

EXECUTIVE CHAMBERS  
HONOLULU

LINDA LINGLE  
GOVERNOR

December 13, 2002

The Honorable Robert Bunda, President  
and Members of the Senate  
Twenty-Second State Legislature  
State Capitol, Room 003  
Honolulu, Hawai'i 96813

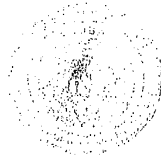
Dear Mr. President and Members of the Senate:

For your information and consideration, I am transmitting herewith two (2) copies of the Report of the Task Force to Resolve Issues Related to Court-Appointed Counsel in Hawai'i. Pursuant to Act 231, SLH 2001, I am also informing you that the report may be viewed electronically at <http://www.hawaii.gov/budget/LegReports/reportslist.htm>.

Very truly yours,

LINDA LINGLE

Enclosures



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December 13, 2002

The Honorable Calvin K.Y. Say, Speaker  
and Members of the House of Representatives  
Twenty-Second State Legislature  
State Capitol, Room 431  
Honolulu, Hawai'i 96813

Dear Mr. Speaker and Members of the House:

For your information and consideration, I am transmitting herewith two (2) copies of the Report of the Task Force to Resolve Issues Related to Court-Appointed Counsel in Hawai'i. Pursuant to Act 231, SLH 2001, I am also informing you that the report may be viewed electronically at <http://www.hawaii.gov/budget/LegReports/reportslist.htm>.

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**Report to the 2003 Hawaii State Legislature**

**By**

**The Task Force to Resolve Issues Related to  
Court-Appointed Counsel in Hawaii**

Pursuant to House Concurrent Resolution No. 171 H.D. 1 [hereinafter "HCR 171"], a task force was created to resolve issues related to court-appointed counsel in Hawai'i. The members of the task force were as follows:

John M. Tonaki, State Public Defender, Chairperson  
Honorable Dan Kochi, Criminal Admin. Judge, First Circuit Court  
Honorable Colette Garibaldi, Criminal Admin. Judge, District Court  
Joanne Hao, Deputy Attorney General  
Wanda Kimura, State of Hawaii, Dept. of Budget and Finance  
David Bettencourt, Attorney-at-law, Hawai'i State Bar Assoc. representative  
Edwin (Ted) Baker, Attorney-at-law, Appellate counsel  
Keith Shigetomi, Attorney-at-law, Trial counsel  
Jack Schweigert, Attorney-at-law, Trial and Appellate counsel

The task force included attorneys who have practiced in every court in the State of Hawai'i and who have served as court-appointed counsel on felony, misdemeanor and appellate cases. Also included were the criminal administrative judges of both the District and Circuit Courts of the First Circuit who appoint private counsel to cases and approve fee requests.

HCR 171 requested that the task force address two questions with regard to court-appointed counsel.

- 1. Whether there are unreasonably long delays in receiving payment by court-appointed counsel and, if so, the reasons therefore; and**
- 2. What remedies, if any, exist to mitigate these issues**

## **I. Background on Court-Appointed Counsel**

Both the federal and state constitutions require that in every criminal prosecution where the accused is facing a loss of liberty, the accused is entitled to an attorney. If the accused is indigent, the government must provide him/her with an attorney. In the State of Hawaii, the Office of the Public Defender has been established in Hawaii Revised Statutes [hereinafter "HRS"] § 802-8 to represent indigent criminal defendants. Frequently a conflict of interest arises in a case and the Public Defender is legally prohibited from representing the client with whom the conflict exists. The most common example of such a conflict is when a case involves co-defendants. The Public Defender can only represent one of the defendants. Other conflict situations arise when the Public Defender represents a prosecution witness or when the defendant claims dissatisfaction with the representation of the Public Defender. Sometimes, a particular defendant will go through more than one court-appointed attorney because of his/her dissatisfaction with the representation.

In these situations, the court must appoint private counsel to represent indigent defendants whom the Public Defender cannot represent. These court-appointed private attorneys are compensated by the state. Compensation rates are set by statute [HRS § 802-5]. Currently, court-appointed counsel are compensated at the rate of \$40 per hour for out-of-court services and \$60 per hour for in-court services.

**II. Question No. 1: Are there unreasonably long delays in receiving payment by court-appointed counsel and, if so, what are the reasons for the delays?**

The task force finds that there are unreasonably long delays in receiving payment for fees by court-appointed counsel in appellate cases. The cause of this delay is the backlog of criminal cases in the appellate courts of the state and the resulting delay in the resolution of those cases.

The majority of the work performed by counsel in a case on appeal occurs in the briefing process in which the parties identify and address the issues on appeal through written briefs. This is especially true given the current practice of the Hawai'i appellate courts in dispensing with oral argument in the vast majority of cases. It is the current practice of both the Hawai'i Supreme Court and the Hawai'i Intermediate Court of Appeals to compensate counsel at the conclusion of the case--specifically, when the court issues a disposition of the case. Currently, that disposition routinely occurs more than a year after counsel performs work in the initial briefing process. In some cases, case disposition has occurred two or three years following performance of the work.

Rule 53(a) of the Hawaii Rules of Appellate Procedure permits the appellate courts to delay payment of court-appointed fees until resolution of the case. The rule reads, in pertinent part, as follows:

**RULE 53. REQUESTS FOR ATTORNEYS' FEES AND EXPENSES**

- (a) Indigent Representation.** Attorneys appointed to represent indigents may submit a request for attorneys' fees and expenses, as provided by statute, after the case is assigned to either the supreme court or the intermediate court of appeals. Requests for indigent fees and expenses may be held in abeyance until resolution of the case on the merits. . . .  
[emphasis added].

This rule allows the court to hold the fees in abeyance until resolution of the case but does not mandate it. Nevertheless, it has been the practice of the appellate courts to delay payment to counsel.

With respect to the trial courts, there does not appear to be a problem with unreasonably long delays in payment to counsel. HRS § 802-5 requires that the court certify the fees and expenses that court-appointed counsel requests. Once the certification is received, the fee and expense request is forwarded to the Department of Budget & Finance for payment. Once the court certifies the fee and expense request, payment is made to counsel.

### **III. Question No. 2: What remedies, if any, exist to mitigate these issues?**

Because the majority of work by the attorney in appellate cases is performed during the briefing process, the most expedient remedy for the delay in payment problem in appeals cases is for the court to compensate counsel following the submission of the briefs. Counsel could then submit additional billings for subsequent work performed. This remedy would require an amendment to Rule 53 of the Rules of Appellate Procedure.

According to Judge Dan Kochi, a member of the task force, and the criminal administrative judge for the First Circuit Court, the Judiciary is having a difficult time obtaining court-appointed counsel to represent defendants on appeal. It is the finding of this task force that delays in payments until resolution of the case on appeal is a major reason that the Judiciary is experiencing this problem. The supreme court must allow for prompt payment to court-appointed counsel. There is very little motivation for an attorney to undertake representation when there is a strong likelihood that payment for services will not occur for more than one year after work is completed.

### **IV. Further findings of the task force**

The task force has identified other issues which are critical to the efficiency of the court-appointed counsel system in Hawaii. Although HCR 171 did not specifically request that these issues be addressed, the task force feels it would be remiss in its duties by not commenting on them.

As pointed out in the introductory paragraph in lines 18 through 20 of HCR 171, the fees for court-appointed counsel are set below prevailing market rates. As previously mentioned, HRS § 802-5 sets compensation rates for court-appointed counsel at \$40 per hour for out-of-court services and \$60 per hour for in-court services. Because these rates are established by statute, they cannot be adjusted to meet prevailing market rates without legislative action. This has proved to be an impediment to providing court-appointed counsel with a fair and just rate of compensation.

**The last time an adjustment was made to the court-appointed counsel fees was 15 years ago.** Since that time, the costs of running a private law practice have risen dramatically. Costs have risen in virtually every area of law practice – lease rents for office space, equipment costs, bar association dues, and insurance premiums. Moreover, the cost of living in Hawaii has long been among the highest in the nation. It is simply unjust to continue to expect court-appointed counsel to zealously represent criminal defendants at the current rate of compensation.

Associate Justices Mario Ramil and Simeon Acoba have, individually, expressed concerns about the inadequate hourly rate of compensation paid to court-appointed counsel. In *In re Attorney's Fees of Reinhard Mohr*, 97 Haw. 1, 32 P.3d 647 (2001), both Justices Ramil and Acoba stated, in separate opinions, that the current hourly rate was inadequate and could adversely affect the rights of indigent criminal defendants to adequate representation.

Justice Ramil writes:

In my view, the patently inadequate hourly rate paid to state court-appointed private counsel is endangering the right of indigent criminal defendants to adequate representation. The current rate does little to encourage private counsel to participate enthusiastically in the defense of indigent criminal defendants. At the existing rate, competent private counsel may not feel it worthwhile to accept court appointments. The interests of indigent criminal defendants would be better served if capable lawyers can be relied upon--without excessive financial sacrifice--to provide competent, skillful representation.

32 P.3d at 658. Justice Ramil goes on to urge the Hawaii legislature to increase the hourly rate paid to court-appointed counsel.

Justice Acoba writes:

The hourly rate under HRS § 802-5 is no longer reasonable. . . .Insofar as compensation is inadequate, those attorneys who represent indigent clients, in effect, personally subsidize the financial obligation imposed upon the State by the United States and Hawai'i constitutions' mandate that such defendants be represented by counsel.

32 P.3d at 661.

Justice Acoba quotes from the ABA Standards for Criminal Defense—Providing Defense Services (2d ed. 1986):

[W]here payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.

32 P.3d at 661.

Clearly, the inadequate rate of compensation for court-appointed counsel is a long-standing problem that has been acknowledged by various members of the Judiciary and by justices of the State's highest court. Judge Kochi acknowledges that it has become difficult for the court to find attorneys to accept complex cases on a court-appointed basis. Very few attorneys are willing to undertake appellate cases on court-appointments due to both the inadequate hourly rate of pay and the aforementioned delays in payment of fees. Recently, the circuit court appointed the Office of the Public Defender to handle the appeal in a complex white-collar case in spite of the fact that the Public Defender represented a co-defendant in the case and therefore had a clear conflict of interest in the case on appeal. This occurred after the circuit court contacted approximately ten private attorneys, all of who turned down court-appointment on the case.

The judiciary also periodically has difficulty in securing attorneys to undertake the defense of perceived "difficult" defendants. There are a number of defendants who are perceived as chronic complainers. This type of defendant is generally one who has been in the criminal justice system for a lengthy period of time and who has nothing to lose by targeting his/her attorney for disciplinary action in the hope that it will somehow benefit his/her case legally. Every state system has these defendants. Representation of this type of defendant takes experience and training. The attorneys who are best qualified to handle these cases are currently discouraged from taking them due to the fee issue. Under the current fee structure, there is absolutely no incentive for an experienced attorney to undertake representation of a difficult client in an unpopular case which is likely to result in the attorney having to answer a disciplinary complaint at the conclusion of the case.

If an effort is not made to rectify the compensation issue, this problem will reach a crisis point and the quality of representation for indigent defendants will suffer, causing a domino effect within the criminal justice system with prolonged litigation of cases and endless claims by defendants of ineffective assistance of counsel.

In addition to the inadequate hourly rate of compensation, there are persistent complaints by attorneys that the court, in exercising its duty to certify the payment of fees under HRS 802-5, reduces the total fees requested thereby rendering the hourly rate even lower than the statutory hourly rate. This "cutting of fees" seems to occur most often in the circuit court and appellate courts. The reductions oftentimes seem to be arbitrary and apparently are based upon the personal feelings of particular judges regarding what he/she "feels an attorney's representation is worth." There are no statutory or written guidelines on how an attorney's request for fees is to be evaluated. Currently, the individual judge's assessment is entirely subjective.



It is the finding of this task force that guidelines for the certification of fees must be established and further, that an attorney is entitled to be specifically informed as to reasons for the court's non-certification of requested fees and expenses and offered a chance to rebut the court's findings in this regard. By reference, in the federal system, if an attorney's fee request is reduced, that attorney is afforded: 1) a right of written notice of the reasons for the reduction; 2) an opportunity to respond; and 3) a neutral administrative review. The current state of the fee certification process breeds distrust and animosity between members of the bar and the judiciary. Attorneys have expressed sentiments such as "if I don't anger the judge and play ball with the court, I won't get my fees cut," or "if I vigorously argue for a client and the judge feels I am wasting time, my fees will be cut."

Also, sentiments have been expressed by a number of criminal practitioners that the delays in payments and the cutting of fee requests are part of a concerted judicial effort to discourage criminal appeals and trials and to provide incentives for attorneys to spend very little time on cases and to resolve them in the most expedient and cost-effective manner possible. This task force does not make a finding to that effect. However, the fact that such a perception may exist is illustrative of the fundamental harm to the system that this issue threatens to present. These types of sentiments threaten the very foundation of our adversarial criminal justice system.

#### **V. Recommendations of the task force on the fee issue**

The task force strongly recommends that the statutory rate of compensation for court-appointed counsel be increased. Also strongly recommended is that a mechanism be placed in the statute whereby the compensation rate is reviewed on a periodic basis.

The best measure of an appropriate hourly compensation rate is the federal court for the district of Hawaii. Currently, court-appointed counsel in the federal court here are paid at the rate of \$90 per hour. No distinction is made between in-court and out-of-court work. The state court rate should be one which is comparable to the federal court rate. The attorneys who practice in federal court are largely the same ones who practice in state court here. Jury trials take place far more often in state court and thus, the skill levels required to practice in state court at least equal that required to practice in federal court.

When Congress authorized the federal rate increase to \$90/hour, the House judiciary report outlined the reasons for the needed increase:

The committee is supportive of the need to raise hourly rates and provides funding to increase the panel attorney rates to \$90 per hour.

The panel recognizes that panel attorney rates have not kept pace with inflation for the past 15 years and that this has negatively impacted the Judiciary's ability to attract and retain attorneys to the panel. The Committee understands that the current rates often do not cover private counsel's

overhead costs. Since over 90 percent of panel attorney appointments are made to sole practitioners of firms with 2 to 5 attorneys, the low compensation rates place a significant financial burden on the individual attorneys accepting appointments. This low rate of pay has resulted in a decline in the number of attorneys willing to take Federal cases, especially complex cases that involve a significant investment of time. This is particularly problematic as the number of CJA [Criminal Justice Act] representations continues to escalate. In testimony before this Committee, the Judiciary stated that one of the biggest impediments to maintaining a fair system of justice is the low rate of pay that private attorneys receive.

In order to address this problem, the Committee has provided sufficient funding to increase panel attorney rates to \$90 per hour. The Committee recommends that the in-court and out-of-court hours should no longer be compensated at different rates. The Committee directs the Judiciary to fund in and out-of-court time at the same level. The committee expects the Judiciary to implement this increase as soon as is technically feasible.

House Report No. 107-139.

The reasons cited by Congress for increasing the federal rate echoes the findings of this task force. In the last fiscal year, the Hawaii State Department of Budget and Finance paid out approximately 2.5 million dollars in court-appointed fees. Thus, a doubling of the court-appointed compensation rate would require an annual budget of approximately 5 million dollars. It is the finding of the task force that, to insure that indigent defendants receive constitutionally adequate representation, the legislature increase the allocation to the court-appointed fund.

## **VI. Conclusion**

Court-appointed private counsel serve as important a role in the criminal justice system as the Office of the Public Defender and each of the law-enforcement agencies. The system cannot function without attorneys who are willing and able to accept cases on court-appointment. These attorneys have not had a fee adjustment in fifteen years. They are not asking for an exorbitant rate of compensation. Indeed, when the state or county governments contract with private law firms or counsel to defend those entities, the agreed-upon hourly rate dwarfs the proposed hourly rate for the criminal court-appointments. It is beyond dispute that the current court-appointed fee rates are outdated and unfair compensation for the work being performed on behalf of indigent criminal defendants. Only legislation updating the hourly rate can rectify this injustice.