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TABLE OF CONTENTS

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ARTICLES

OF NOTE

On the Cover: *Sunflower Love.* by Noelle DaVinci. DaVinci is a Visual Storyteller, inspired by love, nature and everything Hawaii. It was her lifelong dream to live in Hawaii and to experience the incredible beauty it holds within everyday. Noelle calls herself a HeARTist because she always put love into everything she paints and you can always find a heart symbol somewhere in her paintings. Noelle resides in Kaneohe, Hawaii. Please visit her website at: noelledavinci.com.

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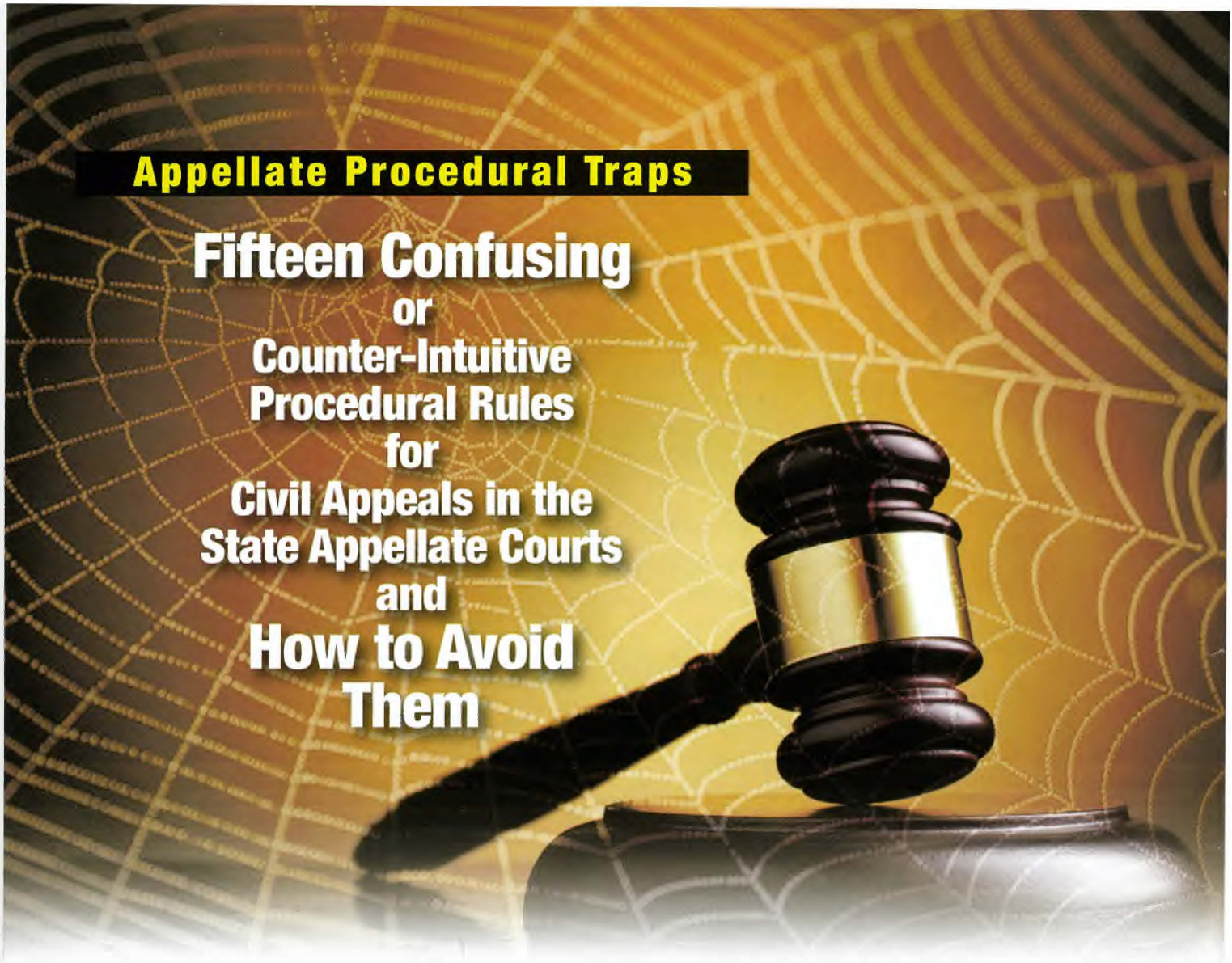


Appellate Procedural Traps

Fifteen Confusing or Counter-Intuitive Procedural Rules for Civil Appeals in the State Appellate Courts and How to Avoid Them

by Deirdre Marie-Iha

Introduction

For civil litigators who occasionally do appeals in the state courts—or want to—the intricacies of appellate practice can be overwhelming. This article discusses fifteen procedural aspects of Hawai'i state court appeals that are counter-intuitive, confusing, obscure, or all of the above. This will not substitute for counsel's careful analysis and research on any one particular question, of course, but it should provide a helpful roadmap for some of the more challenging procedural hurdles and make it easier for practitioners to avoid common pitfalls.

Anyone practicing in the state appellate courts should carefully read the Hawai'i Rules of Appellate Procedure (HRAP). These rules are the source of many of the appellate practice rules explained below. Compared to other sets of court rules, the HRAP are unusually detailed about the required *contents* of filings. *See, e.g.*, HRAP 12.1 (statement of jurisdiction); HRAP 28(b) (opening brief); HRAP 28(c) (answering brief); HRAP 40.1(d) (application for writ of certiorari). Also, compared to the Hawai'i Rules of Civil Procedure (HRCP), the HRAP are shorter and have far fewer moving parts. Careful study of the HRAP will answer many questions civil practitioners typically raise.[1]

A word about cite form:

This article uses the cite form as it appears in the Hawai'i appellate caselaw. This is contra to the Bluebook format on several points: (1) the Hawai'i reporter is included for all Hawai'i cases post-statehood, along with the regional (Pacific) reporter; (2) App. is used to refer to the ICA rather than Ct. App.; (3) HRS is used instead of Haw. Rev. Stat.; (4) court rules like the HRAP are referred to with the acronym rather than Haw. R. App. Proc.; and (5) the Hawai'i reporter cite form is Haw. through volume 75, and Hawai'i from volume 76 on. The first of these is required by court rule. HRAP 28(b)(1). The others are favored by local practice and are taught to the law clerks at both Hawai'i appellate courts.

Trap No. 1. A Timely Notice of Appeal is Jurisdictional and Any Defect in its Timely Filing Cannot be Waived

What is it. This is black-letter appellate procedure: a timely notice of appeal is jurisdictional. *Bacon v. Karlin*, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986). Although other appellate procedural deadlines can be waived in the courts' discretion for good cause, HRAP 26, the existence of jurisdiction cannot. *See* HRAP 26(b) ("no court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules.").

What to do about it. File the notice of appeal on time—or better yet, a few days early at the latest. HRAP 4(a)(4)(A) permits an extension of time in which to file a notice of appeal during the original time period, for "good cause," and HRAP 4(a)(4)(B) permits an extension of time in which to file a notice of appeal after the expiration of the original time period, for "excusable neglect[.]" The latter may be sought only with 30 days after the original prescribed deadline. *Id.* If the use of these provisions cannot be avoided, any prospective appellant should still be wary, because the grant of these extensions is itself reviewable for an abuse of discretion. *See, e.g., Enos v. Pac. Transfer & Warehouse, Inc.*, 80 Hawai'i 345, 349, 910 P.2d 116, 120 (1996) (overturning circuit court's grant of extension as excusable neglect). Thus, appellate jurisdiction for an appeal filed using these extensions may not be entirely safe. The best practice is to avoid this issue all together and file the notice of appeal within the initial time period.

ProTip:

What is a "day" under the HRAP? Like most sets of court rules, the HRAP have a time calculation rule. Of note: "The last day of the period shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, any intervening Saturday, Sunday, or legal holiday shall be excluded in the computation." HRAP 26(a).

What does this mean for practitioners? Pragmatically this means: (1) a response to an appellate motion, which is due in 5 days, HRAP 27(a), is actually due in a week in most cases, because the intervening weekend is not counted as the period is less than 7 days; and (2) a party receives extra time for deadlines if they land on a Saturday, Sunday, or legal holiday. The deadline will get bumped to the next business day. This means state holidays, not federal holidays. *See* HRS § 8-1 (listing designated holidays, including, for example, Kamehameha Day, Prince Kuhio Day, and Admission Day, but not Juneteenth).

(*Continued*)

Trap. No. 2. The Appellant Must Affirmatively Add the Relevant Transcripts to the Record on Appeal

What is it. The record on appeal is absolutely critical for appeals—it is the fixed universe in which the appeal occurs. The record on appeal includes the trial court record, "as set out in Rule 4 of the Hawaii Court Records Rules[.]" HRAP 10(a). This cross-reference means the record on appeal includes all filings, proposed jury instructions, exhibits, the docket, and minutes. Hawai'i Court Records Rules (HCRR) 4. This part of the record will be filed on the appellate docket by the clerk of the trial court within 60 days of the notice of appeal. HRAP 11(b). The filing of the record on appeal will prompt the appellate clerk's office to calendar or "docket" the appeal and set the deadlines for the appellant's jurisdictional statement and opening brief. HRAP 12(b).

Importantly, however, the appellant must ***separately*** request the transcripts, *within 10 days of the notice of appeal.* HRAP 10(b)(1)(A). The failure to do so could doom the appeal, because if an appellant does not add a transcript that is necessary for their argument, the appellate court will not have access to it. *See, e.g., Bettencourt v. Bettencourt*, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) ("The burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.") (brackets omitted).

What to do about it. An appellant should timely file all transcript requests on the ICA's docket, within 10 days of the filing of the notice of appeal. If the transcript *request* is timely filed, then the transcript filed later by the court reporter (even well after the rest of the record has certified) will automatically be made part of the record. Note that practitioners have to do this step even if they have already ordered the transcript for their own use, because designating the transcript in this fashion will give a copy of it to the appellate court.

ProTip:

Ordering fewer than all the transcripts. In one of the more obscure provisions, HRAP 10(b)(4) requires that an appellant ordering fewer than *all* the transcripts "shall . . . file a statement of the points of error the appellant intends to present on appeal[.]" This provision is intended to give the appellee an opportunity to determine whether they need to request other transcripts, based on the issues that will be raised on appeal. *Id.* This has to be done within ten days of the notice of appeal. *Id.*

In practice, this rule is honored largely only in the breach. Pragmatically speaking, therefore, an appellee should monitor the transcripts ordered by appellant and determine whether there are any transcripts missing that are critical to the *appellee*'s own arguments on appeal, and file their own transcript requests. (An appellee is under no obligation to designate transcripts, so this is a strategic decision.) If an appellee has discovered this omission after the initial 10-day period, counsel can seek relief by filing the transcript request and a motion to supplement the record. The motion to supplement the record should point out the appellant's failure to identify the points of error under HRAP 10(b)(4) as part of that motion. If this relief is sought in a timely fashion (that is, early in the briefing process), it is likely to be granted and the missing transcript, once prepared, will be made part of the record.

Trap No. 3. A Good Faith Settlement Determination Has to Be Appealed Within 20 Days

What is it. A good faith settlement determination can be immediately appealed as of right, but the notice of appeal has to be filed in *20 days*, not 30. *See* HRS § 663-15.5(e) ("A party aggrieved by a court determination on the issue of good faith may appeal the determination. The appeal shall be filed within twenty days after service of written notice of the determination, or within any additional time not exceeding twenty days as the court may allow."). Thirty days is the standard timeline in which to appeal, and the one that most practitioners are familiar with, but the good faith settlement statute has its own deadline.

What to do about it. Representing a prospective appellant: remember this deadline, and warn colleagues and staff. Representing an appellee: if appellant filed an appeal of a good faith settlement within 30 days instead of 20, wait until

the time in which to seek an extension under HRAP 4(a)(4)(B) has passed, and then file both a statement contesting jurisdiction (HRAP 12.1) *and* a motion to dismiss at the ICA under HRAP 27.

Trap No. 4. A Statement Contesting Jurisdiction Is Not the Best Way to Contest Appellate Jurisdiction

What is it. This one is particularly counter-intuitive. HRAP 12.1 permits, but does not require, appellees to file a statement contesting appellate jurisdiction. (It is mandatory for appellants to file a statement of jurisdiction. *Id.*) This filing is due 10 days after the record on appeal certifies, HRAP 12.1(a), and its contents are governed by rule, HRAP 12.1(c). This filing is *not a motion*, however, so it does not request immediate relief from the ICA.

What to do about it. Appellee's counsel who believes that appellate jurisdiction is improper should file *both* a statement contesting jurisdiction under HRAP 12.1 *and* a motion to dismiss for lack of appellate jurisdiction under HRAP 27. As a motion, it will be assigned to an ICA judge to review. In practice, the ICA generally will not rule on a motion to dismiss until after the record has certified. There is no harm in filing a motion to dismiss before the record certifies if the appellate jurisdictional defect is obvious (for example, an untimely notice of appeal), but do not be surprised if the ICA waits until after the record certifies to rule on the motion.

Counsel for appellees should still file a motion to dismiss an appeal for lack of jurisdiction even if the deadline to file a statement contesting jurisdiction has passed. This is a matter of subject-matter jurisdiction and consequently can be raised at any time. *Chun v. Employees' Ret. Sys. of State of Hawaii*, 73 Haw. 9, 13, 828 P.2d 260, 263 (1992). An appellate court always has jurisdiction to either correct an error in jurisdiction or to determine its jurisdiction. *Id.* Appellee's counsel should politely admit in the motion to dismiss that a statement contesting jurisdiction was not filed, but the motion should request dismissal of the appeal anyway.

Trap No. 5. Lack of *Jenkins*-Compliant Judgment Does Not Doom an Appeal (Not Anymore)

What is it. The leading Hawai'i case about final judgments in civil cases is unquestionably *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 869 P.2d 1334 (1994). This is the case that requires strict enforcement of the separate judgment rule. A *Jenkins*-compliant final judgment (at the end of a case) "must, *on its face*, show finality as to all claims against all parties." *Id.* at 120, 869 P.2d at 1339 (emphasis in original). HRCP 54(b) judgments, on the other hand, indicate the resolution of one or more claims but not all of them, and are granted at the circuit court's discretion. Under *Jenkins*, HRCP 54(b) judgments *must* include the "the necessary finding of no just reason for delay[.]" *Id.*

Until recently, the ICA would dismiss appeals for lack of a *Jenkins*-compliant judgment, and the parties would have to return to circuit court, secure a new judgment, and start the appeal again. In 2017, however, this practice changed with a Hawai'i Supreme Court case that directed the ICA to exercise its supervisory authority to temporarily remand the appeal to fix a judgment, rather than dismiss the appeal. *See State by Office of Consumer Prot. v. Joshua*, 141 Hawai'i 91, 98, 405 P.3d 527, 534 (2017) ("when a party to a circuit court civil case appeals what is purported to be a final and appealable judgment, but the judgment does not meet *Jenkins* requirements, rather than dismiss the appeal, the ICA must temporarily remand the case 'in aid of its jurisdiction' for entry of an appealable final judgment pursuant to HRS § 602-57(3), with a direction to the circuit court to supplement the record on appeal with the final judgment."). Another 2017 case requires the ICA to do the same when the circuit court fails to enter a judgment. *See Waikiki v. Ho'omaka Vill. Ass'n of Apartment Owners*, 140 Hawai'i 197, 204, 398 P.3d 786, 793 (2017) ("Having determined that it lacked jurisdiction over the appeal due to the absence of a final judgment and in light of Jhun's motion requesting that it issue an order directing the circuit court to execute a final judgment, the ICA should have exercised its authority under HRS § 602-57(3) to direct the circuit court to enter an appropriate appealable final judgment.") (footnote omitted).

What to do about it. If a judgment was filed but it is not *Jenkins*-compliant,

or the circuit court fails to enter a judgment despite a litigant's requests that it do so, counsel should: (1) timely file the notice of appeal anyway, and then (2) file a motion for temporary remand at the ICA. To reduce potential delay, this motion should be filed as soon as possible. If there is an error in the judgment, the ICA will typically grant these motions. The ICA's order will generally specify a time period of 30-45 days in which the circuit court must act (i.e., fix the judgment), order that the record be supplemented after that is accomplished, and state when jurisdiction will revert to the ICA.

ProTip:

How to prepare a Jenkins*-compliant judgment. Jenkins* remains a source of confusion nearly 30 years after its issuance. Any civil state court practitioner should meticulously review this short decision. Under *Jenkins*, an HRCP 54(b) judgment must have the "magic words," that is, an express finding of no just reason for delay. *See* HRCP 54(b); *Jenkins*, 76 Hawai'i at 120, 869 P.2d at 1339. A final judgment at the end of a case must show—"on its face"—the resolution of ***all*** claims as to ***all*** parties. *Id.*

To construct a *Jenkins*-compliant final judgment, counsel should study the pleadings (including any cross, counter, or third-party claims). Then review all the orders where each of the claims were resolved; the judgment should specifically list them and show where each claim was resolved. For example, if two claims of a five-count complaint were resolved on summary judgment, one was dismissed by stipulation, and two were resolved by trial (and those are the only claims), the judgment would formally specify which counts of the complaint were

(*Continued*)

resolved by each mechanism. Then, as the last paragraph, add text along these lines: "This Final Judgment resolves all claims as to all parties. There are no further claims or parties remaining in this action. All other claims, cross-claims, or counterclaims, if any, are hereby dismissed." Careful readers will note that this text is redundant. That is deliberate, to plainly state the court's intention to enter a final, complete, and *Jenkins*-compliant judgment.

ProTip:

Role of appellee's counsel. Under HRCP 58, the prevailing party is supposed to prepare a proposed final judgment for the trial court's consideration. That means—awkwardly—that the party who is *not* likely to appeal is responsible for preparing the document on which their opponent's appeal depends. Obviously, as an officer of the court, counsel should prepare a proper proposed final judgment for the court's use despite this odd arrangement. Just as importantly, however, appellee's counsel should be aware that, even if no appeal is anticipated, res judicata does *not* attach until a final judgment is entered, and the time to appeal has lapsed. *See Hoopai v. Civil Serv. Comm'n*, 106 Hawai'i 205, 224, 103 P.3d 365, 384 (2004) ("A judgment is final and binding unless an appeal is taken.") (citations omitted); *Smallwood v. City & Cnty. of Honolulu*, 118 Hawai'i 139, 150, 185 P.3d 887, 898 (App. 2008) (both res judicata and collateral estoppel require the entry of a final judgment). That means the happy client will *not* get the preclusive benefit of their victory until a final judgment has been entered. In addition, once a judgment is entered, a prospective appellant *must* decide whether to appeal, because the timely filing of a notice of appeal is jurisdictional. A proper final judgment will force the appellant's hand.

Trap No. 6: Premature Notices of Appeals Can Time Travel

What is it. As noted above, a late-filed notice of appeal will deprive the appellate court of jurisdiction, and this cannot be fixed. In contrast, the HRAP provides that appeals filed early are deemed timely. In other words, a notice of appeal generally can be filed early, but never late.

A notice of appeal is premature but still proper when it is filed "after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal." HRAP 4(a)(2). In practice, if a trial court judge rules from the bench at a hearing in which an appealable decision was rendered, an appeal filed *after* that, but *before* the formal order is entered, will be considered timely. As stated in the rule, it is "considered as filed immediately after" the relevant orders or judgment. *Id.* Thus, if properly filed, a premature appeal will "jump" to the proper time after the orders or judgment are entered by operation of rule.

What to do about it. Sometimes this rule can inadvertently save an appeal's jurisdiction if counsel has misunderstood amended notices of appeal (see below). In terms of affirmatively using this option, it is most important as procedural matter if an appellant has an extremely urgent need for a stay pending appeal and needs to file the appeal in order to request that relief from the ICA under HRAP 8. (Under that rule, parties must first ask the court appealed from for a stay pending appeal.) Other than that, this rule operates predominantly as a fail-safe so that early-filed notices of appeal do not share the same fate as late-filed notices of appeals.

Trap No. 7. An Amended Judgment Might Create a New Appeal Period (But Probably Not)

What is it. This trap is particularly dangerous because an appellant can accidentally miss the deadline to appeal, and that error cannot be corrected. An amended judgment necessarily follows an initial judgment that came before it. There are two kinds of amended judgments: (1) where the changes to the judgment are typographical or clerical; or (2) where the changes are truly substantive and materially impact the rights or obligations of the parties. If the changes are typographical (such as correcting the spelling or procedural identification of party), it operates merely to clean up the record, and *the first judgment is the judgment* for purposes of the appeal deadline. The entry of a second judgment would not extend or restart the deadline for the notice of appeal. *See, e.g., Poe v. Hawaii Labor Relations Bd.*, 98 Hawai'i 416, 419, 49 P.3d 382, 385 (2002) ("Because the correction was clerical in nature and had no adverse effect upon any rights or obligations or the parties' right to appeal, we hold that the time for appealing the judgment in the instant case is measured from April 17, 2001—the entry of the first amended judgment—and not from April 26, 2001—the entry of the second amended judgment."). *Poe* describes the substantive changes that *would* amend a judgment sufficiently to create a new period in which to appeal as "materially alter[ing] any rights or obligations determined by" the prior judgment. *Id.*

The danger created by this standard is apparent. If amendments to a judgment are more than clerical, an attorney might not know for certain which category the amended judgment fell into until it was too late.

What to do about it. If a judgment is amended with a clerical change only, calculate the time to appeal from the first judgment and strictly comply with that deadline.

If, on the other hand, a judgment makes more than clerical changes, the safest course is to timely appeal *both* judgments. If the amended judgment was issued within 2-3 weeks of the first judgment, they could both be appealed at the same time (that is, attached to the same notice of appeal) and it would be timely filed for both. If a judgment is amended after an appeal has already been filed on the first judgment, and the amendments are more than clerical, the most cautious approach is to file a second, new appeal appealing the amended judgment. Then the appellant should file a motion to consolidate this second appeal with the first one. If this motion is timely filed (ideally before the briefing has begun), this motion will typically be granted, and the two appeals will be consolidated under a single appellate case number. The appellant will file one opening brief addressing them both, and the appellee will do likewise.

Trap No. 8. Amended Notices of Appeal Are Not What They Seem

What is it. Sometimes practitioners will file a notice of appeal, and then later file an "amended" notice of appeal in the same ICA case. This filing is not the same as filing a new notice of appeal, and does not operate as parties may assume. In fact, an amended notice of appeal is ***ineffective*** to appeal orders or judgments issued *after* the original notice of appeal was filed. *See, e.g., Enos*, 80 Hawai'i at 355-56, 910 P.2d at 126–27 ("[s]ince an amended notice of appeal relates back to the notice of appeal it purports to amend, it does not appeal an order, judgment, or decree entered subsequent to the notice of appeal it purports to amend.") (quoting *Chan v. Chan*, 7 Haw. App. 122, 129, 748 P.2d 807, 811 (1987).

What to do about it. The best practice is to avoid amended notices of appeal. They are either ineffective or unnecessary. If counsel is looking to include orders and judgments that were issued after the notice of appeal, but for which the decision had already made (orally) *before* the notice of appeal was filed, the amended notice of appeal is unnecessary. The premature appeals provision of the HRAP already operates to make that appeal timely. *See* above and HRAP 4(a)(2). In this situation, the amended notice of appeal is unnecessary but harmless, because the premature appeals provision will make the appeal timely by operation of rule.

If an amended notice of appeal is filed that does *not* fall within the premature appeals provision, then this mistake can doom an appeal. The amended notice of appeal will *not* function as a timely filed appeal. If there is a later-issued judgment or order that should be addressed in the same appeal, an appellant should file a second, new notice of appeal to start that appeal. Appellants can later move to consolidate the appeals. As appellee, if your opponent has filed an amended notice of appeal, wait until the appeal period has passed (counted from the last-issued appealable order or judgment), and then move to dismiss the appeal or that portion of it. An appellee in this situation should also file a statement contesting jurisdiction, if possible.

Trap No. 9. The Truth About Interlocutory Appeals

What is it. Civil appeals often (but not always) follow from the entry of a final judgment. In certain situations, appeals can be filed from interlocutory orders. An interlocutory appeal refers to an appeal filed from an order that does not end the trial court proceeding. For civil appeals, they may be divided into two broad categories: interlocutory appeals for which leave to appeal must be sought, and those which may be filed as of right.

Interlocutory Appeals Requiring Leave to Appeal or Certification. There are two mechanisms by which a circuit court can certify (or permit) an interlocutory appeal. Both are discretionary. In practice, both are rarely sought, and even more rarely granted.

First, under HRCP 54(b), a circuit court can permit an order that fully resolves one or more *claims* (but less than all) to receive its own judgment, which (if properly written) will permit an immediate appeal to be filed. *See* HRCP 54(b) ("When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."). This mechanism would only be properly sought if a *claim* was resolved in full. Thus, a grant of summary judgment on one claim might qualify, but the denial of that same motion would not (because no claim had been resolved). If this mechanism is used in error, appellate jurisdiction will not be proper. *See, e.g., James v. Foodland Super Mkt., Ltd.*, 2021 WL 5504991, at *1 (Haw. App. Nov. 24, 2021) ("the Order does not enter judgment as to any of the claims in the complaint, and Rule 54(b) is inapplicable.").

Second, under HRS § 641-1(b), a circuit court may allow an appeal "from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think *the same advisable for the speedy termination of litigation before it.*" (emphasis added). This is discretionary and, if leave is improperly granted, it can be vacated on appeal. *See Lui v. City & Cty. of Honolulu*, 63 Haw. 668, 671, 634 P.2d 595, 598 (1981) ("The words "speedy termination" are . . . crucial to the determination of whether the trial court exercised its discretion properly. . . . The saving of time and litigation expenses, without more, do not meet the requirement of speedy termination. On the other hand, if the appeal may put an end to the action, obviously the requirement is met.") (citation and footnote omitted).

Interlocutory Appeals That Can Be Filed as of Right. There are two categories of interlocutory orders that can be appealed as of right. The first is under the *Forgay* doctrine, which refers to *Forgay v. Conrad*, 47 U.S. 201 (1848). The *Forgay* doctrine operates to permit an immediate appeal as of right "from (1) a judgment for *immediate execution* against *an interest in real property* that is (2) effectively unreviewable on appeal from a final judgment, even if all other claims of the parties have not been finally resolved." *Greer v. Baker*, 137 Hawai'i 249, 253, 369 P.3d 832, 836 (2016) (citing *Ciesla v. Reddish*, 78 Hawai'i 18, 20, 889 P.2d 702, 704 (1995) (emphasis added). This category is narrow because it concerns only orders granting "immediate execution against an interest in real property[.]" *Id.* An appeal from a writ of possession is an example of a *Forgay* appeal.

Second, immediate appeals are permitted as of right under the collateral order doctrine. "[T]he collateral order doctrine authorizes an appeal from an order that (1) conclusively determines a disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Greer*, 137 Hawai'i 249, 253, 369 P.3d 832, 836 (2016) (citing *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Hawai'i 319, 322, 966 P.2d 631, 634 (1998)). For example, an order denying a motion to dismiss on grounds of legislative immunity is appealable under the collateral order doctrine, but an order denying attorney-client privilege is not. *Greer*; *Abrams*. An order granting a motion to compel arbitration also falls under the collateral order doctrine. *Cnty. of Hawaii v. UNIDEV, LLC*, 129 Hawai'i 378, 301 P.3d 588 (2013).[2]

What to do about it. For *Forgay* appeals and those appealing collateral orders, the 30 days in which to appeal begins with the entry of those appealable orders.

For the discretionary interlocutory appeals, leave to appeal is rare. For both mechanisms, leave to file an interlocutory appeal has to be sought by motion, which must be filed within 30 days of the order for which leave to appeal is sought. HRAP 4(a)(1). Then, if granted, the notice of appeal must be filed within 30 days of the order granting leave. *Id.* If leave to appeal is denied, that decision is unreviewable. *See, e.g.*, HRS § 641-1(b) ("The refusal of the circuit court to allow an appeal from an interlocutory judgment, order, or decree shall not be reviewable by any other court."). Importantly, however, the interlocutory orders for which leave was unsuccessfully sought are still reviewable later if the case is litigated to judgment. *See, e.g., Lui*, 63 Haw. at 671, 634 P.2d at 598 ("where requests for interlocutory appeals are not granted . . . no substantial rights are lost thereby. All questions, if properly preserved, may be raised after final judgment.").

Trap No. 10. When a Tolling Motion Extends the Time to Appeal and the Elusive Motion for Reconsideration

What is it. In certain, limited situations, the time in which a notice of appeal may be filed can be extended by way of a post-judgment "tolling motion." "If any party files a timely motion for *judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, alter or amend the judgment or order, or for attorney's fees or costs, and court or agency rules specify the time by which the motion shall be filed*, then the time for filing the notice of appeal is extended for all parties until 30 days after entry of an order disposing of the motion." HRAP 4(a)(3) (emphasis added). Only a handful of motions qualify under this rule. They must be listed in the rule itself, and the court rules must "specify the time by which the motion shall be filed[.]" *Id.* A motion which does not have a deadline built into it cannot be a tolling motion. A motion which falls under this rule will toll the time in which to appeal until that motion has been resolved. *Id.* The trial court is directed to enter an order resolving the motion within 90 days of its being filed. *Id.*[3]

What to do about it. If these specific forms of post-judgment relief are sought (for example, a motion for new trial), the 30-day deadline in which to appeal does not start until the order resolving the motion is filed. The motion must have a deadline set by rule, and must be itself timely filed. *See, e.g.*, HRCP 59(b) (motion for new trial must be filed within 10 days of the judgment).

There is a complication for motions for reconsideration, which are specifically listed as among the tolling motions in HRAP 4(a)(3), but do not exist *under that exact name* in the HRCP. Instead, a motion for reconsideration falls under HRCP 59(e) or HRCP 60:

> This court has noted that the HRCP do not expressly afford a party the right to file a motion for reconsideration. . . . Hawai'i appellate courts, however, have recognized that a motion for reconsideration can be filed pursuant to HRCP Rule 59(e) (motion to alter or amend judgment) or HRCP Rule 60 (motion for relief from judgment or order).

Cho v. State, 115 Hawai'i 373, 382, 168 P.3d 17, 26 (2007) (citations and block formatting omitted). A motion for reconsideration filed under HRCP 59(e) must follow the 10-day deadline explicitly stated in that rule. For a motion for reconsideration filed under HRCP 60(b), this "motion for relief from judgment may toll the period for appealing a judgment or order, but only if the motion is served and filed within ten (10) days after the judgment is entered." *Lambert v. Lua*, 92 Hawai'i 228, 234, 990 P.2d 126, 132 (App. 1999). Consequently, a later-filed HRCP 60 motion cannot function as a tolling motion.

Trap No. 11. Check the Record on Appeal

What is it. The record on appeal will be certified by the trial court clerk no later than 60 days after the notice of appeal. HRAP 11(b)(1). Since electronic filing began for civil cases in 2019, this step is often faster than it was before, and a record may certify well in advance of the 60-day deadline. By definition, the record is meant to include all the filings in the trial court. The record will show the state of these filings as of the date the record certified (and not after).

What to do about it. All appellate counsel—but especially appellants—must check the record on appeal. *See, e.g., Bettencourt*, 80 Hawai'i at 231, 909 P.2d at 559 ("[i]t is counsel's responsibility to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected[.]"). Despite the parties' and the courts' best efforts, documents that were filed below

may be missing or incomplete. Litigants should check that the documents needed to support their arguments on appeal are indeed present in the record. This should be done promptly—right after the record certifies—and not two days before the brief is due. If there is an error in the record on appeal, relief can be sought by way of a motion to supplement the record. Ideally, this motion will be sought soon after the record certifies, so that the motion can be resolved before the briefing begins in earnest.

Pro Tip:

Pro Tip: An easy-to-read docket is a terrific tool. Oftentimes the record on appeal dockets certified by the circuit courts are difficult to read because of the narrow columns. Practitioners can use the "printable case view" on eCourt Kokua to generate a free, easy-to-read docket in PDF format. Look up the *trial court*'s case number on eCourt Kokua (on the Judiciary's website) and click the button that says "Generate Printable Case View." In a few seconds a link will appear for the "Printable Case View" PDF. In this format, the text of the minutes and document titles is given far more space, so it is much easier to read and can be highlighted in the PDF format and saved to a firm's file management system. The docket numbers are the same as those that appear in the record on appeal index certified by the trial court.

Trap No. 12. How to Get an Extension on the Appellate Briefing Without Accidentally Missing the Deadline

What is it. There are two forms of extensions for appellate briefing under the HRAP. The first is the clerk's extension. HRAP 29(a). Both the appellant and the appellee are entitled to one 30-day extension apiece on the opening and answering briefs, if timely requested. Reply briefs can receive a 10-day extension. This request is typically made by calling the clerk's office and filing a short notice of extension after the clerk has confirmed that the extension is granted. This extension can only be granted once. *Id.*

The second form of an extension is sought for "good cause" under HRAP 29(b) and must be sought by motion. It must be filed "at least 5 days prior to the due date[.]" *Id.* Recall that weekends and holidays are subtracted from the time period if it less than 7 days. HRAP 26(a). In practice, then, the deadline to seek a further extension is at least a week in advance (8 days if there was a holiday in that time). These motions may be denied if untimely. Good cause is generally demonstrated by attaching a declaration of counsel to a short motion under HRAP 27. If a solid reason is provided, and the motion is timely filed, the ICA will generally grant these motions for the first 30-day extension request after the clerk's extension.

What to do about it. Sanctions can be imposed, or appeals can be dismissed by the ICA if an appellant fails to file an opening brief, HRAP 30, so counsel needs to stay mindful of the deadlines. If a further extension is needed after the clerk's extension, the best practice is to file a few weeks before the deadline, so the attorney will receive the benefit of the additional time, if granted.

Trap No. 13. The Lifeline of an Opening Brief: Proper Points of Error

What is it. HRAP 28(b)(4) has detailed requirements for the points of error, which is the section of the opening brief that identifies the issues an appellant wishes to raise on appeal. This rule is extremely important, because "[p]oints not presented in accordance with this section will be disregarded,

except that the appellate court, at its option, may notice a plain error not presented." HRAP 28(b)(4). In other words, failing to strictly comply with this rule can be fatal to an appeal.

For each point of error, appellants must include: "(i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." HRAP 28(b)(4).

What to do about it. Strict compliance with this rule is not particularly difficult, and will avoid the possibility of the court declining to reach the issue due to technical noncompliance. The opening brief must include: (1) the alleged error (2) *where* in the record the alleged error occurred; and (3) *where* in the record the alleged error was preserved. HRAP 28(b)(4). In other words, stating that a circuit court erred in granting summary judgment would be insufficient to create a proper point of error by itself. An appellant would also have to show where in the record this error occurred, and where in the record the appellant raised the issue or objected to this outcome. Where an alleged error occurred and where the alleged error was preserved can be (and often are) in more than one location in the record. All relevant citations to the record should be included.

There are additional requirements for points of error regarding the admission or rejection of evidence, jury instructions, findings or conclusions made by the court or agency appealed from, or a master's report. HRAP 28(b)(4). Challenged findings and conclusions must be either quoted or (if lengthy) attached to the opening brief. In addition, a point of error will be ineffective if it is not accompanied by a corresponding argument section. "Points not argued may be deemed waived." HRAP 28(b)(7).

Trap. No. 14. Appeal-Specific Formatting and Citation Rules

What is it. The HRAP include a few unique citation and formatting rules. Of particular note: (1) footnotes must be in the same size as the text, HRAP 32(b); and (2) citations to Hawai'i cases since statehood must include both the Hawai'i reporter and the Pacific reporter, HRAP 28(b)(1). More critically, the HRAP dictates the level of detail that is required for record citations:

> Record references shall include *a description of the document referenced*, the JIMS or JEFS *docket number* and *electronic page citations*, or if a JIMS or JEFS docket number is not available, the document's filing date and electronic page citations within the document. References to transcripts shall include the JIMS or JEFS *docket number*, the date of the transcript, and the *specific electronic page or pages* referenced.

HRAP 28(b)(3) (emphasis added).

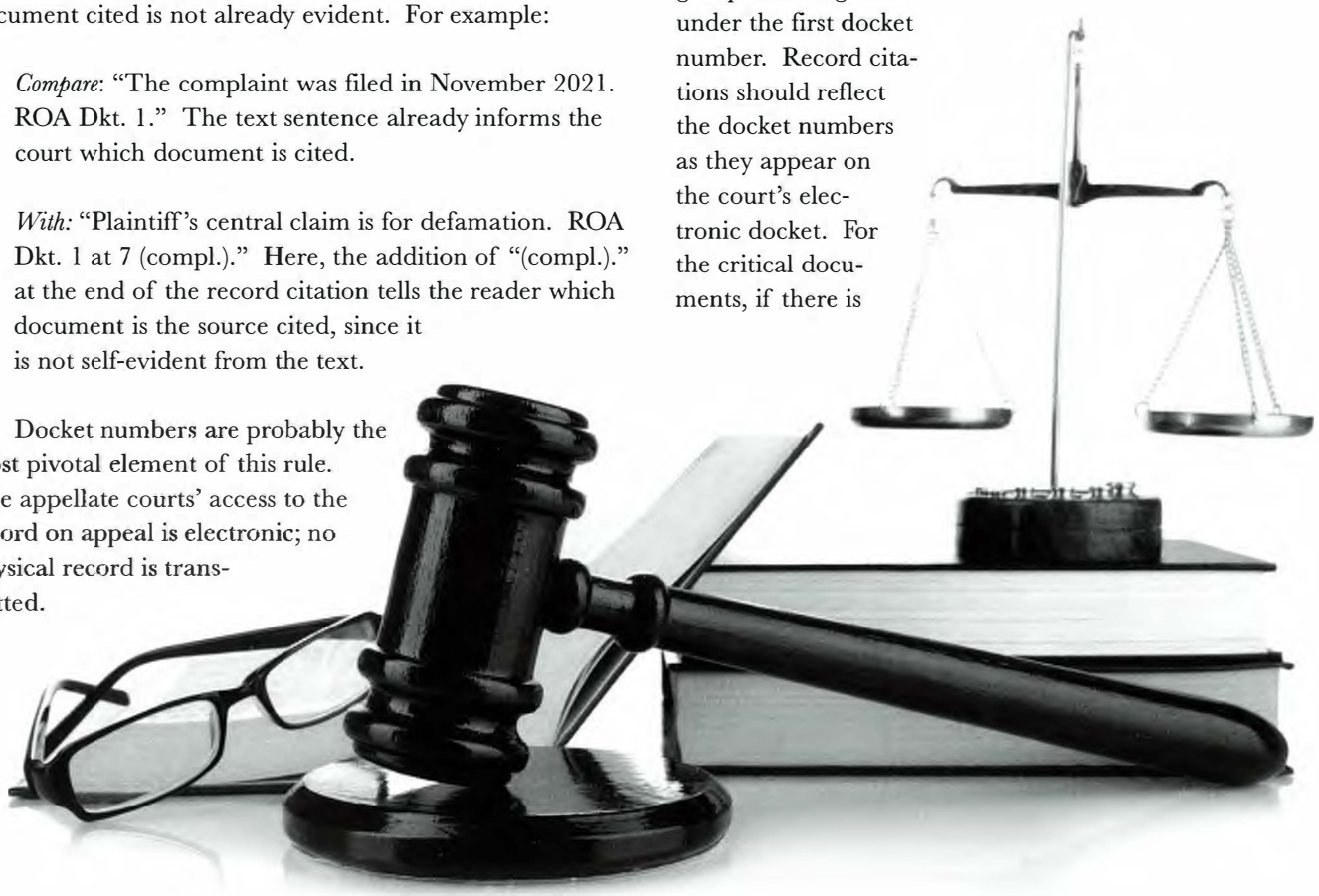
What to do about it. Record references must describe the document referenced, include the docket number, and use electronic page numbers. *Id.* Describing the document referenced would include a short identifier if the nature of the document cited is not already evident. For example:

> *Compare*: "The complaint was filed in November 2021. ROA Dkt. 1." The text sentence already informs the court which document is cited.
>
> *With:* "Plaintiff's central claim is for defamation. ROA Dkt. 1 at 7 (compl.)." Here, the addition of "(compl.)" at the end of the record citation tells the reader which document is the source cited, since it is not self-evident from the text.

Docket numbers are probably the most pivotal element of this rule. The appellate courts' access to the record on appeal is electronic; no physical record is transmitted. Attorneys must include the docket numbers in order to allow the appellate courts to easily locate the document. Without it, referencing the date filed or the title of the document will require additional work for the court to locate the document. This request—to include docket numbers in record citations—is the most frequent best practice urged for practitioners by ICA judges at CLE events. Proper record citations help the court navigate the record.

Note that the same rule requires attorneys to cite to the "electronic page citations," HRAP 28(b)(3), *not* to the pagination that may appear at the bottom of the page. This gives the courts easier access to the record and allows them to navigate to a pin cite quickly.

There are two wrinkles to be aware of for this citation rule. First, the pagination will often differ between the bottom of the page of text and the electronic (or PDF) page number. This happens frequently when a filing has a caption, a separate motion, and tables of contents and authorities before the text of the memorandum in support of the motion begins. Page 4 of the text of a memorandum of law may be page 10 of the PDF. The second wrinkle is that documents are often filed on JEFS in batches of PDFs rather that one PDF, but then law firms' filing systems will group them together under the first docket number. Record citations should reflect the docket numbers as they appear on the court's electronic docket. For the critical documents, if there is



one PDF that is consolidated from several docket numbers, proper record citations may be easier to determine if a practitioner creates a duplicate set of the PDFs separated by docket number.

ProTip:

Pro tip: Citing to unpublished opinions. If they were issued on or after July 1, 2008, unpublished state appellate court decisions may be cited, but for persuasive (not precedential) value only. HRAP 35(c)(2). Attorneys are required to attach a copy of cited unpublished decisions to a filing. *Id.* If issued before July 1, 2008, unpublished decisions can only be cited for purposes of establishing law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent. HRAP 35(c)(1).

Practitioners are not required to cite to unpublished opinions. HRAP 35(c)(2). In practice, however, the ICA frequently cites to, and relies on, its own unpublished decisions. Consequently, practitioners should research and be aware of them even if only for persuasive value. If there is ample unpublished ICA authority on a specific point, the brief should be clear about the decisions' unpublished status, and attach copies of the unpublished decisions as the rule requires. Though published, precedential authority is certainly preferable, attorneys may rely on this sort of unpublished authority if it is on point. Unpublished opinions are always explicitly designated as such, both in the slip opinions and on Westlaw, but they eventually have Hawai'i and Pacific reporter cites as well (in table form). That can be confusing, so counsel should verify the status of an opinion on the decision itself.

Trap No. 15. When to Seek Certiorari at the Hawai'i Supreme Court

What is it. After the ICA has ruled on the merits of an appeal, or dismissed an appeal, the litigants have an opportunity to seek certiorari at the Hawai'i Supreme Court. Certiorari may be sought "within 30 days after the filing of the intermediate court of appeals' judgment on appeal *or dismissal order*[.]" HRAP 40.1(a)(1) (emphasis added).

If the ICA decides to dismiss an appeal (for example, for want of appellate jurisdiction), it will issue an order dismissing the appeal. For that order, the 30 days in which to seek certiorari begins *immediately* (with an optional extension available). After the ICA issues a disposition on the merits, however, the time in which to seek certiorari does not begin until the ICA issues its judgment on appeal, which is generally issued a few weeks after the disposition. *Id. See also* HRAP 36 (governing judgments on appeal).

What to do about it. When the ICA resolves an appeal on the merits, sometimes counsel will file an application for writ of certiorari early, before the judgment on appeal has issued. In that situation, the Hawai'i Supreme Court will dismiss the application without prejudice, because it is premature. The litigant can refile after the judgment on appeal has been issued. If, however, counsel does not seek certiorari within the prescribed period for an ICA dismissal order, because they were mistakenly awaiting the issuance of the judgment on appeal, the opportunity to seek certiorari may be permanently lost.

Extensions of 30 days are available for applications for writs of certiorari if timely requested. HRAP 40.1(a)(2). A party responding to an application for writ of certiorari has 15 days to do so, with a 15-day extension of time available upon timely request. HRAP 40.1(e)(1) and (2). These deadlines and extensions are also set by statute, HRS § 602-59(c), so further extensions beyond those explained in HRAP 40.1 will not be available.

* * * * *

Appellate procedure is often intricate. Fortunately, the basic principles of appellate procedure are also quite stable, for the most part. Counsel who invest time studying the HRAP and the appellate procedural case law should find that effort of lasting value.

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[1] Post-judgment appealable orders are beyond the scope of this article.
[2] In contrast, an order denying a motion to compel arbitration is immediately appealable by statute. HRS § 658A-28(a)(1).
[3] Additional complications may develop if the trial court fails to resolve a post-judgment tolling motion within 90 days. Within the next five days, the clerk is supposed to file a written notice informing the parties that the motion is denied. HRAP 4(a)(3). If that is done, the time to appeal runs from the entry that notice. *Id.* It is unclear what occurs if the clerk fails to file the notice. There is a case pending now at the Hawai'i Supreme Court, *In re Tax Appeal of Cole*, SCAP-13-0000011, which may help answer that question.

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