

CONCURRING OPINION BY RAMIL, J.

I agree with the majority's holding in Part II.A. that an ICA order denying in part or in full attorneys' fees and costs under HRS § 802-5(b) is appealable under HRS § 602-59 as a collateral order. See majority, at 4, 15. I also agree that the ICA abused its discretion in granting Mohr only 2.2 of the 21.3 hours requested for research. See majority at 15-16. I write separately, however, to express my concern about the inadequate hourly rate paid to court-appointed private counsel under HRS § 802-5. In my view, the current rate -- far below the existing federal rate -- could adversely affect the right to indigent criminal defendants to adequate representation.

_____ In Hawai'i's state courts, court-appointed private counsel receive reasonable compensation for fees, based on the rate of \$40.00 an hour for out-of-court services, with a maximum fee of \$2,500.00 for appeals to the supreme court or the ICA. See HRS § 802-5. In contrast, in the federal system in Hawai'i, private attorneys appointed under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A,¹ are "reimbursed for expenses reasonably

¹ 18 U.S.C. 3006A provides in pertinent part:

(d) Payment for representation. (1) Hourly rate. Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$60 per hour for time expended in court or before a United States magistrate and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of \$75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference shall develop guidelines for determining the maximum hourly rates for

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incurred" at the rate of \$75.00 an hour for both in-court and out-of-court work, with a maximum fee of \$2,500.00 for appeals.²

Under article I, section 14 of the Hawai'i Constitution,³ indigent criminal defendants are guaranteed the assistance of appointed counsel. In accordance with that mandate, HRS § 802-5 "provide[s] for the appointment of private attorneys to represent indigent criminal defendants[.]" See Stand. Comm. Rep. No. 4, in 1981 Special Session Senate Journal, at 27 ("The purpose of this bill is to provide for the appointment of private attorneys to represent indigent criminal defendants when the public defender is unable to do so due to a conflict of interest or when the interests of justice so require. The bill also establishes maximum fees payable to, and provides for the payment of necessary expenses incurred by, the appointed

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each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. . . . Attorneys shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts. . . . For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$2,500 for each attorney in each court. . . .

² Prior to January 1, 2000, court-appointed private attorneys in Hawai'i's federal courts received \$70.00 an hour for both in-court and out-of-court services. In the districts of Arizona, Hawai'i, Nevada and Oregon, the Administrative Office of the United States Courts increased the hourly rates by \$5.00 an hour for work performed on or after January 1, 2000.

³ Article I, section 14 of the Hawai'i Constitution provides in pertinent part that "[t]he State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment."

attorney.”)⁴ As other jurisdictions have recognized, providing compensation to appointed counsel aids in fulfilling the primary goal of providing competent, diligent, and capable representation to indigent criminal defendants. See United States v. Tutino, 419 F. Supp. 246, 253 (S.D.N.Y. 1976) (The purpose of the federal CJA is to assure indigent defendants “their constitutional right of adequate representation by competent counsel, and to ease the burden on those lawyers who, as a public service, voluntarily and without compensation gave of their professional skill in the defense of indigents.”); United States v. Owens, 256 F. Supp. 861, 863 (W.D. Pa. 1966) (“The salutary purpose of the Act was to provide adequate legal representation to defendants otherwise unable to employ counsel, and that in providing for compensation to the attorneys appointed under the Act, Congress sought to insure that experienced, capable members of the bar could be called upon without causing them undue financial sacrifices.”); United States v. Bailey, 581 F.2d 984, 989 (D.C. Cir. 1978) (The Sixth Amendment “guarantees to indigents accused in a federal criminal prosecution not just the ‘mere formal appointment’ of someone who happens to be a lawyer but more critically[,] legal assistance that is reasonably diligent, conscientious and

⁴ In 1987, the legislature recognized the inadequate compensation rates paid to court-appointed private counsel and raised, inter alia, the out-of-court hourly rate from \$30.00 to \$40.00 an hour. See Stand. Comm. Rep. No. 234, in 1987 Senate Journal, at 988 (“The purpose of this bill is to raise the amount of compensation to appointed counsel for legal representation of indigent criminal defendants. Your Committee has received testimony that the current compensation rates are below those provided in the Federal system, and fails to provide reasonable compensation in extended or complex criminal litigation.”)

competent. Clearly, then, courts are to interpret the [CJA] to assure competent representation of indigent defendants[.] (Citations omitted.); Miranda v. United States, 455 F.2d 402, 404 (2d Cir.) ("Section 3006A of Title 18 is concerned with the broad topic of 'adequate representation of defendants.' Its primary focus is on providing adequate counsel for trials on substantive offenses.") (Quoting 116 Cong. Rec. 34809-16 (1970) (remarks of Representatives Kastenmeier, Poff, et al.)), supplemental opinion, 458 F.2d 1179 (2d Cir.), cert. denied, 409 U.S. 874 (1972).

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.

To this end, I strongly urge the Hawai'i legislature to increase the hourly rate paid to court-appointed private counsel under HRS § 802-5. As the United States Court of Appeals for the District of Columbia Circuit recognized, "[o]nly if the practicing bar is encouraged to participate broadly and

enthusiastically in the defense of indigent criminal defendants can the promise of [HRS §802-5] ever become reality." Bailey, 581 F.2d at 989.

Finally, I note the Majority's objection to my concurrence. However, having carefully weighed the "wisdom, efficacy, and timeliness" of writing separately, see Trustees of OHA v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987), I am compelled to express my belief that the unreasonably low rate of compensation currently authorized by HRS § 802-5 imperils the right -- enshrined in article I, section 14 of the Hawai'i Constitution -- of indigent defendants to receive competent counsel. As such, I strongly disagree with the Majority's suggestion that my decision to voice legitimate concerns regarding the administration of justice in Hawai'i jeopardizes this state's democratic system of government. Indeed, I deem it my duty.

I also note the Majority's assertion that the sole issue before the court is to review the ICA's denial of attorneys' fees and that, while it might agree with the views expressed by Justice Acoba and myself, "this appeal is not the appropriate forum for expressing them." Majority at 16-17. Historically, however, courts -- this court included -- have not hesitated to call legislative attention to statutes in need of amendment, modification or repeal. Quite recently, for example, in Mitchell v. State of Hawai'i, Department of Education, 85 Hawai'i 250, 942 P.2d 514 (1997), Chief Justice Moon authored a

unanimous opinion in which we suggested that the Hawai'i legislature might want to consider certain amendments to Hawai'i's Workers' Compensation Law.⁵ Courts across the nation do likewise, and not infrequently. See, e.g., Brogan v. United States, 522 U.S. 398, 408-18 (1998) (Ginsburg, J., concurring) (writing separately to draw Congress' attention to legislation it might wish to amend); Rockford Township v. City of Rockford, 608 N.W.2d 903, 909 (Minn. Ct. App. 2000) ("invit[ing] the legislature's attention" to the absence of standards in certain legislation); Black v. Allstate Ins. Co., 711 N.Y.S.2d 15, 16 (N.Y. App. Div. 2000) (while not passing on the issue, calling the legislature's attention to the fact that a statute needs to be amended); Carter v. Continental Land Title Co., 285 Cal. Rptr. 413, 415 n.4 (Cal. Ct. App. 1991) ("We invite the Legislature's attention to this problem."); Devins v. Borough of Bogota, 592 A.2d 199, 204 (N.J. 1991) (inviting legislative attention to certain statutes that the legislature may want to amend in light of the decision); Rogers v. Miles Laboratories, Inc., 802 P.2d

⁵ The sole issue on appeal in Mitchell was whether the Labor and Industrial Relations Appeals Board's (the Board) determination that the claimant's injury was compensable was erroneous. 85 Hawai'i at 254, 942 P.2d at 518. This court concluded that the Board's decision was erroneous and then went on to "note" that "many jurisdictions with statutes similar to HRS chapter 386" have amended them. Id. at 257, 942 P.2d at 521. This court concluded:

If the legislature should deem it advisable in the future, it can -- as have the jurisdictions cited supra -- amend HRS chapter 386 to exclude from coverage those injuries resulting from disciplinary action taken in good faith by the employer. However, unless and until the Hawai'i legislature chooses to amend HRS chapter 386, we are compelled to reach the result we have today.

Id.

1346, 1347 (Wash. 1991) (calling the legislature's attention to its holding and suggesting that the legislature may want to consider amending the statute); People v. Rogers, 555 N.E.2d 53, 55 (Ill. App. Ct. 1990) (calling legislature's attention to statute in need of clarification). Accordingly, I do not believe that my concurrence departs so dramatically from prudential rules of self-governance. To the contrary, I am merely calling attention to an issue that I deem important to the administration of justice here in Hawai'i.

For the foregoing reasons, I concur.