

CHAPTER 802
COUNSEL AND OTHER SERVICES FOR INDIGENT
CRIMINAL DEFENDANTS

Section

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Cross References

Surcharge for indigent legal services, see §607-5.7.

" **§802-1 Right to representation by public defender or other appointed counsel.** (a) Any indigent person who is:

- (1) Arrested for, charged with, or convicted of an offense or offenses punishable by confinement in jail or prison or for which the person may be or is subject to the provisions of chapter 571;
- (2) Threatened by confinement, against the indigent person's will, in any psychiatric or other mental institution or facility;
- (3) The subject of a petition for assisted community treatment under chapter 334; or
- (4) The subject of a petition for involuntary medical treatment under chapter 353,

shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the public defender for any other reason is unable to act, or if the interests of justice require, the court may appoint other counsel.

(b) Except as provided in section 334-126(f), the appearance of the public defender in all judicial proceedings shall be subject to court approval.

(c) The appearance of a public defender in all hearings before the Hawaii paroling authority or other administrative body or agency shall be subject to the approval of the chairperson of the Hawaii paroling authority or the administrative head of the body or agency involved. [L 1971, c 185, pt of §1; HRS §705C-1; ren L 1972, c 9, pt of §1 and am L 1972, c 44, §1(a); am L 1973, c 76, §1; am L 1976, c 92, §8; am L 1984, c 251, §2; gen ch 1985, 1993; am L 2011, c 72, §3; am L 2015, c 231, §5]

Revision Note

In the first paragraph, (1) to (4) reformatted as paragraphs (1) to (4) and "or" deleted in paragraphs (1) and (2) pursuant to §23G-15.

Case Notes

Failure of appointed counsel to give timely notice of appeal did not foreclose defendant's right to appeal. 57 H. 268, 554 P.2d 236 (1976).

Defendant waived right to counsel by not reporting to public defender during five weeks between arraignment and trial. 62 H. 298, 614 P.2d 397 (1980).

Indigent defendant charged with offense punishable by term of imprisonment entitled at trial to be assisted by appointed counsel. 80 H. 246 (App.), 909 P.2d 574 (1995).

Defendant did not waive right to court-appointed counsel where defendant requested substitute court-appointed counsel and was not afforded reasonable opportunity to show good cause for a substitute court-appointed counsel. 80 H. 262 (App.), 909 P.2d 590 (1995).

" **§802-2 Notification of right to representation.** In every criminal case or proceeding in which a person entitled by law to representation by counsel appears without counsel, the judge shall advise the person of the person's right to representation by counsel and also that if the person is financially unable to obtain counsel, the court may appoint one at the cost to the State. [L 1971, c 185, pt of §1; HRS §705C-2; ren L 1972, c 9, pt of 1; gen ch 1985]

Case Notes

Failure to advise indigent pro se defendant of right to counsel and to have one appointed at cost to State reversible error. 80 H. 246 (App.), 909 P.2d 574 (1995).

No waiver by indigent defendant of right to counsel where trial court failed to conduct the necessary inquiry with defendant to ensure that defendant had knowingly and intelligently waived right to be represented by counsel at trial and to have one appointed if indigent. 80 H. 246 (App.), 909 P.2d 574 (1995).

" **§802-3 Request for appointment of counsel.** Any person entitled to representation by a public defender or other appointed counsel may at any reasonable time request any judge to appoint counsel to represent the person. [L 1971, c 185, pt of §1; HRS §705C-3; ren L 1972, c 9, pt of §1 and am L 1972, c 44, §1(b); gen ch 1985]

" **§802-4 Determination of indigency.** Unless otherwise ordered by the court, the determination of indigency shall be made by a public defender, subject to review by the court. Such determination shall be based upon an appropriate inquiry into the financial circumstances of the person seeking legal representation and an affidavit or a certificate signed by such person demonstrating the person's financial inability to obtain

legal counsel. A person shall waive the person's right to counsel by refusing to furnish any information pertinent to the determination of indigency. [L 1971, c 185, pt of §1; HRS §705C-4; ren L 1972, c 9, pt of §1 and am L 1972, c 44, §1(c); gen ch 1985]

Case Notes

Factors to be considered in determination of indigency. 56 H. 23, 525 P.2d 1108 (1974).

" **§802-5 Appointment of counsel; compensation.** (a) Except as provided in section 334-126(f), when it shall appear to a judge that a person requesting the appointment of counsel satisfies the requirements of this chapter, the judge shall appoint counsel to represent the person at all stages of the proceedings, including appeal, if any. If conflicting interests exist, or if the interests of justice require, the court may appoint private counsel, who shall receive reasonable compensation for necessary expenses, including travel, the amount of which shall be determined by the court, and reasonable fees pursuant to subsection (b). All expenses and fees shall be ordered by the court. Duly ordered payment shall be made upon vouchers approved by the director of finance and warrants drawn by the comptroller.

(b) The court shall determine the amount of reasonable compensation to appointed counsel, based on the rate of \$90 an hour; provided that the maximum allowable fee shall not exceed the following schedule:

| | |
|---|---------|
| (1) Any felony case | \$6,000 |
| (2) Misdemeanor case-jury trial | 3,000 |
| (3) Misdemeanor case-jury waived | 1,500 |
| (4) Appeals | 5,000 |
| (5) Petty misdemeanor case | 900 |
| (6) Any other type of administrative or judicial proceeding, including cases arising under section 571-11(1), 571-14(a)(1), or 571-14(a)(2) | 3,000. |

Payment in excess of any maximum provided for under paragraphs (1) to (6) may be made whenever the court in which the representation was rendered certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the administrative judge of that court.

(c) The public defender and the judiciary shall submit to the department of budget and finance for inclusion in the department's budget request for each fiscal biennium, the amount required for each fiscal year for the payment of fees and

expenses pursuant to this section. [L 1971, c 185, pt of §1; HRS §705C-5; ren L 1972, c 9, pt of §1; am L Sp 1981 1st, c 22, §1; gen ch 1985; am L 1987, c 227, §1; am L 2004, c 202, §78; am L 2005, c 86, §§1, 2; am L 2006, c 94, §1 and c 133, §1; am L 2010, c 109, §1; am L 2015, c 231, §6]

Case Notes

Total fees cannot exceed twice the maximum scheduled fee. 66 H. 366, 663 P.2d 630 (1983).

The language of this section does not empower the Hawaii supreme court to compensate attorneys for services rendered before the United States Supreme Court. 95 H. 28, 18 P.3d 890 (2001).

Under subsection (b), both the trial judge and the administrative judge independently review excess fee requests to determine whether a fee award is "fair compensation"; both the trial judge's and the administrative judge's orders awarding fees under subsection (b) are judicial acts subject to appellate review under the abuse of discretion standard; to enable appellate review of excess fee awards, if a fee request is reduced, it is necessary for the judge reducing the request to set forth reasons for the reduction in order to determine whether the judge abused the judge's discretion in ordering reduced fees. 126 H. 26, 265 P.3d 1122 (2011).

"Case" means all matters within numbered case, not each count. 6 H. App. 20, 709 P.2d 105 (1985).

Where record indicated petitioner did not waive right to appeal and trial counsel did not take steps to prosecute appeal, petitioner's allegation of denial of effective assistance of counsel on appeal presented colorable claim for post-conviction relief. 81 H. 185 (App.), 914 P.2d 1378 (1996).

Discussed: 97 H. 1, 32 P.3d 647 (2001).

" **§802-6 Subsequent ability to pay counsel.** If at any time after counsel is appointed, the court having jurisdiction in the matter is satisfied that the defendant is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of counsel, unless the person so represented is willing to pay therefor. If appointed counsel continues the representation, the court shall direct payment for such representation as the interests of justice may dictate. Any payments directed by the court shall be general fund realizations.

If at any time after the counsel's appointment counsel should have reason to believe that a defendant is financially able to obtain counsel or to make partial payment for counsel,

it shall be the counsel's duty to so advise the court so that appropriate action may be taken. [L 1971, c 185, pt of §1; HRS §705C-6; ren L 1972, c 9, §1; gen ch 1985]

" **§802-7 Litigation expenses.** The court may, upon a satisfactory showing that a criminal defendant is unable to pay for transcripts or witness fees and transportation, or for investigatory, expert or other services, and upon a finding that the same are necessary for an adequate defense, direct that such expenses be paid from available court funds or waived, as the case may be; provided that where the defendant is represented by the state public defender or by other counsel appointed by the court except for such other counsel appointed by the court for reasons of conflict of interest on the part of the public defender, the public defender shall pay for or authorize payment for the same, if the public defender determines that the defendant is unable to pay for the same and that the same are necessary for an adequate defense, and if there is a dispute as to the financial ability of the defendant such dispute shall be resolved by the court. In cases where other counsel have been appointed by the court for reasons of conflict of interest, the court may, upon the requisite showing of inability to pay and a finding that such expenses are necessary for an adequate defense as set forth above, direct that such expenses be paid from available court funds or waived, as the case may be. [L 1971, c 185, pt of §1; HRS §705C-7; ren L 1972, c 9, pt of §1 and am L 1972, c 44, §1(d); am L 1976, c 131, §3; am L 1979, c 174, §1]

Case Notes

Defendant requesting services on basis of indigency is entitled to hearing. 61 H. 203, 600 P.2d 1383 (1979).

Where defendant is unable to pay for necessary defense services, defendant may be eligible for court payment even though represented by private counsel. 61 H. 203, 600 P.2d 1383 (1979).

Although the language of this section suggests that the court has discretion to direct that transcript expenses are paid, the balance of the pertinent statutory language indicates that once a satisfactory showing of need for the transcripts and inability to pay has been made, the court should direct that such expenses be paid, unless alternative means for timely obtaining the transcripts are available. This is evident as this section mandates that the public defender's office is required to furnish the relevant transcripts upon making the same findings as the court. 131 H. 333, 319 P.3d 252 (2013).

" **§802-8 Office of the state public defender.** An office of state public defender is hereby created within the department of budget and finance for administrative purposes. [L 1971, c 185, pt of §1; HRS §705C-8; ren L 1972, c 9, pt of §1; am L 1980, c 302, pt of §2]

" **§802-9 Defender council.** The governor shall appoint a defender council consisting of five members, who shall serve at the governor's pleasure. There shall be at least one member from each of the counties of the State. The chairperson of the council shall be selected by its members. Each member shall serve without pay and shall be reimbursed for necessary expenses incurred while attending meetings and while in the discharge of the member's responsibilities. The council shall be the governing body of the office of the state public defender. [L 1971, c 185, pt of §1; HRS §705C-9; ren L 1972, c 9, pt of §1; gen ch 1985, 1993]

" **§802-10 REPEALED.** L 1987, c 283, §66.

" **§802-11 Appointment of state public defender.** The state public defender shall be appointed by the defender council without regard to chapters 76 and 89. The state public defender's appointment shall be for a term of four years except as otherwise provided herein, and until the state public defender's successor is appointed and qualified. The state public defender shall be qualified to practice law before the supreme court of this State. Effective July 1, 2005, the state public defender shall be paid a salary set at eighty-seven per cent of the attorney general. The state public defender shall devote full time to the performance of the state public defender's duties and shall not engage in the general practice of law. [L 1971, c 185, pt of §1; HRS §705C-11; ren L 1972, c 9, pt of §1; am L 1975, c 58, §22; am L 1982, c 129, §19; gen ch 1985; am L 1986, c 128, §18; am L 1987, c 226, §1; am L 1989, c 329, §15; am L 2002, c 148, §46; am L 2005, c 226, §14]

" **§802-12 Organization of office; assistance.** Subject to the approval of the defender council, the state public defender may employ assistant state public defenders and other employees, including investigators, as may be necessary to discharge the function of the office. Assistant state¹ public defenders shall be qualified to practice before the supreme court of this State. Assistant state public defenders shall be appointed without regard to chapter 76 and shall serve at the pleasure of the state public defender. All other employees may be appointed in accordance with chapter 76. An assistant state public defender

may be employed on a part-time basis, and when so employed, the assistant public defender may engage in the general practice of law, other than in the practice of criminal law. [L 1971, c 185, pt of §1; HRS §705C-12; ren L 1972, c 9, pt of §1 and am L 1972, c 44, §1(e); gen ch 1985; am L 2000, c 253, §150; am L 2006, c 300, §16]