

HANDBOOK FOR PRIVATE COUNSEL

APPOINTED BY THE

COURT OF APPEAL SECOND APPELLATE DISTRICT

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1. INTRODUCTION

This handbook explains the role of the California Appellate Project, Los Angeles Office (CAP/LA), in assisting the Court of Appeal and appointed counsel in all cases in which indigents are entitled to appointed counsel (criminal, juvenile delinquency, juvenile dependency, and some mental health) in the Second Appellate District of the California Court of Appeal. It also discusses obligations of appointed counsel in handling cases in this district.

2. THE CALIFORNIA APPELLATE PROJECT, LOS ANGELES OFFICE

The California Appellate Project is a non-profit corporation which contracts with the California Supreme Court and the Second Appellate District Court of Appeal to administer indigent appeals. The San Francisco office provides this service to the Supreme Court in death penalty cases, and the Los Angeles office (CAP/LA) administers indigent representation in the Second Appellate District.

Under its contract, CAP/LA performs duties described in California Rules of Court, rule 8.300, including: maintaining a list of qualified attorneys who are willing to take appointments in indigent appeals and evaluating the performance of those attorneys; evaluating the complexity of cases; and, based upon the evaluations of both the attorney and the case, making recommendations to the Court for appointment of counsel to each specific case. CAP/LA also consults with and assists appointed counsel in varying degrees and evaluates their claims for compensation. In addition, CAP/LA provides training programs for members of the Second District panel and directly represents the indigent appellants in some cases.

3. CLASSIFICATION OF CASES AND COUNSEL

(1) Cases

For the most part, the appointments in the Second District are not made until after the record on appeal has been filed. CAP/LA receives the record from the superior court and first classifies cases according to seriousness, difficulty,

length, and other relevant factors and, based upon this evaluation, designates the case as either “*assisted*” or “*independent*.”

(2) Counsel

CAP/LA recruits attorneys qualified to accept indigent appointments, classifies those attorneys into categories based upon qualification to take appointments, and maintains lists of names of attorneys in those categories. Attorneys interested in taking appointments in the Second Appellate District must file an application to join the panel. The application can be found on CAP/LA’s website or obtained by calling CAP/LA.

The initial classification of the panel attorney is based on the application, resume, and writing samples submitted. Thereafter, the Court has delegated to CAP/LA its task of reviewing and evaluating “the performance of appointed counsel to determine whether counsel’s name should remain on the same appointment list, be placed on a different list, or be deleted.” (Cal. Rules of Court, rule 8.300(b)(d).) A CAP/LA committee meets weekly to adjust the lists based on the panel attorney’s case evaluations, critiques of work in progress made at a weekly CAP/LA staff attorney meeting, and input from the Court.

4. APPOINTMENT OF COUNSEL

After assessing the difficulty of the case, CAP/LA then matches the case to an attorney and contacts counsel as to counsel’s availability. Upon receiving counsel’s consent, CAP/LA recommends to the Court the appointment of the specific panel attorney. Thereafter, the Court makes the appointment.

The record is then sent to the panel attorney, and the client is notified of the name of appointed counsel. Prior to appointment of counsel, CAP/LA field appellant’s questions about the appellate process.

5. CASES APPOINTED ON AN “ASSISTED” BASIS

Generally, in cases appointed on an “*assisted*” basis:

(1) A CAP/LA attorney:

(a) quickly reviews the entire record; and

- (b) sends to appointed counsel a letter outlining potential issues that the assisting attorney noticed in reviewing the record along with some preliminary research on those issues, and noting any missing portions of the record that the assisting attorney identified in the initial review of the record.

NOTE: Appointed Counsel is alone responsible for the case. Therefore, counsel should thoroughly review the record as soon as it is received to determine whether completion or augmentation is required and what issues are presented. Counsel must then do the comprehensive research necessary to address those issues with CAP/LA providing preliminary help and assistance throughout the appeal.

- (2) The CAP/LA attorney who sends the initial letter remains available to discuss any aspect of the appeal, including:
 - (a) substantive issues;
 - (b) procedures;
 - (c) rules and norms of practice;
 - (d) briefing requirements; and
 - (e) available resources.
- (3) The assisting CAP/LA attorney must be provided with a draft of the Opening Brief for review and comment before it is filed. Generally, the draft should be sent to CAP/LA at least *10 days before* the filing deadline, unless an alternative agreement has been made. This allows enough time for the CAP/LA attorney to review the draft and give suggestions to the panel attorney and for the panel attorney to make use of those suggestions before the brief must be filed.

The draft brief should be in “ready to file” condition and not a “rough draft.” The CAP/LA attorney should not have to draft or re-write the brief. Thus, while the draft need not include tables of contents or authorities, which must be included in the filed version, it should include complete headings and proper citation to authority.
- (4) Appointed Counsel is responsible for filing all pleadings in the direct appeal. This includes any needed motions to augment, the opening and

reply briefs, and all appropriate petitions for rehearing, review, and writs of certiorari. As noted above, the CAP/LA attorney must review the opening brief before it is filed, and may arrange to review other pleadings. Appointed counsel should also send CAP/LA a copy of all other pleadings, including extension of time requests, motions to augment, rule 8.340 letters, reply briefs, and petitions. These copies may be sent in final form *after* filing without submission of a draft for pre-filing review. Please note that CAP/LA requests that an electronic copy of all pleadings be sent to capdocs@lacap.com, and no other copies need be sent.

- (5) If the Court of Appeal directs counsel to file a supplemental pleading or requests briefing on a particular question, appointed counsel should contact the assisting CAP/LA attorney immediately to discuss the request.
- (6) The CAP/LA assisting attorney will evaluate the performance of appointed counsel; the evaluation is kept on file at CAP/LA.
- (7) The CAP/LA assisting attorney does the initial assessment of the compensation claim in the case based upon the Guidelines for Appointed Counsel Compensation.

6. CASES APPOINTED ON AN “INDEPENDENT” BASIS

In cases appointed on an “*independent*” basis:

- (1) No CAP/LA attorney will do a preliminary review of the entire record, prepare a letter outlining potential issues or providing initial research, or review a draft of the Opening Brief prior to its being filed with the Court.
- (2) CAP/LA does not have to be consulted before a substantive opening brief is filed, but is always available to assist upon request. If appointed counsel would like input on substantive or procedural law, potential issues, or new developments in the law, counsel may at any time contact CAP/LA. CAP/LA will also provide other specific assistance such as reviewing drafts, pleadings, or other documents related to the appeal upon request.
- (3) Each case has a CAP/LA attorney assigned to it. Please contact the assigned attorney when requesting assistance. If you do not know who is assigned to your case, please call. If the assigned attorney in a criminal

case is not available, the “duty day” attorney may be able to assist you. In dependency appeals, appointed counsel should contact only the CAP/LA attorney that is designated as the contact at the time of appointment.

- (4) CAP/LA requests that you contact us whenever the court asks for additional briefing.
- (5) Before a no-issue brief or letter is filed or the appeal is voluntarily dismissed, appointed counsel must contact CAP/LA and arrange to send the record and a summary of issues rejected to CAP/LA for review. A CAP/LA attorney will then review the case and get back to counsel as soon as possible; counsel must not file the proposed pleading without receiving approval from the CAP/LA attorney. CAP/LA recommends that counsel also request a review of the case before filing a brief that raises only an issue of minimal value to the client.
- (6) CAP/LA attorneys will review the compensation claim based upon the Guidelines for Appointed Counsel Compensation.

7. LIABILITY INSURANCE

CAP/LA carries professional liability insurance coverage for work done by panel attorneys on cases appointed and administered through CAP/LA. A copy of the terms of that policy is available upon request. Appointed counsel is required to notify CAP/LA of any lawsuit, claim, or *potential* claim *immediately* upon learning of it. A delay in communicating may result in refusal of coverage by the underwriter.

8. COMPENSATION CLAIMS

(1) Rate of Pay

California Penal Code section 1241 provides that appointed counsel shall receive a reasonable sum for compensation and necessary expenses in an amount to be determined by the Court. The Chief Justice of the Supreme Court, the Administrative Presiding Justices of the five other appellate districts, along with the Judicial Counsel of California (JCC) have approved “Guidelines” for reasonable time and expense claims in appointed cases. A copy of these

“Guidelines” can be found on the CAP/LA website. CAP/LA will notify the panel attorneys of changes as they occur.

Hourly rates are based upon whether the case is independent or assisted, the type of crime involved, and the length of the appellate record. The highest rate of pay is for cases assigned on an *independent* basis that involve jury trial of a murder or sex offense, or a record of 3000 pages or more. Currently, these cases are paid at a rate of \$130/hour. All other independent cases are paid at the rate of \$120/hour, and all assisted cases are paid at the rate of \$110/hour.

The proceedings underlying the *current* appeal control the rate. Thus, if an upper tier appeal results in further proceedings, such as a remand for re-sentencing, that are followed by a new appeal, the rate of pay for the new appeal will be determined by applying the rate criteria to the new appeal, and will not be automatically the same rate that applied to the initial appeal.

Hourly rates are periodically changed. The applicable rate is determined by the rate in effect at the time of the appointment. If counsel is uncertain as to the applicable rate of a particular case, counsel should contact CAP/LA.

(2) Review of Claims

In most cases, in the Second Appellate District, the duty to review the claims and determine reasonable compensation has been delegated to CAP/LA, under supervision of the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC), the JCC, and the Court of Appeal.

CAP/LA makes recommendations to the JCC for compensation of counsel and reimbursement of expenses in both “assisted” and “independent” cases. The Guidelines are used as a basis for compensation recommendations.

The compensation guidelines are just that - - guidelines only. Every case is different; the difficulty of a specific task will determine whether compensation will be under or over the ordinary range of the “Guidelines.” If a claim for a task exceeds the “Guidelines” or does not facially appear to justify the hours claimed, the panel attorney should attach an explanation; if there is no explanation, the claim will likely be cut to the “Guidelines.” Compensation may be claimed only for hours actually worked and expenses actually incurred, even if the claim is under the Guidelines. The claim is made under penalty of perjury.

The standard of review is the amount of time that a reasonably experienced criminal appellate lawyer would take to complete a given task. A statewide appointed counsel claims manual sets out the policies and standards used by the projects in evaluating claims. The manual can be found on the CAP/LA website.

Compensation claims are randomly audited by AIDOAC. The quarterly audits can result in adjustments of awards upward or downward beyond the cuts or adjustments already made. When AIDOAC authorizes a negative adjustment to a claim after payment of the final claim has already been made, counsel will be informed of the amount of and reason for the adjustment, and the adjustment amount will be deducted from counsel's next compensation claim.

(3) Timing of Claims

Usually, a case has only one interim and one final claim. The interim claim may be made after the Appellant's Opening Brief has been filed. However, when the record in a case is 7,500 pages or more, an interim claim may be filed after completion of record review, with a second interim claim made after the filing of the Opening Brief. Otherwise, special permission must be obtained before filing multiple interim claims in a case. Additionally, when the case involves a no-issue brief or letter or a voluntary dismissal of the appeal, generally, no interim claim is filed and only a single final claim is made.

Interim claims are paid based on 95% of the approved attorney hours plus 100 percent of the approved reimbursable expenses. Payment of the additional 5% is deferred to the final claim.

Final Claims should be submitted upon completion of services, that is, after all of the pleadings in the direct appeal have been filed, including possible petitions for review and writ of certiorari. A final claim may also be filed in cases where the attorney of record has been relieved; payment of the claim may be dependent on the good cause shown for counsel's withdrawal from the case and the extent to which counsel's pre-withdrawal efforts were of benefit to successor counsel on the appeal.

For a case in which a no-issue brief or letter has been filed or the appeal has been voluntarily dismissed, a single final claim is appropriate. This claim

may be made immediately after the no-issue brief or letter has been filed, but counsel will be forfeiting any claim for the small amounts of time spent thereafter for reviewing the opinion and communicating with the appellant. Exceptions can be made when the court requests supplemental briefing in the case or other significant work on the case becomes necessary.

Final claims should usually be filed not later than 180 days following completion of the case. In determining when to file a final claim, counsel should take into account additional communication that may be expected from the client. Small amounts of time spent on the case after the final claim has been made will generally not be compensated. Where substantial additional work is required after the final claim, however, a supplemental final claim may be awarded.

(4) Electronic Filing

Compensation claims are made through the E-claim program found on the CAP/LA website. Instructions for filing and a copy of the “Guidelines” are on the website as well.