a third party neutral under these procedures shall disclose in writing to DPR (and through DPR to the parties) any circumstances, relationships or conditions which could create the impression or presumption of partiality or bias. DPR shall immediately solicit the parties’ comments on any written disclosure and, if the parties agree, replace the neutral and appoint another qualified neutral. If the parties do not agree that a substitute neutral should be appointed, DPR shall review the matter and issue a binding determination. Any person appointed to serve as a third party neutral under these Rules, Procedures and Protocols who has a social or personal relationship with a party or counsel or any other interest in the proceeding may serve only with the written consent of all parties.

If any third party neutral appointed pursuant to these Rules, Procedures and Protocols shall for any reason be unwilling or unable to fully carry out the responsibilities and duties of the office for which he/she was appointed, DPR shall declare the office vacant and proceed to appoint another neutral.
V. Notice of Mediation Proceedings

The appointed neutral(s) shall establish the schedule for the initial and all subsequent mediation sessions. To the greatest extent possible, DPR will provide the parties and the neutral with written notice of all mediation proceedings. The parties may conduct the mediation in the offices of DPR (1003 Bishop Street, Pauahi Tower Suite 1155, Honolulu, Hawaii), the offices of the duly-appointed neutral, or at any other location which is agreeable to the parties. If the parties are unable to agree on a venue or location, DPR and the neutral will determine an appropriate venue and location.

VI. Submission of Documents and Other Materials

The appointed neutral may request that each party submit a confidential pre-mediation statement or memorandum which sets forth (a) the legal and factual issues, (b) the claims and defenses, (c) the most recent settlement demands and offers, if any, (d) settlement positions, if any, and (f) the present status of any related proceeding(s).

During the course of the mediation process, the Mediator may request that the parties provide additional information in order to insure that all of the issues and the interests and positions of the parties are clearly understood.

VII. The Duties and Obligations of the Mediator

Mediators do not have the authority to issue decisions, enforce discovery, or impose conditions or settlement terms on the parties. The primary function of the Mediator is to help the parties reach a mutually acceptable resolution of their dispute. In order to accomplish this objective, Mediators may conduct joint sessions and private caucuses with some or all of the parties. Mediators may also make recommendations to the parties about possible settlement terms; however, the Mediator's recommendations are advisory in nature and are not binding upon the parties.

Mediators have the authority to (a) establish the mediation schedule, (b) require a recess in the proceedings, (c) request the parties' permission and consent to obtain technical or procedural expertise as the case may warrant, (d) request that parties impose a "no communications" rule (e.g. a "gag order") on an ongoing mediation matter and (e) declare an impasse, if in the estimation of the Mediator, further mediation proceedings are not likely to lead to or enhance the likelihood that a resolution of the controversy can be reached.

VIII. Privacy and Confidentiality

The process of mediation is by its nature a private proceeding. DPR and the neutral(s) appointed by DPR are obligated at all times to maintain the privacy of
(a) the nature of and parties to a dispute, (b) the status of any ongoing ADR proceedings, and (c) the terms of settlement, if any, that were or may be reached in the mediation.

Persons having a direct interest in the mediation proceeding may attend joint and private mediation sessions (only those private sessions that are specifically designated by the Mediator). Any other person or persons who wish to attend and/or participate in the mediation proceeding may do so only with the express permission of all of the other parties and with the authorization of the Mediator.

Mediation proceedings are governed, in part, by Rule 408 of the Hawaii Evidence Code. This rule acknowledges the inadmissibility of compromises and offers of compromise in any subsequent administrative, arbitral or judicial forum. Any confidential information that is disclosed by the parties or their witnesses to the Mediator during the course of a mediation proceeding shall be held in confidence by the Mediator. Any and all records, reports, exhibits, memoranda or other documents which are submitted to the Mediator in confidence (for purposes of the mediation) shall be held in confidence by the Mediator. No Mediator serving under these Rules, Procedures, and Protocol shall be compelled to produce his or her notes of the proceeding or any other records or documents which were submitted to the Mediator during the course of the mediation proceeding. Mediators serving under these Rules, Procedures, and Protocols shall not be compelled to testify as to any matters or issues relating to the mediation and may not voluntarily agree to testify in any proceeding which arises from or relates to the mediation proceeding or the parties thereto.

IX. Record of the Mediation Proceeding

Because the mediation process is private and confidential no record of the proceeding may be made by or on behalf of any participant (i.e. stenographic, tape recording, video recording, etc.).

X. Closure of the Mediation Proceeding

The parties and/or the Mediator may close the mediation proceedings as follows: (a) the parties agree to the terms of and sign a binding and enforceable settlement agreement, or (b) the parties enter into and the appointed neutral signs a Stipulated Award of Arbitrator, or (c) the Mediator declares that an impasse exists, or (d) one or more of the parties withdraws from the mediation proceeding and the remaining parties elect not to proceed, or (e) one or more of the parties is stayed from proceeding in mediation by an order from an appropriate court, and the remaining parties elect not to proceed.

XI. Exemption from Liability
Neither Dispute Prevention & Resolution, Inc. nor the DPR appointed neutral are necessary parties to any arbitral, judicial or administrative proceeding which arises from or relates to the mediation proceeding or the parties thereto. By agreeing to these Rules, Procedures and Protocols, the parties acknowledge that neither DPR nor the DPR appointed neutral is or shall be liable for any act or omission that occurs in relation to the administration and/or conduct of the mediation proceeding under these Rules, Procedures and Protocols.

XII. Fees, Expenses, Deposits & Refunds

DPR and the DPR appointed neutral will charge a single negotiated hourly or daily fee on each case. In order to assure the highest degree of objectivity and independence, DPR will negotiate and administer all arrangements for compensation between the parties and the DPR Neutral. The DPR/neutral hourly or daily fee covers the compensation of the neutral as well as all other costs normally associated with the administration and conduct of an ADR proceeding (e.g. hearing room charges, case administration expenses, phone and fax charges, etc.) Out-pocket-expenses incurred by the DPR neutral in the course of the mediation proceeding (e.g. transportation, lodging, meals, etc.) will be borne equally by the parties unless all parties agree to a different allocation.

DPR/Neutral will assess the Hawaii General Excise Tax.

DPR will require each party to submit in advance of the proceeding a deposit for the anticipated DPR/neutral fees and expenses. All funds deposited with DPR are held in trust. DPR is responsible for issuing payment(s) to the neutral(s) and any refunds which may due to the parties at the conclusion of the case.

DPR and the appointed neutral reserve the right to suspend services at any time due to insufficient deposits or non-payment.

Please contact DPR at (808) 523-1234 with any questions or to obtain additional information about our services.

5. ARBITRATING AND TRYING THE AUTOMOBILE INJURY CASE IN HAWAII, National Business Institute, Inc. ® 03K04010

A) Loss of Earnings.

Lost earnings between the date of injury and the date of trial is an item of special damages. This evidence is normally introduced by the plaintiff's testimony, his employer's wage records, medical testimony indicating disability from working caused by the accident-related injury, or a combination of these.

More difficult proof problems may arise in death cases. Under the Hawaii survival statute, H.R.S. § 663-7, the decedent's estate can recover general
damages for the decedent's conscious pain and suffering between the tortious injury and death, special damages for medical and funeral expenses, and the present-day value of the decedent's prospective lifetime earnings diminished by the decedent's lifetime maintenance expenses.

This measure of damages is specified by H.R.S. §663-8:

Together with other damages which may be recovered by law, the legal representative of the deceased person may recover where applicable under section 663-7 the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his actual or probable family and dependents during the period of time decedent would have likely lived but for the accident.

In 1986, the Legislature passed § 663-8.3, which provides that in all tort cases where damages are awarded for loss of earning capacity, the amount of probable future earnings shall be determined by taking into account the effect of probable taxes on the gross that would have been earned but for the injury. H.R.S. § 663-8.3 also provides that nothing in this section shall be construed to limit or restrict the use of other factors deemed appropriate by a court in calculating damages for loss or impairment of earning capacity.

The case of Rohlfing v. Akiona, 45 Haw. 373 (1961), may also still give guidance to this element of damage. The usual method of proving the present-day value of "lost excess earnings" is through the analysis and testimony of an economist. Most such experts rely on statistical data for both the earnings and maintenance expense items of calculation. Many also utilize methodology in which they take into account the decedent's income tax obligation for the income received without significantly affecting the bottomline number.

In addition to the survival action of the decedent's estate under H.R.S. § 663-7, certain survivors enumerated in H.R.S. § 663-3 have wrongful death actions. The measure of damage specified in the wrongful death statute includes such intangible items as loss of care, comfort, society, protection, loss of marital care, attention, advice and counsel, loss of parental care, training, guidance and education. Since the statute also provides for pecuniary loss, a measure of damage for loss of support by such individuals as the surviving spouse, children, father, mother or dependent person is allowed. Again, the loss of support increment of wrongful death damages to the plaintiff survivors is based primarily upon economic analysis and expert testimony. The economics experts will normally analyze each wrongful death plaintiff's loss of support from the decedent based upon the decedent's prospective income stream. In the case of such dependent person, the amount of excess income to the decedent's estate is normally reduced by sums that would be expended for the support of the specified dependents.

B) Loss or Impairment of Earnings Capacity
Another more difficult proof problem is presented by this increment of damage. Examples include child brain damage cases in which medical evidence indicates that the child will never have income producing capability, or at best a reduced income producing capacity. In this circumstance, the present-day value of the lost income stream is normally the subject of expert opinion from an economist. Statistics are available showing the lifetime earnings of categories of individuals based upon total educational attainment. Separate statistics are also available indicating lifetime earnings differentials between males and females. Such statistics indicate that females, on average, remain in the labor market for far fewer years during their working life than males of comparable education. In calculating lost future earnings, or impairment of earning capacity, the plaintiff does not have to take living costs into account in reducing net income, as is the concept with a decedent's income.

A plaintiff should have medical expert evidence to prove a claim that he/she cannot work due to a physical or mental disability caused by the defendant's alleged negligence. The Hawaii case of Franco v. Fujimoto, 47 Haw. 408, 432-33 (1964), provides that only a medical expert is qualified to express an opinion as to future pain and suffering and for how long it will last. Furthermore, if any injury is a subjective one in character, competent medical expert opinion is required bearing on the permanency of the injury, or the likelihood the plaintiff will endure future pain before any recovery may be allowed. The requirement that in order to prove impaired earning capacity, a plaintiff must have expert medical opinions, is seen mainly in worker's compensation cases.

For example, in Simpson v. Satterfield, 564 S.W.2d 953 (Tenn. 1978), the court stated that where the nature of a plaintiff's injury, and the resulting circumstances do not in themselves supply the element of causal connection when tested by the 'common knowledge and experience of mankind, expert medical testimony is necessary to establish that the plaintiff's claimed injuries were caused by the defendant's negligence, and that as a result the plaintiff cannot work. In Magnavox Co. v. Sheppard, 379 So.W.2d 791 (Tenn. 1964), the court determined that the evidence was insufficient to support a finding that the plaintiff's increased incapacity to work developed solely from her injury. The court acknowledged that lay testimony, including that of plaintiff, is of probable value in establishing such matters as the existence of pain and inability to work, however, there were areas in which lay testimony is obviously incompetent. The court found that the plaintiff and her husband were not competent to testify that the alleged increased incapacity to work suffered by the plaintiff "was due solely to her original injury". This question was one for a physician to determine.

In the Hawaii case of Condron v. Harl, 46 Haw. 66 (1962), the plaintiff was injured in an automobile accident and liability was admitted. The plaintiff claimed lost future earnings. The Hawaii Supreme Court found that the plaintiff's testimony at trial that his income since the accident would have increased more
than it did but for the injuries sustained in the automobile accident was inadmissible because it was too speculative. The testimony was based on trends which were not well established; plaintiff was a manufacturer’s representative for sportswear, and there was nothing to show, other than plaintiff’s own testimony, that an increased income in the future was reasonably certain, but for his injuries.

The Condron court found that an inability to work as hard as formerly does not, without more, lend itself to measurement under the heading of earning capacity, inasmuch as the impairment of earning capacity is too conjectural. 46 Haw. at 75. The court stated that if there is insufficient evidence to show with reasonable certainty that the plaintiff’s condition will, in the future, call for an operation, the evidence should not be admitted as to the costs of the operation, and the matter or an award for the operation expenses should not be submitted to the jury.

In order to recover for a loss of time and decreased earning capacity, the plaintiff has the burden of establishing with reasonable probability that the injury did bring about a loss of time and impairment of earning ability, and the plaintiff must prove both the probable duration of the injury and its reasonable value. See 22 Am.Jur.2d Damages, § 298 "Lost Time and Decreased Earning Capacity". See also, 22 Am.Jur.2d Damages, at § 93-96 (measuring the extent of diminution of earning capacity, etc.) See also Annot., Sufficiency of Evidence, in Personal Injury Action, to Prove Impairment of Earning Capacity and to Warrant Instructions to Jury Thereon, 18 A.L.R.3d 88 (1968).

Generally, the process of ascertaining the amount of compensation to be awarded for the impairment of the capacity to work or to earn, requires 1) the determination of the extent to which such capacity has been diminished; 2) determination of the permanency of the decrease in earning capacity; and 3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth. Most cases find that evidence of substantial personal injuries is insufficient, by itself, to show a loss of earning capacity. 22 Am.Jur.2d Damages, §93 "Measuring Extent of Diminution of Earning Capacity".

As indicated above, the key point in the cases is the plaintiff’s establishment of impaired earning capacity with reasonable certainty. This is consistent with the general principal that one seeking damages must show such loss with reasonable certainty, which excludes a showing based on mere speculation or guess. See e.g. Burgess v. Arita, 5 Haw.App. 581, 704 P.2d 930 (1985).

In this connection, present cash value is an economic mythical amount of money which when invested at a reasonable rate of return will pay the future damage at the time and in the amount that the damages accrue. For example, if a plaintiff is going to sustain a $1 wage loss 20 years from today, then what amount of money earning interest at an assumed 10 percent needs to be set aside today to produce that one dollar 20 years from now? The answer is about 15 cents, and that is the
present cash value of $1.00 in 20 years. Do not get this concept confused with an "annuity" which carries with it the burden and overhead of an insurance company. United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960); Swanson v. United States, 557 F. Supp. 1041, 1046 (D. Idaho 1983).

The rule requiring present value determinations for future lost wages or income also applies to future medical or rehabilitation expenses. However, claims for future general damages, such as pain, loss of the enjoyment of life, consortium, etc., need not be reduced to present value. United States v. Harue Hayashi, supra.

Central to the determination of present value is the selection of both an interest rate as well as an inflation rate. In other words, to obtain present value the damage amounts are reduced by an interest rate and increased by an inflation rate. While this may well sound like mumbo-jumbo to the ordinary practitioner, it is the bread and butter of economic experts. For a lucid discussion of economic theory, see LaCroix & Miller, Lost Earnings Calculations and Tort Law: Reflections on the Pfeifer Decision, 8 U.H. L. Rev. 31 (1986).

Some defense counsel will attempt to argue, or try to introduce evidence of, the value of an annuity as a measure of compensation. To those in the plaintiffs' bar who need to combat this type presentation, note should be made of the Ninth Circuit decision in Diede v. Burlington Northern Railway Co., 772 F.2d 593 (9th Cir. 1985).

C) Increased Living Expenses

Certain injuries will require the injured plaintiff to expend sums over and above the usual living expenses. For example, either full-time or part-time nursing or attendant care service may be required. Special home modifications may be necessary to accommodate wheelchairs, and to facilitate the injured plaintiff in activities of daily living. Special conveyances such as motorized wheelchairs, and hand controls for automobiles or specially equipped vans may be required in the case of paralyzed plaintiffs. The best source for determining such future potential needs would be an expert who specializes in rehabilitation medicine. Rehabilitation specialists and physical therapists have knowledge of these requirements, and are usually familiar with the costs of such products and services. These elements of damage are normally proven at trial through the combined testimony of medical experts required to establish the nature of the disability and its permanency, plus the testimony of a rehabilitation specialist. In a serious, catastrophic damage case, it may be advisable to present a variety of rehabilitation experts such as speech therapists, occupational therapists, physical therapists, and psychological or psychiatric testing experts.

5. **State Administrative Entity Rule-Making Authority**
INSURANCE DIVISION (INS)

INS is responsible for overseeing the insurance industry in the State of Hawaii, which includes insurance companies, insurance agents, self-insurers and captives. The division ensures that consumers are provided with insurance services meeting acceptable standards of quality, equity and dependability at fair rates by establishing and enforcing appropriate service standards. The division provides for the licensing, supervision and regulation of all insurance transactions in the State. Prepaid Legal Services also falls within the division duties.

http://cca.hawaii.gov/ins/captive/

OFFICE OF ADMINISTRATIVE HEARINGS (OAH)

OAH is responsible for conducting administrative hearings and issuing recommended or final decisions for all divisions within the Department of Commerce and Consumer Affairs that are required to provide contested case hearings pursuant to the provisions of Hawai`i Revised Statutes Chapters 91 and 92.

http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0091/
http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0092/
http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0092E/
http://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0092F/

OFFICE OF CONSUMER PROTECTION (OCP)

OCP was created in 1969 to protect the interests of consumers and legitimate businesses. The primary purpose of the office is to promote fair and honest business practices by investigating alleged violations of consumer protection laws, by taking legal action to stop unfair or deceptive practices in the marketplace, and by educating the consumer public and businesses regarding their respective rights and obligations.

6. DEFENSES IN ACTIONS AGAINST INSURERS

a. Misrepresentations/Omissions: During Underwriting or During Claim

A misrepresentation shall not prevent a recovery on the policy unless made with actual intent to deceive or unless it materially affects either the acceptance of the
risk or the hazard assumed by the insurer. HRS § 431:10-209 (1987). See also, Vannatta v. Pacific Guardian Life Ins. Co. Ltd., 1 Haw. App. 294, 296, 618 P.2d 317, 319 (1980). A misrepresentation is material where the insurer, as a careful and intelligent person, either would not have issued the policy had the truth been known, or would have issued it only at a higher rate of premium. Park v. Government Employees Ins. Co., 89 Hawai`i 394, 399, 974 P.2d 34, 39 (1999).

To rescind a policy, the insurer must show that the insured’s representations contained in the policy application were: (1) misrepresentations, and (2) made with either an intent to deceive, or (3) materially affected the insurer’s decision to accept the risk or hazard. Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 958 (9th Cir. 1994). (applying Hawai`i law). The misrepresentation in this context “need only relate to the insurance company’s decision to insure the risk.” Genovia v. Jackson Nat’l Life Ins. Co., 795 F.Supp. 1036, 1041 (D.Haw. 1992). Whether there was a misrepresentation in an insurance application, whether it was made with actual intent to deceive, and whether it materially affected either the acceptance of the risk or hazard assumed by the insurer are disputed questions of fact and thus jury questions. Vannata at 296, 618 P.2d at 319.

b. Preexisting Illness or Disease Clauses


i. Statutory Provisions Regarding Preexisting Conditions

Haw. Rev. Stat. § 431:10H-108 governs preexisting conditions in group and individual long-term care insurance policies and provides:

(b) No long-term care insurance policy or certificate other than a policy or certificate thereunder issued to a group as defined in paragraph (1) of the definition of “group long-term care insurance” in section 431:10H-104 shall use a definition of “preexisting condition” which is more restrictive than the following: “Preexisting condition” means a condition for which medical advice or treatment was recommended by, or received from a provider of health care services within six months preceding the effective date of coverage of an insured person.

(b) No long-term care insurance policy or certificate other than a policy or certificate thereunder issued to a group as defined in paragraph (1) of the definition of “group long-term care insurance” in section 431:10H-4 may exclude coverage for a loss or confinement which is the result of a preexisting condition unless the loss or confinement begins within six months following the effective date of coverage of an insured person.

(c) The commissioner may extend the limitation periods in subsections (a)
and (b) as to specific age group categories in specific policy forms upon findings that the extension is in the best interest of the public.

(d) The definition of “preexisting condition” does not prohibit an insurer from using an application form designed to elicit the complete health history of an applicant, and, on the basis of the answers on that application, from underwriting in accordance with the insurer’s established underwriting standards. Unless otherwise provided in the policy or certificate, a preexisting condition, regardless of whether it is disclosed on the application, need not be covered until the waiting period described in subsection (b) expires. No long-term care insurance policy or certificate may exclude or use waivers or riders of any kind to exclude, limit, or reduce coverage or benefits for specifically named or described preexisting diseases or physical conditions beyond the waiting period described in subsection (b).

If a long-term care insurance policy or certificate contains any limitations with respect to preexisting conditions, the limitations shall appear as a separate paragraph of the policy or certificate and shall be labeled as “Preexisting Condition Limitations”. HRS § 431:10H-214.

ii. Case Law

The only case in Hawaii which has specifically dealt with pre-existing insurance policy clauses is Estate of Doe v. Paul Revere Ins. Group, 86 Haw. 262, 948 P. 2d 1103(Haw. 1997). The outcome-dispositive case is whether, under Hawaii law, the standard “incontestability clause” of an insurance policy precludes an insurer from denying total disability benefits caused by an insured’s HIV infection that arguably “manifested” itself prior to the policy’s effective date of coverage, even though the (1) insurer is not seeking to void the policy on the ground that the insured fraudulently misstated his physical or medical condition on his insurance application, (2) the “disease or physical condition” is not excluded from coverage by name or specific description” as of the effective date of coverage, and (3) the “contestability period” set forth in the policy has already lapsed. The Hawaii Supreme Court ruled in the insured’s favor. The Hawaii Supreme Court held that, pursuant to HRS Chapter 431, article 10A, part 1, in general, and HRS Section 431:10A-105(2)(A)(ii), in particular, that the standard “incontestability clause” precludes Paul Revere from denying DOE’s estate the “Total Disability Benefit” for which Doe contracted, notwithstanding that the HIV infection that caused the disability arguably “manifested” itself prior to the effective date of coverage.

c. Statute of Limitations

Two years.

7. BENEFICIARY ISSUES

Same sex marriage has been legal in Hawaii since December 2, 2013. Hawaii also allows both same-sex and opposite-sex couples to formalize their relationships legally in the
form of civil unions and reciprocal beneficiary relationships. Once married, same sex couples have all of the rights and responsibilities of marriage under both Hawaii and Federal law. This includes health insurance and pension benefits for State employees.

HRS Section 580-47(a) governs the distribution of assets upon divorce. As set forth in Labayog v. Labayog, 83 Haw. 412, 927 P.2d 420 (Haw. App. 1996), upon granting a divorce…the court may make such further orders as shall appear just and equitable…(3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether held commonly, joint or separate…In making such further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left in the divorce…and all other circumstances of the case.” Hawaii case law on this issue in largely contingent upon the factual circumstances in each given case and decisions are based upon the equitable standards set forth above.

8. INTERPLEADER ACTIONS

a. Availability of Fee Recovery

Rule 22 of the Hawaii Rules of Civil Procedure states that interpleader “provides a process by which a party may join all other claimants as adverse parties when their claims are such that a stakeholder may be exposed to multiple liability. Aetna Life Insurance Co. v. Bayona, 223 F.3d 1030, 1033 (9th Cir.2000 ) The purpose of an interpleader action is to “decide the validity and priority of existing claims to a res.” Texeira Inc. v. Ponsoldt, 118 F.3d 1367, 1369 (9th Cir. 1997).

In an interpleader action, the court has discretion to award attorneys’ fees and costs to the stakeholder when it is fair and equitable to do so. See Gelfgren v. Republic National Life Insurance Co., et. al, 680 F.2d 79, 81 (9th Cir. 1982). See also Wright, Miller & Kane at Section 1719.

The Court’s discretion to award attorneys’ fees and costs is limited, however, if the award operates to diminish a distribution of the fund to satisfy a federal tax lien. Abex Corp. v. Ski’s Enterprises, Inc., et. al, 748 F.2d 513, 517 (9th Cir. 1984).

B. Differences in State v. Federal Circuit