DISSENTING OPINION OF ACOBA, J.

I write separately for two reasons. First, as to the merits of the case, I believe we should construe ambiguous rules in favor of resolving matters on the merits of the case. Accordingly, I must respectfully dissent from the holding in this case for the reasons set forth in Part I, infra. But second, I favor the process in which we heard oral argument in this case, and discuss the benefits of oral argument in Part II, infra.

I.

As a general matter, this court interprets a rule in the same manner as a statute. See Dorrance v. Lee, 90 Hawai‘i 143, 145, 976 P.2d 904, 907 (1999) ("The interpretation of a rule promulgated by the courts involves principles of statutory construction." (Quoting Cresencia v. Kim, 85 Hawai‘i 334, 335, 944 P.2d 1277, 1278 (1997).)). Thus, "[w]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute [or rule], an ambiguity exists." Gray v. Administrative Dir. of the Court, 84 Hawai‘i 138, 148, 931 P.2d 580, 590 (1997). Plaintiff-Appellant Alfonso D. Rivera, Jr. (Appellant) argues that Hawai‘i Rules of Civil Procedure (HRCP) Rule 6 is ambiguous as to whether HRCP Rule 6(e) applies exclusively of Rule 6(a), or whether Rule 6(a) and Rule 6(e) are to be consecutively applied in a situation where an order is served by mail and a holiday or weekend intervenes.

Appellant notes that section 6(a),[1] which comes first in the order of the sections listed in Rule 6, states that, when the last day of the relevant period, in this case, thirty days, falls on a weekend or is a holiday, the period for doing the subject act will be extended to the next working day. Rule 6(e),[2] which follows Rule 6(a), states that, when the order is served by mail, two days will be added to the "prescribed period." Accordingly, Appellant, applying sections 6(a) and 6(e) in the order in which they appear, posited that, if the last day of the prescribed period ends on a weekend or holiday, the period is extended to the next business day, and pursuant to Rule 6(e), when service is done by mailing, two more days are tacked on to the prescribed period. In their construction of the parallel Federal Rules of Civil Procedure (FRCP) Rule 6, Wright and Miller acknowledge that some state courts adopt the same construction of Rule 6 advocated by Appellant. See C. Wright & A. Miller,

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[1] Rule 6(a) states in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a holiday.

(Emphasis added.).

[2] Rule 6(e) states:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 2 days shall be added to the prescribed period.

(Emphasis added.).

Federal Practice and Procedure: Civil 3d § 1171 at 595-96 (3d ed. 2002) [hereinafter "Federal Practice"] ("It has been argued under state provisions similar to Rule 6(e) [that the period is extended to the next working day and then the mail rule is applied.]").

Appellant also observes that his interpretation best fulfills the purpose of the Rule 6(e) "mail rule," inasmuch as it grants two days beyond the prescribed period available for a non-mailed filing. Under the majority's interpretation, an appellant to whom a filing had been mailed may receive no additional days beyond what a non-mailed appellant would receive. For example, under the majority's analysis, if the thirtieth day falls on a Saturday, the date for filing is extended to the next Monday under both Rules 6(a) and 6(e). This construction of the rules, however, would penalize a party who has received the notice by mail, presumably several days later, and, thus, has had less time to review the decision than a party who is not served by mail. This contravenes the purpose and intent of Rule 6(e). Cf. Kessler Inst. for Rehab. v. National Labor Relations Bd., 669 F.2d 138 0(3rd Cir. 1982) ("Without such an allowance, a party would be penalized by being allotted less time to complete his task merely because his adversary chose to use the mail.").

In this regard, in light of the ambiguity of Rule 6, Appellant's interpretation is neither unreasonable nor absurd.[3]

[3] Moreover, analysis of the federal rules is distinguishable, insofar as FRCP Rule 6(e) grants a three day extension when service is by (continued...)

See Mahiai v. Suwa, 69 Haw. 349, 351, 742 P.2d 359, 362 (1987) ("Courts will not adopt an interpretation of a rule which would lead to an absurd result."). Here, if applied first, HRCP Rule 6(a) extends the prescribed period to Monday, August 6, 2001. Then utilizing HRCP Rule 6(e), two more days would be appended, extending the final deadline to Wednesday, August 8, 2001. Under this construction of HRCP Rule 6, Appellant's appeal to the circuit court would be timely.

The Intermediate Court of Appeals (ICA) has applied Rule 6 in the same way. Posing a similar factual situation, the ICA applied Rule 6(a) first. Inasmuch as the last day of the prescribed period fell on a Sunday, the ICA indicated two additional days should be added to the relevant time pursuant to Rule 6(e) because service had been accomplished by mail:

> In the instant case, the certified copy of the . . . order was mailed on January 12, 1990. The thirtieth day after mailing was February 11, 1990, which, however, was a Sunday. Therefore, the appeal period was extended to Monday, February 12, 1990. Rule 6(a), HRCP. Under Rule 6(e), HRCP, [appellant] was required to file the notice of appeal no later than February 14, 1990.

Korean Buddhist Dae Won Sa Temple v. Zoning Bd. of Appeals, 9 Haw. App. 298, 305-06, 837 P.2d 311, 315, reconsideration denied, 9 Haw. App. 659, 833 P.2d 98 (1992). Under this analysis, Appellant conformed to case law existing at the time in determining that, when an order is mailed, Rule 6(a) would be

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mail. See FRCP Rule 6(e). A three day period spans most weekends and holidays, thus alleviating any problem when the thirtieth day falls on a holiday. Under HRCP Rule 6(e), however, a two-day period does not span a weekend and a holiday.

applied first, followed by Rule 6(e). But see Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai‘i 343, 949 P.2d 183 (1997) (applying a contrary view of HRCP Rule 6). The decision in Price v. Zoning Bd. of Appeals, 77 Hawai‘i 168, 171, 883 P.2d 629, 632 (1994), adds little to this discussion as it did not involve the question of what occurs when the final day of the thirty-day period falls on a holiday or weekend.

I do not believe the construction given the federal rule should be applied to our rule. See C. Wright & A. Miller, Federal Practice, supra, at 595-96 ("there is simply one thirty-three day period and that the thirty-third day . . . is the final day of the extended period"). Under this interpretation of the federal rule, it was acknowledged that some state courts differ from the federal courts and apply the rule in the same way as Appellant espouses. See id. Moreover, in the construction of FRCP Rule 6, apparently no consideration was given to the proposition that cases should be decided on their merits.

On the other hand, we favor adjudication on the merits of the case. See Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Haw. 103, 107, 899 P.2d 386, 390 (1995) (this court prefers "giving parties an opportunity to litigate claims or defenses on the merits"). Hence, we should construe Rule 6 in consonance with this principle. Accordingly, I would vacate the circuit court's determination that Appellant's appeal was untimely and remand with instructions to the circuit court of the

first circuit to treat the appeal as timely and to decide the appeal accordingly.

II.

Because this case arose from our expedited oral argument (EOA) calendar, I take this opportunity to discuss EOA. EOA procedures were proposed by Justice Ramil and implemented on July 3, 2002 on an experimental basis. Thus, the continuance of the EOA calendar rests on the good faith of a majority of the justices to the values of oral argument. The purpose of these proceedings was to mitigate delay by resolving cases identified for summary disposition orders (SDO) that would be appropriate for oral argument. Attorneys who have since appeared on the expedited oral argument calendar have remarked that they appreciated the opportunity to argue before this court. See In re Doe Children, No. 24376 (July 25, 2002) (SDO) (Joseph A. Dubiel was "glad that [the court was having] oral argument, [and] so thank[ed the court] for that."); State v. Bundy, No. 23857 (July 9, 2002) (SDO) (Steven B. Songstad remarked, "Your Honors, it was pretty good to be here."); State v. Ferreira, No. 24069 (July 9, 2002) (SDO) (Craig T. Kimsel "appreciate[d] the opportunity [to be] here.").

Although the EOA calendar was meant to address cases with SDO characteristics, some of the cases heard have presented significant questions of laws. Therefore, the EOA calendar has given rise to published opinions, as in this case. See also

Bauernfiend v. Association of Apartment Owners of Kihei Beach Condominiums, 99 Hawai‘i 281, 54 P.3d 452 (2002). Oral argument then has illuminated issues not evident from the briefs that would not have been otherwise discovered. The EOA calendar has also provided cases as to which two members of this court believed publication was warranted, although the majority voted against publication. See State v. Bush, No. 24808 (October 11, 2002) (SDO) (Acoba, J., dissenting) (noting "that requiring a waiver-of-jury-trial colloquy would remove many issues raised in these cases . . . [and that the] questions raised in this appeal will continue to arise in future cases unless the colloquy is made mandatory"); id. (Ramil, J., dissenting) ("This case exemplifies the problems associated with the lack of a standard colloquy requirement."); State v. Makalii, 99 Hawai‘i 431, 431 n.1, 56 P.3d 733, 733 n.1 (2002) (Ramil, J., dissenting) ("Because the case at bar raises a very important issue dealing with the statutory construction of the word 'fee[]' [in the prostitution statute,] I strongly feel that it is critical for this court to publish this opinion."), reconsideration denied (2002) (Acoba, J., dissenting) ("I . . . agree with the assertion by Defendant that a decision in this case should be published, as was requested by Justice Ramil.").[4] If only for these reasons,

[4] In urging publication, the defendant set out what I believe is one set of conditions making it obligatory on this court to publish. The defendant argued that "the majority's order does not inform Hawaii's citizens of what conduct is prohibited, nor how to act accordingly. Moreover, since the majority's order cannot be cited or relied upon as precedent, it fails to provide the requisite guidance to police officers, judges, and juries." (continued...)

oral argument has proven invaluable to the just resolution of cases.

However, the EOA calendar is a limited approach to oral argument and does not supplant the scheduling of regular oral argument. In recently authorizing two additional Intermediate Court of Appeals judges, the legislature observed that "oral argument has become rare." Stand. Comm. Rep. No. 1460, in 2001 House Journal, at 1495. The lack of oral argument may lead some to believe that we are an absentee court. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 34 governs the hearing of oral argument in the appellate courts of this state. HRAP Rule 34(a) states that "[o]ral argument shall be had in all cases except those in which the appellate court before which the case is pending enters an order providing for consideration of the case without oral argument." (Emphasis added.). This statement seemingly makes oral argument the rule, rather than the exception, but the opposite is true.

For example, in the historic case of Rice v. Cayetano, 528 U.S. 495, 516-17 (2000) (holding that a provision of the Hawai‘i Constitution that governed election of trustees for Office of Hawaiian Affairs, under which voter eligibility was limited to "Hawaiians" or "native Hawaiians," violated the fifteenth amendment), the Federal District Court for the District of Hawai‘i, the Ninth Circuit Court of Appeals and the United

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States Supreme Court all entertained oral arguments. Yet this court, arguably the tribunal most directly affected by Rice, did not hold oral argument in the related state case of Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 8, 6 P.3d 799, 806 (2000) (holding that the U.S. Supreme Court decision in Rice v. Cayetano did not create vacancies as to the trustees who had been already voted into office).

Justice must be seen to be done. That proposition applies to all appellate courts:

> [T]he principal purpose of the argument before the [United States Supreme Court] Justices is . . . to communicate to the country that the Court has given each side an open opportunity to be heard [and, t]hus[,] not only is justice done, but it is publicly seen to be done. . . . This consideration -- that justice should always be seen to be done -- is applicable to all appellate courts.

Blair v. Harris, 98 Hawai'i 176, 187, 45 P.3d 798, 809 (2002) (Acoba, J., concurring and dissenting in part) (citations omitted) (some brackets in original). Oral argument also produces other benefits stemming from judicial interaction with members of the Bar in a legal setting. See id. at 186, 45 P.3d at 808 ("A dialogue among the members of the court and counsel, which is the essence of oral argument, enlivens the written briefs, heightens our awareness of what is significant to the parties, and invigorates our analytical senses.").

However, oral argument is only possible in any case if a majority of the justices vote for it. Again, unless oral argument is supported by the good faith and commitment of the justices, whether on the EOA calendar or on a regular schedule, the function of oral argument and its contributions to the

appellate process will be substantially diminished as will the public's perception of justice.