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J. ROLAND WAGNER: "This is the worst conceivable result, and the least expected," he said of the 1985 Supreme Court ruling in "Yarbrough."

'Yarbrough' Bill Being Drafted for Third Try

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SACRAMENTO — Controversial legislation to reimburse attorneys forced to represent indigent prisoners in civil actions is being re-drafted to include a so-called \$5,000 *pro bono* deductible.

The third "Yarbrough bill" in several years, expected to be introduced this month, is a complex measure that would provide attorneys fees and expenses to lawyers appointed to represent impoverished civil defendants.

The legislation is named after Terry Val Yarbrough, a Folsom Prison inmate convicted in 1982 of second-degree murder in the shooting death of a man in the parking lot of a Napa bar. The victim's son sued Yarbrough in 1982 for wrongful death in *Shane Michael Cantrell v. Terry*

Val Yarbrough, The Brass Rail, et al., 44340.

Yarbrough's criminal defense lawyer, Napa solo practitioner J. Roland Wagner, was appointed in 1983 to represent him in the civil action. Napa County refused to compensate Wagner, and the case ended up in the state Supreme Court.

The bill, AB 4134, sponsored this time around by Assemblywoman Jackie Speier, D-South San Francisco, also is expected to include amendments that will reduce, to \$250,000, the original \$1-million statewide appropriation — with priority for appointed attorneys' out-of-pocket expenses. The fund would be administered by the California Judicial Council.

After the first \$5,000 *pro bono*, lawyers in such cases could not charge more than \$60 per hour, said an aide to Speier.

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Bill Will Seek Civil Pro Bono Reimbursement

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Out-of-pocket expenses would be fully reimbursed.

"On the one hand there is the lawyer's duty and ethical responsibility to handle *pro bono* [work]," said Susan Wilkinson, a legislative attorney and assistant to Speier. "But at the same time, not to have out-of-pocket expenses reimbursed is unfair. Advancing expenses is one thing. Paying clients' expenses out-of-pocket is quite another."

Previous measures either failed in the Legislature or were vetoed by Gov. George Deukmejian pending the outcome of *Yarbrough v. Superior Court of Napa County* (39 Cal. 3d 197; 702 P.2d 583; 216 Cal.Rptr. 425) in the Supreme Court, which ruled in 1985.

For Wagner, the newest legislation comes none too soon.

To prepare a *pro bono* defense in the complex wrongful-death action, Wagner faces a potentially costly and difficult task. Several key witnesses have moved out of state, Wagner said, and the bartender is dead. Yarbrough claimed that the gun that killed his victim fired accidentally, and the defendant indicated that he would bring the gun manufacturer into the suit, substantially increasing the cost of a defense.

The State Bar, which backs the Speier measure, estimated that when the Supreme Court ruled in Yarbrough, the cost of defending Yarbrough would be \$75,000 to \$100,000.

The Supreme Court held that a court must appoint a lawyer to represent an indigent inmate defendant in such a case, but deftly avoided the issue of who would pay — a decision that drew a sharp dissent from then-Chief Justice Rose Bird, who said: "Lawyers should not be forced to represent anyone without adequate

compensation. . . . I am disturbed by the majority's avoidance of the issues squarely presented by this case. . . . This court should confront these complicated issues now. Placing these vexing problems on the 'judicial backburner' will only exacerbate the situation and further confuse the trial courts and the bar. I suspect these problems will not disappear nor will they become any more tractable with the passage of time."

The majority opinion, written by former Justice Otto Kaus, concluded that "the problem is . . . primarily a legislative one. . . . It is our hope that the Legislature, working closely with the State Bar and other interested groups, will use the respite afforded by our disposition on this case to enact a fair legislative solution to the vexing problems which, for the time being, have been placed on the judicial backburner."

A State Bar spokeswoman commented when the ruling was issued that it "threw everybody for a loop." Thirty *amicus* briefs had been filed by a host of legal groups and practitioners, and the case generated enormous interest in the legal community.

"This is the worst conceivable result, and the least expected," Wagner said of the Supreme Court ruling in Yarbrough, which was remanded to the trial court. (The Supreme Court subsequently declined a request for re-hearing.) "We have been doing this *pro bono*, and you kind of hate to see all of it go to waste. It leaves us as much in the air as we were before."

In its 1985 decision, the court cited a 1976 ruling in *Payne v. Superior Court* (17 Cal.3d 908; 132 Cal.Rptr. 405; 553 P.2d 565), which held that an indigent inmate who is a defendant in a "*bona fide*

legal action threatening his interests" is entitled to legal counsel. The court clearly intended that Yarbrough apply to a limited number of cases, because most inmates imprisoned for violent crimes are indigent, making suits against them unlikely.

Wagner disagreed with the \$5,000 so-called *pro bono* deductible in the to-be-amended version of the Speier bill, which he said "strikes me as pretty unfair."

"We make this system available to litigate cases, but it makes no sense to me that ultimate access to the courts [is limited by funding]," he said. "That's 80 hours with the overhead running. That may be OK if you're Pillsbury, Madison & Sutro, but I'm just a small solo practitioner in a little town."

The bill's author contends that AB 4134 would have limited application. "There are a very few attorneys out there who would fall under this," Wilkinson said. "It stirred up some controversy among lawyers who are interested, but it's really a limited situation."

Much of the final language in the bill, she said, would be "lifted from the Yarbrough decision, tailored to [that] decision" in terms of limitations on cases that would be affected.

"One of the criteria for appointment of counsel is that an adverse judgment will affect property rights," Kaus wrote in the majority opinion. "If the indigent presently has no property — and by definition he is not likely to have much — some assessment must be made as to the indigent's assertion that his interests are 'actually at stake.'"

"In addition to finding a potential for loss that is not wholly ephemeral, the trial court must determine that counsel will be helpful to the prisoner under the circum-

stances of the case. Further, the doctrine of collateral estoppel will preclude relitigation of the issues decided in the criminal prosecution."

Gerald Uelmen, dean of the Santa Clara University Law School and author of an *amicus* brief in the Yarbrough case, said the \$5,000 deductible is "obviously a compromise. I can see the concern — that the Legislature doesn't want to create a magnet to in effect have people going after these cases."

Uelmen said "it's difficult to predict" whether the \$250,000 proposed appropriation will be sufficient. "It's hard to get a handle on how many cases are out there," he said. "I think we will need a year to find out." But he expressed skepticism that \$250,000 is enough.

He said the measure will probably be more favorably received in the Legislature and by the governor than previous measures, which carried larger appropriations and broader parameters for applicability. And, now that the matter has been fully litigated in the state courts, legislative action is more timely.

"The climate has changed to the point that the factors that led to the [governor's] veto [no longer exist]," Uelmen said, adding that legislative success is more likely "now that the court has passed the buck back to the Legislature."

"The key is adequate funding," Uelmen added. "There are really two problems: Compensation and reimbursement. There has to be full reimbursement for out-of-pocket expenses. No lawyer should be required to reach into his or her wallet or purse on behalf of an appointed client. Most lawyers donate substantially more than \$5,000."