

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on
Judiciary and Hawaiian Affairs**

March 15, 2022

S.B. No. 416 SD1: RELATING TO WITNESS FEES AND REIMBURSEMENTS
IN CRIMINAL CASES

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Office of the Public Defender supports S.B. No. 416 SD1, which would clarify that expert witness fees for witnesses in criminal cases are paid out of a fund established under the State of Hawai‘i Department of Budget & Finance.

S.B. No. 416 SD1 mandates that expert witnesses subpoenaed on behalf of either the prosecutor or the indigent criminal defendant at the expense of the state in criminal cases are entitled to applicable fees associated with their testimony, consultation, and preparation associated with the expert’s testimony.

This statutory section, HRS § 621-7, which relates to witness fees is currently tied into a fund for such fees established under and administered by the Department of Budget and Finance. S.B. No. 416 clarifies that fees for expert witnesses who are subpoenaed to testify in criminal cases fall are eligible for payment under this statute.

Until March 2, 2017, the Department of Budget & Finance reimbursed these associated costs for all county prosecutors, indigent defendants represented by the Office of the Public Defender, and private conflict counsel. Although the current statutes associated with reimbursements for witnesses remain silent in regard to expert witnesses, the Legislature made it clear in the 1976 House Journal Conference Committee Report that expert witness fees were not only contemplated, but anticipated to be included in any reimbursements:

At present, the courts have an account titled “Legal Expenses” which is looked to by both the prosecutor and indigent defendants to pay for witness expenses, transcript costs in the case of indigent defendants and investigatory, expert and other services.

On January 2, 2018 the Governor signed and issued Governor's Administrative Directive No. 18-01, which essentially re-established the guidelines and procedures regarding expert witness reimbursements that had been in effect prior to March 2, 2017. In addition, the directive proposed that legislative action be taken, to expressly clarify allowable expenses and ensure efficient administration of criminal cases. While the Directive officially expired as of June 30, 2018, the Department of Budget & Finance has continued to follow these procedures as a courtesy, yet the Department of the Attorney General continues to note that statutory changes are needed in order to make these changes permanent.

Given the importance of ensuring the cooperation and participation of qualified expert witnesses to provide effective assistance of counsel, this measure is necessary to codify the legislature's intent that the State of Hawai'i reimburse county prosecutors, the Office of the Public Defender, and private conflict counsel for these expenditures.

Thank you for the opportunity to comment on this measure.

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-first State Legislature
Regular Session of 2022
State of Hawai'i

March 15, 2022

RE: S.B. 416, S.D. 1; RELATING TO WITNESS FEES AND REIMBURSEMENTS IN CRIMINAL CASES.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of S.B. 416, S.D. 1. This bill is part of the Department's 2021-2022 legislative package.

The primary purpose of S.B. 416, S.D. 1 is to clarify the applicable reimbursements allowable for expert witnesses, as outlined in Sections 621-7, 621-9, and 836-3 of the Hawaii Revised Statutes. This is in direct response to a March 2, 2017 policy change within the Department of Budget and Finance ("B & F"), by which B & F discontinued reimbursement of certain expert witness fees. In addition, S.B. 416, S.D. 1 would allow a slightly higher per diem amount for all witnesses that are required to travel overnight, for the purpose of testifying in a criminal case; this would greatly assist crime victims and witnesses in covering the rising costs of travel, and there is already a budgeted fund to cover these reimbursements.

Generally, when a party subpoenas an expert witness for the purposes of trial, grand jury or any other criminal proceeding, the subpoenaing party incurs a number of costs associated with that particular expert. These may include but are not limited to: expert testimony, review of documents, consultation and preparation, travel, and time in attendance at court. Until March 2, 2017, the State—specifically B & F—reimbursed these associated costs for all county prosecutors, indigent defendants represented by the Office of the Public Defender, and private conflict counsel. Although the current statutes associated with reimbursements for witnesses remain silent in regards to expert witnesses, the legislature made it clear in the 1976 House Journal Conference Committee Report that expert witness fees were not only contemplated, but anticipated to be included in any reimbursements:

“At present, the courts have an account titled “Legal Expenses” which is looked to by both the prosecutor and indigent defendants to pay for witness expenses, transcript costs in the case of indigent defendants and investigatory, expert and other services.”

After discussions with the Department of the Attorney General, on January 2, 2018 the Governor signed and issued Governor’s Administrative Directive No. 18-01. The directive essentially re-established the guidelines and procedures regarding expert witness reimbursements that had been in effect prior to March 2, 2017. In addition, the directive proposed that legislative action be taken, to expressly clarify allowable expenses and ensure efficient administration of criminal cases. While the Governor’s Administrative Directive No. 18-01 officially expired as of June 30, 2018, B&F has continued following these procedures as a courtesy, yet the Department of the Attorney General continues to note that statutory changes are needed in order to make these changes permanent. **Because a new Governor will inevitably be elected this year, these changes are needed now more than ever.**

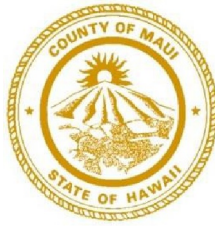
Using the right expert witness in any particular case can make or break a case, and thus it was always the Legislature’s intent to ensure that the quality of a case—whether presented by the prosecution or defense—not be dictated by financial considerations. Given the importance of ensuring the cooperation and participation of qualified expert witnesses to successfully prosecute offenders or properly defend against criminal allegations, the Department strongly believes that this measure is necessary to codify the legislature’s intent that the State reimburse county prosecutors, the Officer of the Public Defender, and private conflict counsel for these expenditures.

For these reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of S.B. 416, S.D. 1. Thank you for the opportunity to testify on this matter.

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TESTIMONY
ON
S.B. 416 SD 1 RELATING TO
WITNESS FEES AND
REIMBURSEMENTS IN CRIMINAL CASES

March 14, 2022

The Honorable Mark M. Nakashima
Chair
The Honorable Scot Z. Matayoshi
Vice Chair
and Members of the Committee on Judiciary

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 416 SD1, Relating to Witness Fees and Reimbursements in Criminal Cases. Specifically, we would like to express our strong support for the applicable reimbursements allowable for expert witnesses per §§ 621-7, 621-9 and 836-3 of the Hawaii Revised Statutes (“HRS”).

Generally, the party who subpoenas an expert witness for a trial, grand jury or other criminal proceeding incurs multiple costs in doing so, especially when that witness is from a different island or from outside of Hawaii altogether. These costs include both travel expenses and compensation for the expert’s time spent reviewing information, rendering an opinion, preparing for trial and actual time spent testifying. In criminal cases, the Department of Budget and Finance typically reimburses both the prosecution and defense counsel for these expenses. However, on March 2, 2017, the Department of Budget and Finance enacted a policy change whereby reimbursement of certain expert witness fees would be discontinued.

On January 2, 2018, after discussions with the Department of the Attorney General, the Governor signed and issued Governor’s Administrative Directive No. 18-01 which, in relevant part, re-established the pre-March 2, 2017 guidelines and procedures regarding expert witness reimbursements and directed that legislative action be taken to clarify allowable expenses to ensure efficient administration of criminal cases. While the Governor’s Administrative Directive No. 18-01 officially expired as of June 30, 2018 and the Department of the Attorney General has continued to note that statutory changes are needed, the Department of Budget and Finance has

continued to follow those directives as a courtesy. A new Governor will be elected this year, however, and the continued reimbursement of expert witness fees may be in jeopardy.

The current HRS witness reimbursement statutes are silent with regards to reimbursement for expert witness costs. The Legislature made it clear, however, in the 1976 House Journal Conference Committee Report that expert witness fees were not only contemplated, but anticipated that they would be included in cost reimbursements:

"At present, the courts have an account titled "Legal Expenses" which is looked to by both the prosecutor and indigent defendants to pay for witness expenses, transcript costs in the case of indigent defendants and investigatory, expert and other services."

The work and testimony of expert witnesses on behalf of both prosecutors and defendants can be vital to the presentation of their cases to a fact-finder and do lead to just outcomes. Passage of S.B. 416 will ensure the continued cooperation and availability of qualified experts.

For these reasons, the Department of the Prosecuting Attorney, County of Maui strongly supports the passage of S.B. 416 SD 1. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.