

★ See section 5 and Section 6 on pages 7, 8, 9 ★

PUBLIC DEFENDER

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Scope of topic:

This article discusses the powers, duties, and status of public defenders.

Treated elsewhere:

Right of accused to be represented by counsel and to effective assistance of counsel, see CRIMINAL LAW.

Compensation of court-appointed counsel and reimbursement by defendant for costs of counsel in criminal cases, see CRIMINAL LAW.

Issuance of subpoena by public defender, see CRIMINAL LAW.

District attorneys and city prosecutors, see DISTRICT AND MUNICIPAL ATTORNEYS.

Attorneys at law, generally, see ATTORNEYS AT LAW.

Collateral References

Text References:

Witkin, CALIFORNIA CRIMINAL PROCEDURE: INTRODUCTION § 16D (1978 Supp); TRIAL §§ 370, 370A-370B (1978 Supp), 377

Digest References:

McKinney's Digest, PUBLIC DEFENDER

Cal Digest of Official Reports 3d Series, PUBLIC DEFENDER

Annotation References:

ALR Quick Index, PUBLIC DEFENDER

I. GENERALLY; STATE PUBLIC DEFENDER [§§ 1, 2]

II. COUNTY PUBLIC DEFENDER [§§ 3-8]



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PUBLIC DEFENDER

I. GENERALLY; STATE PUBLIC DEFENDER

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I. GENERALLY; STATE PUBLIC DEFENDER [§§ 1, 2]

Summary

The code provides for the office of state public defender and prescribes his powers and duties, foremost among which is the representation of indigent persons in criminal proceedings in the appellate courts (§§ 1, 2).

General References

- Deering's Annotated Government Code §§ 15400 et seq.
- Cal Digest of Official Reports 3d Series, Public Defender
- Witkin, California Criminal Procedure (1978 Supp): Introduction § 16D
- ALR Quick Index, Public Defender

§ 1. In general

The governor is authorized to appoint a state public defender, with specified qualifications, subject to confirmation by the senate.¹ The state public defender is appointed for a term of four years, and receives the same annual salary as the attorney general.²

The state public defender must formulate plans for the representation of indigents in the supreme court and in each appellate district. Each plan is adopted upon the approval of the court to

1. *Deering's Gov C § 15400.* **Law Review:** 7 Pacific LJ 524 (creation of office of state public defender).
Annotation: Construction and effect of statutes providing for office of public defender, 36 ALR3d 1403.

2. *Deering's Gov C § 15401.*

which the plan is applicable, and may be modified or replaced by the state public defender with the approval of the court.³

The state public defender may employ such deputies and other employees, and establish and operate such offices, as he may need for the proper performance of his duties.⁴ He may contract with county public defenders,⁵ private attorneys, and nonprofit corporations organized to furnish legal services to persons who are not financially able to employ counsel and provide for participation by such attorneys and organizations in his representation of eligible persons.⁶ He may also enter into reciprocal or mutual assistance agreements with county boards of supervisors to provide for exchange of personnel on a temporary basis where the state or county public defender has properly refused to represent a party because of a conflict of interest.⁷

§ 2. Duties and powers

The state public defender's primary responsibility⁸ is to represent, upon appointment by the court or upon the request of the person involved, any person who is not financially able to employ counsel in an appeal, petition for hearing, or petition for rehearing to any appellate court, a petition for certiorari to the United States Supreme Court, a petition for executive clemency from a judgment relating to criminal or juvenile court proceedings, a petition for an extraordinary writ or an action for injunctive or declaratory relief relating to a final judgment of conviction or wardship or to the punishment or treatment imposed thereunder, a proceeding of any nature after a judgment of death has been rendered, or a proceeding in which an inmate of a state prison is charged with an offense and the county public defender has

3. *Deering's Gov C § 15403.*

4. *Deering's Gov C § 15402.*

5. As to county public defenders, see §§ 3 et seq., *infra*.

6. *Deering's Gov C § 15402* (attorneys and organizations serve under supervision and control of state public defender and are compensated for

their services either under contract or in manner provided in *Pen C § 1241*).

7. *Deering's Gov C §§ 15402, 27707.1.*

As to reciprocal or mutual assistance agreements between county public defenders, see § 3, *infra*.

8. *Deering's Gov C § 15420.*

refused to represent the inmate because of a conflict of interest or other legal reason.⁹ The state public defender is also authorized to represent a person who is not financially able to employ counsel in a proceeding of any nature where a person is entitled to representation at public expense;¹⁰ to represent a person whom a county public defender has refused or is otherwise reasonably unable to represent because of a conflict of interest or other reason and who is charged with the commission of any contempt or offense, at all stages of any proceedings relating to the charge, including restrictions on liberty resulting from the charge;¹¹ and to appear as a friend of the court and in legislative, administrative, or other similar proceedings.¹²

The foregoing duties are not exclusive, and the state public defender may perform any act consistent with them in carrying

9. Deering's Gov C § 15421 subs (a)-(d).

A person requesting appointment of the state public defender must make a financial statement under oath in the manner provided in rules adopted by the Judicial Council. *Deering's Gov C § 15424.*

The court must appoint the state public defender to represent a person not represented by counsel who is unable to afford the services of counsel, except: when the state public defender has refused representation because of conflict of interest or other reason; when the court, in its discretion and at the person's request, appoints trial counsel, or for good cause appoints another attorney; when the court appoints a county public defender, private attorney, or nonprofit organization with which the state public defender has contracted to furnish defense services; or when the supreme court, in its discretion, appoints counsel other than the state public defender or trial counsel in a capital case. *Deering's Pen C § 1240 subd (a).*

At the request of an attorney representing a prospective indigent appellant in a criminal, juvenile court, or civil commitment case, or at the request of the prospective indigent appellant himself, the state public defender must provide counsel and assistance as to whether arguably meritorious grounds exist on which the judgment to be appealed from would be reversed or modified on appeal. *Deering's Pen C § 1240.1 subd (c)* (effective until January 1, 1981, unless such date is deleted or extended).

10. Deering's Gov C § 15421 subd (e).

11. Deering's Gov C § 15422 (representation is pursuant to contract with county which provides for reimbursement of costs; except in proceedings in which state prison inmate is charged with offense, state public defender may decline representation by filing letter with appropriate court citing *Gov C § 15420*).

12. Deering's Gov C § 15423.

out the functions of his office.¹³ The state public defender is specifically authorized to issue any regulations and take any actions as may be necessary for proper implementation of the statutes relating to the state public defender.¹⁴

II. COUNTY PUBLIC DEFENDER [§§ 3-8]

Summary

The board of supervisors of a county may establish the office of public defender (§ 3). The code prescribes the time the public defender must devote to his official duties (§ 4) and the classes of persons for whom and proceedings in which the public defender may be appointed (§ 5). To be eligible for the services of the public defender, a criminal defendant must be indigent; although either the court or the public defender to whom the defendant has applied for counsel may make the determination that the defendant is indigent, the court may make the final determination (§ 6). A public defender appointed to represent a criminal defendant becomes the defendant's attorney to the same extent as if he had been retained; the trial court has no more authority over him than over any other attorney, and he is free from any restraint or domination by the prosecuting authorities (§ 7). The code provides for payment of the public defender's operating expenses, requires him to keep records, and provides for reimbursement to the county of the cost of counsel furnished to persons who, upon conclusion of the proceedings in the trial court, have the present financial ability to pay all or part of the cost (§ 8).

General References

Deering's Annotated Government Code §§ 27700 et seq.
 McKinney's Digest, Public Defender
 Cal Digest of Official Reports 3d Series, Public Defender
 Witkin, California Criminal Procedure: Trial §§ 370, 370A-370B
 (1978 Supp), 377
 ALR Quick Index, Public Defender
 Am Jur 2d, Criminal Law § 323

§ 3. In general; establishment of office

The board of supervisors of any county is authorized by law to

13. Deering's Gov C § 15425.

14. Deering's Gov C § 15404.

establish the office of public defender, or the county may join with other counties to maintain the office to serve all the member counties.¹⁵ At the time of establishing the office the supervisors determine whether the public defender is to be appointed or elected.¹⁶ If appointed, he serves at the will of the board.¹⁷ If elected, the board must appoint a public defender to serve until the next general election, at which time one is elected to serve a term of four years.¹⁸

The boards of supervisors of two or more counties may authorize their respective public defenders to enter into reciprocal or mutual assistance agreements whereby a deputy public defender of one county may be assigned on a temporary basis to perform public defender duties in the county to which he has been assigned in actions or proceedings in which the public defender of the county to which the deputy has been assigned has properly refused to represent a party because of a conflict of interest.¹⁹

§ 4. Time devoted to official duties

In counties of the first, second, and third classes, a public defender must devote all his time to the duties of the office. He may not engage in the practice of law except in the capacity of public defender.²⁰ In no event is a public defender permitted to defend or assist in the defense of, or act as counsel for, any person

15. Deering's Gov C § 27700.

A contract between a county and an attorney to provide, with a few exceptions, the usual and customary public defender legal services for an agreed monthly sum, did not establish the office of public defender in the county. *Phillips v Seely*, 43 CA3d 104, 117 Cal Rptr 863.

Annotation: Construction and effect of statutes providing for office of public defender—nature and creation of office, 36 ALR3d 1403 § 3.

Law Reviews: 5 Santa Clara Law 48 (argument for public defender system); 36 SCLR 125 (Los Angeles County

public defender system); 13 Stan LR 522 (representation of indigents in California—field study of public defender and assigned counsel systems).

16. Deering's Gov C § 27702.

17. Deering's Gov C § 27703.

18. Deering's Gov C § 27704.

19. Deering's Gov C § 27707.1 (also providing for reimbursement of salary and payment of expenses).

As to reciprocal or mutual assistance agreements with state public defender, see § 2, supra.

20. Deering's Gov C § 27705.

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accused of any crime in any county, except as provided in the laws relating to public defenders.²¹

§ 5. Official duties

The public defender is required by law to defend at the request of a defendant or on order of court, at all stages of the proceedings including preliminary examination, any person not financially able to employ counsel who is charged with the commission of any contempt or offense triable in the superior, municipal, or justice court. He must, on request, give counsel and advice to such a person about any charge against him on which the public defender is conducting the defense, and must appeal all convictions to a higher court or courts where, in his opinion, the appeal will or may reasonably be expected to result in reversal or modification of a judgment of conviction.²² Upon order of the

21. *Deering's Gov C § 27705.1.*

Gov C § 27705.1 pertains only to those who occupy the office of county public defender. One who has merely contracted to perform the usual duties attendant to the office is not thereby precluded from engaging in criminal practice in other counties. *58 Ops Atty Gen 725.*

22. *Deering's Gov C § 27706 subd (a).*

Representation by the public defender is without expense to the defendant, unless the court, after a hearing, determines that the defendant has the present ability to pay. *Deering's Gov C § 27706 subd (a); Deering's Pen C § 987.8.*

Where because of conflict of interest or other reasons a public defender has properly refused to represent the accused, the court may appoint other counsel. *Deering's Pen C § 987.2 subd (a).*

If the public defender reasonably believes that a judgment, although final, is so defective as to be subject to

a successful collateral attack, whether by coram nobis or habeas corpus, it does no violence to *Gov C § 27706*, directing the public defender to represent indigents charged with the commission of any offense at all stages of the proceedings and to prosecute all appeals to a higher court where in his opinion the appeal might be expected to result in reversal or modification, to allow him to represent such an indigent at the latter's request. *Ingram v Justice Court for Lake Valley Judicial Dist., 69 C2d 832, 73 Cal Rptr 410, 447 P2d 650, 36 ALR3d 1391.*

A county public defender is not justified in assuming that *Gov C § 27706 subd (a)* and *Pen C § 987.2* confine his power or his duty to give advice and counsel only on the request of a defendant about any charge against him on which the public defender is conducting the defense; the public defender is required to defend any indigent defendant on order of the court, at all stages of the proceedings. *Ligda v Superior Court of Solano*

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court, he must represent any person who is required to have representation of counsel at all stages of the preliminary and trial proceedings in a capital case,²⁵ and any person who is entitled to be represented by counsel but is not financially able to employ counsel in proceedings under the juvenile court law.²⁶ And upon order of the court or request of the person involved, he may represent any person who is not financially able to employ counsel in any proceeding relating to the nature or conditions of detention, of other restrictions prior to adjudication, of treatment, or of punishment resulting from criminal or juvenile proceedings.²⁷

★ ↓ The public defender is required, on request, to prosecute actions for the collection of wages and other demands of any person not financially able to employ counsel, where the sum involved does not exceed a specified amount and where, in the judgment of the

County, 5 CA3d 811, 85 Cal Rptr 744.

As to representation, on appeal, by state public defender, and appointment of state public defender where county public defender has properly refused representation, see § 2, supra.

As to qualifications of defendant, and procedure for appointment of public defender in criminal prosecutions, see § 6, infra.

As to reimbursement for legal assistance provided by public defender, generally, see § 8, infra.

As to reimbursement for costs of counsel in criminal cases, see CRIMINAL LAW § 640.

Annotation: Construction and effect of statutes providing for office of public defender—public defender's discretion as to representation on appeal, 36 ALR3d 1403 § 8.

Ops Atty Gen: 46 *Ops Atty Gen* 40 (propriety of public defender's refusal to defend on grounds that he is overburdened and cannot afford accused effective defense); 47 *Ops Atty Gen* 50

(duty of public defender to represent indigent defendants in all criminal prosecutions in superior and inferior courts, unless disqualified in a particular case); 59 *Ops Atty Gen* 27 (where public defender cannot represent criminal defendant because of conflict of interest, none of his deputies may represent such defendant even though they are part of separate division of office established for that purpose).

25. *Deering's Gov C* § 27706 subd (f); *Deering's Pen C* § 686.1.

26. *Deering's Gov C* § 27706 subd (e).

As to juvenile court law, generally, see DELINQUENT AND DEPENDENT CHILDREN.

27. *Deering's Gov C* § 27706 subd (g).

Annotation: Construction and effect of statutes providing for office of public defender—appointment of public defender in particular forms of proceedings, 36 ALR3d 1403 § 6.

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★ public defender, the claim urged is valid and enforceable in the courts,²⁸ and to defend any person who is not financially able to employ counsel in any civil litigation in which, in the judgment of the public defender, the person is being persecuted or unjustly harrassed.²⁹ He must also, on request or court order, represent any person not financially able to employ counsel in guardianship and conservatorship proceedings,³⁰ and in proceedings for the involuntary treatment of mentally disordered persons.³¹ The court may also appoint the public defender to represent a mentally retarded person in proceedings for his commitment or recommitment,³² to represent an alleged narcotics addict in proceedings for his commitment and treatment,³³ or to represent an alleged mentally disordered sex offender, unless he affirmatively, knowingly, and intelligently demands to act as his own attorney.³⁴ ↑
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§ 6. Appointment in particular case

The right to counsel in criminal proceedings generally, and to court-appointed counsel, is treated elsewhere.³⁵ The present discussion is limited to the qualifications and procedure for appointment of the public defender in criminal cases and in certain civil proceedings.³⁶ ★★

Indigency of a person charged with the commission of a criminal offense is a qualification required for representation by

28. *Deering's Gov C § 27706 subd (b).*

29. *Deering's Gov C § 27706 subd (c).*

30. *Deering's Gov C § 27706 subd (d).*

As to guardianship and conservatorship proceedings, see GUARDIANSHIP AND CONSERVATORSHIP.

31. *Deering's Gov C § 27706 subd (d).*

As to involuntary treatment of mentally disordered persons, see INCOMPETENT, ADDICTED, AND DISORDERED PERSONS §§ 91 et seq.

32. *Incompetent, Addicted, and Disordered Persons § 49.*

33. *Deering's W & I C § 3104.*

As to commitment and treatment of narcotics addicts, see INCOMPETENT, ADDICTED, AND DISORDERED PERSONS §§ 59 et seq.

34. *INCOMPETENT, ADDICTED, AND DISORDERED PERSONS § 25.*

35. *CRIMINAL LAW §§ 141 et seq.*

36. As to types of proceedings in which public defender may be appointed, see § 5, supra. ★★

the public defender at public expense.³⁷ The standard applied in determining indigency is flexible and contemplates consideration of such factors as amount of income, bank accounts, ownership of a home or car, outstanding debts, the number of dependents, and the seriousness of the charge.³⁸

There are two ways in which an indigent person charged with a crime may obtain the services of the public defender: one, by applying directly to the public defender himself, the other by appearing unrepresented at arraignment and receiving a court-ordered appointment of counsel. If a defendant makes his first appearance on a criminal charge without counsel, the court is required to advise him of his rights and to inquire if he desires to be represented, and to appoint the public defender if the defendant so desires but is unable to employ counsel; in that event, it is the power and duty of the trial court to inquire into the defendant's financial condition and determine whether he is eligible for the public defender's assistance. But the public defender has the power and duty to determine whether a person charged with crime is eligible for the public defender's assistance when that person comes directly to him for assistance rather than awaiting his first court appearance. Thus, either the public defender or the court may make an affirmative determination that a defendant applying for counsel is indigent.³⁹ But the code provides that the

37. *Ingram v Justice Court for Lake Valley Judicial Dist.*, 69 C2d 832, 73 Cal Rptr 410, 447 P2d 650, 36 ALR3d 1391.

Although indigency is a qualification required for representation by the public defender, no right of defendant is violated when the public defender is appointed by the court without a prior determination of indigency. *People v Johnson*, 5 CA3d 851, 85 Cal Rptr 485.

38. *People v Ferry*, 237 CA2d 880, 47 Cal Rptr 324 (defendant was indigent entitled to be represented by public defender where his property consisted of unavailable land subject to probate, he had 11 children, one attor-

ney did not want to take mortgage on land in view of number of defendant's children, second attorney refused case, and third attorney asked for cash in advance).

Annotations: Construction and effect of statutes providing for office of public defender—indigency or insolvency as test of eligibility for services of public defender, 36 ALR3d 1403 § 5; Determination of indigency of accused entitling him to appointment of counsel, 51 ALR3d 1108.

39. *Ingram v Justice Court for Lake Valley Judicial Dist.*, 69 C2d 832, 73 Cal Rptr 410, 447 P2d 650, 36 ALR3d 1391.

court in which the proceeding is pending may make the final determination in each case as to whether a defendant or other person whom the public defender is authorized to represent is financially able to employ counsel and qualifies for the services of the public defender. An exception is made, however, for legal services to defendants in criminal cases,⁴⁰ to plaintiffs in actions for the collection of wages and other demands, and to defendants in civil cases who are being persecuted or unjustly harrassed.⁴¹ In those cases, the public defender must render legal services for any person he determines is not financially able to employ counsel until such time as a contrary determination is made by the court. If a contrary determination is made, the public defender thereafter may not render services for that person except in a proceeding to review the determination of financial ability to employ counsel or in an unrelated proceeding. In order to assist the court or public defender in making the determination of financial ability, the court or the public defender may require a defendant or person requesting services of the public defender to file a financial statement under penalty of perjury.⁴²

§ 7. Status when representing accused

When the public defender is appointed to represent a defendant accused of crime, he becomes the attorney for that defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant.⁴³ It is his task to

40. As provided in *Deering's Gov C § 27706 subd (a)*, further discussed in § 5, supra.

41. As provided in *Deering's Gov C § 27706 subds (b), (c)*, both further discussed in § 5, supra.

42. *Deering's Gov C § 27707*.

A financial statement given pursuant to *Gov C § 27707* is protected by the lawyer-client privilege. *People v Canfield*, 12 C3d 699, 117 Cal Rptr 81, 527 P2d 633.

43. *Re Hough*, 24 C2d 522, 150 P2d

448; *Re Atchley*, 48 C2d 408, 310 P2d 15, cert den 355 US 899, 2 L Ed 2d 195, 78 S Ct 273; *Mowrer v Superior Court of Los Angeles County*, 3 CA3d 223, 83 Cal Rptr 125.

Once the public defender is appointed or undertakes to represent an indigent defendant, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. *Ingram v Justice Court for Lake Valley Judicial Dist.*, 69 C2d 832, 73 Cal Rptr 410, 447 P2d 650, 36 ALR3d 1391.

investigate carefully all defenses of fact and of law that may be available to the defendant and confer with him about them before he permits his client to foreclose all possibility of defense and submit, by pleading guilty, to conviction without a hearing.⁴⁴

Since a person accused of crime must be afforded the full right to have assistance of counsel for his defense, a public defender in carrying out his duties is completely independent of any other county officer. The judge of the trial court has no more authority or control over him than over any attorney practicing before his court.⁴⁵ The public defender is free from any restraint or domination by the district attorney or the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the person he represents.⁴⁶ It necessarily

44. *People v Mattson*, 51 C2d 777, 336 P2d 937.

The public defender is under no duty to call any witness unless the record reflects that defendant requested that a witness be called in his own behalf. *People v Brooks*, 207 CA2d 664, 24 Cal Rptr 596.

As to adequate assistance of counsel, generally, see CRIMINAL LAW §§ 141 et seq.

45. *In Re Hough*, 24 C2d 522, 150 P2d 448.

A deputy public defender is assigned by his office to handle various criminal cases, and his assignment to cases set in one particular department of court for the purpose of efficiency does not confer on the presiding judge of that department the right to command the presence of that deputy public defender in that department at all times. *Mowrer v Superior Court of Los Angeles County*, 3 CA3d 223, 83 Cal Rptr 125.

The fact that the public defender is a public officer, acting by deputy, does not institutionalize the representation, and once a deputy has appeared as

counsel in a cause, the court may retain him before the court in such a matter both to regulate the procedure before the court and to maintain the attorney-client relation between defendant and his counsel in the cause itself. A deputy public defender who has been ordered to assist a defendant who has demanded the right to represent himself is a person connected with a judicial proceeding before the court, and on relieving the public defender as counsel in the case, the court has the power to require him, both as an officer of the court and as an attorney and in his official capacity to continue to assist defendant, and neither the deputy public defender nor his superior has the power to defy the court's order. *Ligda v Superior Court of Solano County*, 5 CA3d 811, 85 Cal Rptr 744.

Annotation: Construction and effect of statutes providing for office of public defender—public defender as not subject to control of judiciary or prosecuting authorities, 36 ALR3d 1403 § 7.

46. *In Re Hough*, 24 C2d 522, 150

follows that no act of his in advising his client or in defending him on the charge against him can be considered in any different light than if he were regularly employed.⁴⁷ On the other hand, in no sense can it be held that the prosecuting officers of the county are in any respect charged with the consequences of the public defender's actions.⁴⁸

§ 8. Operation expenses; records, payment for costs

The county or counties employing a public defender must provide suitable office space, furniture, and supplies,⁴⁹ and fix the annual salary of the public defender.⁵⁰ The expense of printing or typewriting briefs on appeal on behalf of a defendant represented by a public defender is a county charge.⁵¹

A public defender must keep a record of all services rendered by him in that capacity and file with the board or boards of supervisors an annual, written report.⁵²

In any case in which a party is provided legal assistance through the public defender, upon conclusion of the proceedings the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance. If the court determines that the party has the ability to pay all or part of the cost, it must order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his ability to pay. Execution may be issued on the order in the same manner as on a judgment in a civil action, but the order may not be enforced by contempt.⁵³

P2d 448; People v Lewis, 166 CA2d 602, 333 P2d 428.

47. *In Re Hough, 24 C2d 522, 150 P2d 448* (contention that petitioner is not bound by plea of guilty on ground that in so pleading he was misled by advice of public defender acting as his attorney is not well taken).

48. *In Re Hough, 24 C2d 522, 150 P2d 448.*

49. *Deering's Gov C § 27708.*

50. *Deering's Gov C § 27711.*

Annotation: Construction and effect of statutes providing for office of public defender—compensation and expenses, 36 ALR3d 1403 § 4.

51. *Deering's Gov C § 27709.*

As to representation on appeal by state or county public defender, see §§ 2, 5, supra.

52. *Deering's Gov C § 27710.*

53. *Deering's Gov C § 27712* (pro-

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viding that determination of ability to pay may be made only after hearing conducted according to provisions of *Pen C § 987.8*; that court may, in its discretion, hold one such additional hearing within six months of conclusion of criminal proceedings; and that court must adjudge standard by which

to measure cost of legal assistance provided, which standard must reflect cost of legal services provided).

For provisions of *Pen C §§ 987.4, 987.8*, providing for reimbursement for costs of counsel in criminal cases, see *CRIMINAL LAW § 640*.