

STATE BAR OF CALIFORNIA
BAR ASSOCIATION OF SAN FRANCISCO
AND
LAWYERS' CLUB OF SAN FRANCISCO
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED that the American Bar Association recommends that all jurisdictions provide by statute or rule of court that attorneys appointed to represent persons who have a constitutional right to counsel receive reasonable compensation and full reimbursement for costs and expenses.

REPORT

This resolution was approved by the Board of Governors of the State Bar of California at its May 7, 1988 meeting, by the Board of the Lawyers' Club of San Francisco in June 1988, and by the Board of Directors of the Bar Association of San Francisco in June 1988.

In California attorneys have been appointed to represent, without compensation, civil defendants who have a constitutional right to counsel in certain types of cases. (See e.g. Payne v. Superior Court (1976) 17 Cal. 3d 908; Yarbrough v. Superior Court (1985) 39 Cal. 3d 197.)

There are serious problems with appointment without compensation and reimbursement. The burdens of such appointments are not, and cannot be, fairly and equally apportioned among attorneys because only certain attorneys have the skills to competently handle cases for which appointments are made. The financial burden of providing competent representation to the conclusion of a case places an attorney in a conflict of interest between the attorney's financial interest in making a living and paying office expenses and salaries and the attorney's obligation to provide uncompromised and conscientious representation for an indigent defendant without remuneration. Attorneys in these cases are not only uncompensated for their legal services, but must take out of their own pockets the costs and expenses required for adequate representation. These include costs of depositions, paraprofessionals, office staff and expert witnesses. As a result, uncompensated appointments do not meet minimum standards for constitutionally effective counsel, and place attorneys in a questionable ethical situation. These appointments create serious problems of equal protection among attorneys and taking of property without due process arising from the financial impact upon attorneys "selected" for appointment without reasonable compensation or without reimbursement of expenses.

In addition, the state has the obligation to ensure the fulfillment of constitutional rights and to provide the resources to meet constitutional obligations. Attorneys are being asked to work for nothing to fulfill the obligations of the state itself.

The organized bar has traditionally supported the proposition that attorneys should volunteer their services when needed to represent the defenseless or the oppressed. Attorneys already do this in significant numbers. However, when a complex, time-consuming case is involved, it is unfair to both the litigant and to the attorney to require uncompensated representation.

Uncompensated or unfairly compensated appointments are a problem in other states as well. For example, the Kansas Supreme Court recently held the state's indigent defense system unconstitutional because lawyer assignments to handle criminal cases for indigents unfairly and unequally burden some lawyers with the defense of these cases without reimbursement for out-of-pocket expenses and payment of a rate for services which is not confiscatory, considering overhead and expenses. (State ex rel. Stephan v. Smith (Kan. 1987) 747 P.2d 816)

The House of Delegates has previously supported the provision of compensation of assigned counsel in criminal cases. In February, 1974 the ABA supported action by Circuit Judicial Councils to provide compensation for assigned counsel in criminal cases comparable to that paid for private counsel for similar services. In February 1979 the House of Delegates recommended that the Criminal Justice Act be amended to provide for adequate compensation to counsel in death penalty cases. The House, however, has not specifically recommended that the principle of adequate compensation be applied to all cases, including civil cases, in which counsel are assigned to represent persons who have a constitutional right to counsel.

Respectfully submitted,

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