

RULE 608 CIVIL COURT APPOINTMENTS

Does Unfunded Mean Unconstitutional?

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A lawyer's
time and
advice are his
stock in trade.

—Abraham Lincoln

How can the legal profession and the State equitably and responsibly balance the public service aspect of the profession with the business realities of lawyering? This is the question that underlies the disconnect between the South Carolina Bar's ongoing call for fair compensation for civil court appointments and the response of the South Carolina courts and legislature.

On the one hand is the right of indigents in certain cases to have competent counsel to protect their constitutional rights, such as in parental rights termination cases. It is understood that the legal profession's call to *voluntary* public service, as reflected in the revised Oath of Office for Attorneys, is a noble tradition that should be embraced, not abandoned. However, on the other hand it is believed that the State of South Carolina, through its current practice of refusing to adequately fund its own statutory provisions, seeks to fulfill its duty to such indigents at the unjustified expense of the constitutional rights of the attorneys so appointed. Such under-

compensated appointments not only raise constitutional issues, such as governmental taking of property without just compensation, violations of equal protection and due process, and involuntary servitude, but are often ineffective in delivering the very thing that they were designed to provide—competent legal representation. There has to be a better way.

South Carolina's current court appointment compensation system

Rule 608 of the S.C. Appellate Court Rules authorizes the circuit or family court to appoint an attorney to serve as counsel or guardian *ad litem* for indigents within the state and outlines the process for such appointments. *See* S.C. App. Ct. R. 608. The Rule exempts 13 categories of attorneys from the appointments, including attorneys employed by the government. *See* S.C. App. Ct. R. 608(d). Section 14-1-235 of the S.C. Code provides what appears to be a limitation on court appointments, stating, "A judge, court, or court official shall not appoint an attorney to represent a party in a civil action unless the authority to make the appointment is specifically provided by statute." S.C. CODE ANN. § 14-1-235 (Supp. 2006). However, because the S.C. Code provides for appointment in a wide variety of cases, in practice the statute has no real limiting effect.

Court-appointed attorneys in civil cases (excluding post conviction relief cases) are entitled to be paid a "reasonable fee" based on \$40 per hour, with a \$1,750 cap. Funds for civil appointments are to be paid from the Civil Appointment Fund (Fund) created by the legislature in 1999. *See* 1999-2000 S.C. General Appropriations Act, H. 3696. However, appropriations cuts have caused resources earmarked for the Fund to dwindle. And although increases in court fines have helped to sustain the Fund, as the 2003-2004 Accountability Report from the Commission on Indigent Defense, which operates the Fund, states, "[t]he main barrier to the successful operation of this Agency

is adequate appropriated funding. ... [s]trong appropriated funds are necessary." S.C. COMM'N ON INDIGENT DEF., FY 2003-2004 ACCOUNTABILITY REPORT 4 (2004). Furthermore, many attorneys eligible to receive pay for civil court appointments do not file for reimbursement, in all likelihood due to the impracticality of applying to receive such low amounts resulting from the caps imposed and the delay in obtaining such requested funds. *See id.*

Effects of inadequate compensation for mandatory service

Given the low compensation rates and caps and the lack of substantial appropriations, the effect of the current system is, in essence, a mandate that lawyers carry the bulk of the financial burden for the execution of a largely public function—providing access to courts for indigents in certain cases. While attorneys should be encouraged to be civic-minded and provide a portion of their services pro bono to the community, the current court appointment system raises serious ethical and efficiency issues.

Although attorneys are required to be competent in the matters they handle, *see* S.C. App. Ct. R. 407, R. 1.1, court-appointed attorneys who do not litigate for a living have little or no experience in the types of cases for which they have been appointed. This can result in inadequate representation and may even rise to the level of ineffective assistance of counsel in some cases. Such ineffective assistance of counsel can have the effect of further straining judicial resources, for instance where continuances or delays result. Additionally, inexperienced counsel is likely to submit for reimbursement for more time spent on a file than that submitted by an attorney experienced and competent in the area.

For those attorneys who may be starting out or are struggling financially, unfunded court appointments can easily strain their practices' financial resources. The problem is compounded in cases, such as those involving minor children, that may require the file to be open for years even as the attorney continues to

receive additional appointments every year. In 2005-06 the highest average number of civil appointments in a county was 9.4 per eligible attorney; Rule 608 exposes some lawyers to up to 12 appointments in a 12-month period. Opening cases yearly without being able to close cases with the same frequency can often overwhelm small offices, even to the point of closing temporarily. *See, e.g.,* Schuyler Kropf, *Attorneys for Indigent Clients Seeking a Raise*, THE POST AND COURIER (Charleston, SC), October 2, 2006. Not only does this have the deleterious effect of reducing or eliminating the amount of voluntary pro bono service the attorney can handle, particularly work-intensive court appointments have prompted some attorneys to even consider leaving the practice. *See* S.C. BOARD OF GOVERNORS, REPORT OF THE TASK FORCE ON COURT APPOINTMENTS 2 (2004) [hereinafter TASK FORCE REPORT]. It is important to note that in these cases the issue for many such attorneys is not about demanding high rates to feed into an already lucrative practice, but rather it is about sustaining a practice and, in turn, a livelihood. This raises serious constitutional issues.

Case law

To date South Carolina courts have recognized no constitutional violations with regard to uncompensated, much less under-compensated, civil court appointments. These cases address single appointments with counsel experienced in handling such matters and were decided prior to the enactment of Rule 608 and additional statutes authorizing compensation for counsel. The cases are no longer instructive.

The issue of compensation for civil appointments was first addressed in *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983). In that decades-old case, the court held that the uncompensated appointments to represent an inmate in several civil actions did not constitute a "taking," evidently in violation of the Fifth and 14th Amendment rights. The court cited the "duty attendant to the public

office which the lawyer voluntarily seeks” in reasoning that “[i]t has been traditionally held that a lawyer, by accepting a license to practice law, becomes an officer of the court and assumes the obligation of representing, without pay, indigent defendants in criminal cases.” *Id.* at 594, 310 S.E.2d at 441. With regard to civil appointments, the court simply stated that “[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.” *Id.* at 595, 310 S.E.2d at 442. Note, however, that this “inherent authority” argument has been specifically rejected by some courts in other jurisdictions. See, e.g., *Lavallee v. Justices In Hampden Superior Court*, 442 Mass. 228, 812 N.E.2d 895 (2004) (the court does not “have the inherent authority to order members of the bar to undertake representation of indigent criminal defendants on a pro bono basis”). The S.C. Supreme Court would later echo *Dibble’s* sentiment in *Roberts v. State* by stating that an attorney “voluntarily submits to an appointment for indigent representation by the act of taking the oath of admission.” 318 S.C. 219, 222, 456 S.E.2d 905, 907 (1995) (citing *Bailey v. Aiken County*, 309 S.C. 455, 456, 424 S.E.2d 503, 504 (1993)).

In 1994 the Court ruled on a case involving DSS’s failure to pay guardian *ad litem* and attorney fees in an action to terminate parental rights case. In *South Carolina Dep’t of Soc. Servs. v. Tharp*, the Court affirmed the family court’s award of fees to the guardian *ad litem*, as such fees were provided by statute, but reversed the award of fees to the attorney for his representation of the parents, reasoning that they were not provided for by statute. 312 S.C. 243, 245, 439 S.E.2d 854, 856 (1994). The Court specifically declined to decide whether excessive civil case appointments may at some point place such a burden on a lawyer’s time and services as to constitute a taking. *Id.* at 247, 439 S.E.2d at 857. Instead, the Court opined that, in light of the “late stage of the proceedings” at which

the appointment was made, the appointment of an attorney to represent an indigent mother pro bono did not place such a burden on the attorney’s time and services as to be a taking without just compensation. *Id.*

Notably, the South Carolina case law with regard to criminal court appointments has been more faithful to constitutional precepts. For instance, in *Bailey v. State*, the Court reasoned that, “[g]iven the extraordinary time, effort, and commitment required of defense counsel in capital cases, it is unrealistic to expect that token compensation will suffice ... to provide an indigent defendant with the quality of legal representation mandated by the United States Supreme Court.” 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). The Court stated that an “appointed attorney should not expect to be compensated *at market rate*, rather at a reasonable, but lesser rate, which reflects the unique difficulty these cases present as bal-

Carolina bar bears a heavy and unreasonable burden in the civil court appointment scheme. See TASK FORCE REPORT, *supra*. As the Task Force on Court Appointments aptly concludes, “appointment of counsel in many cases is based on a statutory obligation created by the State If the State has elected to provide counsel as a social benefit or a means to expedite judicial proceedings, it has the obligation not to conscript or coerce a small number of its citizens to provide that service.” *Id.* at 3.

The issue of whether mandatory gratuitous legal service deprives an attorney of property without due process of law, denies him or her equal protection of the law and/or constitutes involuntary servitude has been addressed in cases outside South Carolina. Like South Carolina, many such cases have reasoned that rendering gratuitous services when appointed by the court is the duty of the attorney as an officer of the court or as a condi-

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anced with the attorney’s obligation to defend the indigent.” *Id.* Under *Bailey* counties are responsible for providing reasonable fees above those provided under the Defense of Indigents Act, at least in the context of criminal cases.

The rationale reflected in *Bailey* is just as applicable in the civil court appointment situation. There is clear evidence that the South

tion to receiving a license to practice law. See, e.g., *Waters v. Kemp*, 845 F.2d 260, 263 (11th Cir.1988); *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Wash.*, 795 F.2d 796 (9th Cir. 1986); *U.S. v. Dillon*, 346 F.2d 633 (9th Cir. 1965).

A growing number of jurisdictions are ruling against such uncompensated or under-compensated

appointments, mostly on the basis that they constitute a governmental taking without just compensation. In three jurisdictions—Indiana, Iowa and Wisconsin—the view that uncompensated court appointments constitute a taking has been in existence for more than 100 years. *See, e.g., Gordon v. Board of Comm'rs. of Dearborn County*, 52 Ind. 322, 1876 WL 6408 (1876); *Hall v. Washington County*, 2 Greene 473, 1850 WL 157 (Iowa 1850); *Dane County v. Smith*, 13 Wis. 585, 1861 WL 1530 (1861). For example, the Indiana court in *Webb v. Baird* declared as early as 1854 that “[t]he idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.” 6 Ind. 13, 1854 WL 3268 (1854). The court also added that a law that requires gratuitous services from a particular class in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law that provides for a uniform and equal rate of assessment and taxation upon all the citizens. *Id.*

More recently, the Kentucky Court of Appeals in *Spees v. Kentucky Legal Aid* held that the denial of fees for services as a warning order attorney for an indigent client represented the taking of private property without just compensation, even though no party involved had the resources with which to compensate him. No. 2005-CA-000510-MR, 2006 WL 1791154, at 3 (Ky. Ct. App., June 30, 2006). The court noted that, under the applicable statute, warning order attorneys may decline appointment if they “impose a financial sacrifice so great as to be unjust” until such time as the funds are appropriated to cover such appointments. *Id.* at 4; *see also State v. Perala*, 132 Wash. App. 98,130 P.3d 852 (2006) ([t]he courts must award an amount that will allow for the financial survival of his or her practice, and the county is required to pay a reasonable

amount for those services when they are not donated.”).

And in *State v. Sells*, the court indicated that only voluntarily accepted assignments avoided the takings issue in a case in which two court-appointed attorneys spent nearly 800 hours on the defense of an indigent defendant and their compensation was capped at \$20,000. No. 2005-CA-37, 2006 WL 2795340 (Ohio Ct. App., Sept. 29 2006). *See also Machado v. Leahy*, 17 Mass.L.Rprt. 263, 2004 WL 233335 (Mass. Super. Ct. 2004) (attorneys who can remove themselves from the Private Counsel Division list cannot be held victim of an unconstitutional taking).

In *Baker v. Arkansas Dep't of Human Servs.*, the Arkansas Supreme Court ruled that appointing an attorney to represent an indigent parent in a parental rights termination case pro bono amounted to an unconstitutional taking. 340 Ark. 42, 8 S.W.3d 499 (Ark. 2000). In that case the court stated, “[T]he services of an attorney are a specie of property subject to Fifth and Fourteenth Amendment protection” and that principles that require payment of attorney’s fees for representing an indigent criminal defendant are applicable to the civil context as well. *Id.* at 52, 8 S.W.3d at 505.

The theory that an attorney, in being licensed, consents to render uncompensated services under an appointment for indigent defendants has been specifically rejected in *Ruckenbrod v. Mullins*, in which the Utah Supreme Court declared that, while the right of personal liberty and the right to earn a livelihood in any lawful calling are subject to the licensing power of the state, a state cannot impose restrictions on the acceptance of the license that will deprive the licensee of his constitutional rights. 102 Utah 548, 133 P.2d 325 (1943). *See also Bedford v. Salt Lake Cty.*, 22 Utah 2d 12, 447 P.2d 193 (1968) (holding that statute providing court shall appoint counsel to represent alleged insane person in proceeding for involuntary hospitalization was invalid in absence of pro-

vision for compensation of appointed counsel).

As in *South Carolina Dep't of Soc. Servs. v. Tharp*, some cases in other jurisdictions have noted that, even though uncompensated court appointments were not *per se* unconstitutional, an unreasonable amount of required uncompensated service may constitute an impermissible taking. *See, e.g., State v. Wigley*, 599 So.2d 858 (La. Ct. App. 3d Cir. 1992) (when burden imposed is excessive to extent that it is confiscatory, it constitutes a taking of attorney’s time, which is his stock in trade), *rec'd in part*, 624 So.2d 425 (La. 1993).

While most decisions focus on the takings claim, some courts have emphasized the equal protection violation inherent in such unfunded court appointments. They reason, under an equal protection analysis, there is no rational relationship by which the government can charge the cost of operation of a state function to a particular class of persons. *See, e.g., Cunningham v. Superior Court of Ventura County*, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854 (Cal. Ct. App. 1986). As the California appellate court states, “An attorney who is appointed to represent an indigent without compensation is effectively forced to give away a portion of his property—his livelihood. Other professionals, merchants, artisans, and state licensees, are not similarly required to donate services and goods to the poor.” *Id.* at 348, 222 Cal. Rptr. at 862. South Carolina’s numerous exemptions under its court appointment statute present implications for an equal protection claim. Of the 8,039 in-state active members in 2004, 2,611 claimed an exemption. *See TASK FORCE REPORT, supra*, at 4. Yet, government lawyers, who constitute a large portion of those exempted, may voluntarily undertake pro bono work. *See S.C. CODE ANN. § 40-5-380*. Read as a whole, the statute and rule cannot reasonably be deemed to meet the rational relationship test.

While most cases in this area focus on either the takings issue or the equal protection claim, at least

one court has addressed compensation for court appointments in the context of involuntary servitude. In *Bedford v. Salt Lake County*, an attorney challenged his appointment in an involuntary commitment proceeding. 22 Utah 2d 12, 447 P.2d 193 (1968). In holding for the attorney, the court reasoned, "the legislature can no more require a lawyer to represent a client for free than it can compel a physician to treat a sick or injured indigent patient without pay." *Id.* at 14, 447 P.2d at 194. It concluded that "[t]he legal assistance which an attorney renders to a client is his stock in trade; and in order for the attorney to make a living, he must sell his service." *Id.* at 14-15, 447 P.2d at 195. Thus, to compel a lawyer to so work constituted "a form of involuntary servitude." *Id.* The S.C. Supreme Court rejected the involuntary servitude argument in *Roberts v. State*, 318 S.C. 219, 222, 456 S.E.2d 905, 907 (1995).

Where should we go from here?

The only appropriate solution to

the problem of compensation for civil court appointments is provision of adequate funding. It resolves the constitutional concerns and creates the efficiencies sought when statutory authorization for appointment of counsel was enacted. The state's budget for civil and criminal court appointments should be increased by at least \$14 million to allow a pay scale of \$90 to \$120 per hour. This rate is in line with federal standards and, although less than the standard attorney rates, would help to alleviate the fiscal burden associated with court appointments.

Once the fees are increased, the state should move toward a voluntary contract system for court appointments. This option would alleviate the competency issues surrounding the current system of court appointments and eliminate the equal protection concerns. Ultimately, this would improve the quality of the legal services provided to indigents by creating a pool of experienced counsel.

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large number of cases being borne by a small number of practitioners. It was not intended to remove from the State its obligation to fund core government functions. The best solution would be for the State to now meet its fiscal obligation. If that does not happen, Rule 608 should be rescinded, and appointments by trial courts should be permitted only of those lawyers who volunteer their services.

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