

# **HANDBOOK FOR PRIVATE COUNSEL**

**APPOINTED BY THE**

## **COURT OF APPEAL SECOND APPELLATE DISTRICT**

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**PAGE**

<b>1. INTRODUCTION AND BASIC EXPECTATIONS .....</b>	<b>2</b>
<b>2. THE CALIFORNIA APPELLATE PROJECT-LOS ANGELES OFFICE.....</b>	<b>3</b>
<b>3. CLASSIFICATION OF CASES AND COUNSEL.....</b>	<b>3</b>
<b>4. APPOINTMENT OF COUNSEL .....</b>	<b>4</b>
<b>5. CASES APPOINTED ON AN ASSISTED BASIS .....</b>	<b>4</b>
<b>6. CASES APPOINTED ON AN INDEPENDENT BASIS.....</b>	<b>6</b>
<b>7. SPECIAL RULES FOR “NO ISSUE” BRIEFS AND ABANDONMENTS.....</b>	<b>7</b>
<b>8. LIABILITY INSURANCE .....</b>	<b>10</b>
<b>9. COMPENSATION CLAIMS .....</b>	<b>10</b>
<b>(1) Rate of Pay.....</b>	<b>10</b>
<b>(2) Review of Claims.....</b>	<b>11</b>
<b>(3) Timing of Claims .....</b>	<b>12</b>
<b>(4) Electronic Filing of Claims.....</b>	<b>13</b>

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## 1. INTRODUCTION AND BASIC EXPECTATIONS

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 civil commitment) in the Second Appellate District of the California Court of Appeal. It also discusses obligations of appointed counsel in handling cases in the Second District Court of Appeal.

Please review every section of this Handbook and keep it available for future reference. In addition to the topics covered in this Handbook, panel attorneys are expected to regularly check CAP-LA's website ([www.cap-la.org](http://www.cap-la.org)). Important panel updates will be semi-regularly emailed to all panel members, but it is also critical to check our website for information on any changed procedures and important trainings. If you have a question about any CAP-LA policy and you cannot find the topic on our website, please contact the office and speak with the Duty Day Attorney.

Appointed counsel is expected to have a [Truefiling](#) account, linked to a credit card, which is required for electronic filing in the Court of Appeal and the Supreme Court. Counsel is also expected to keep current with evolving criminal law and relevant case authorities. Serious appellate work requires access to legal research services which track when cases are depublished or when review is granted.

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## **2. THE CALIFORNIA APPELLATE PROJECT-LOS ANGELES OFFICE**

**CAP 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 administers indigent representation in the Second District Court of Appeal.**

**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 indigent appellants in some cases.**

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## **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 (usually an electronic copy) 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.

The initial classification of the panel attorney is based on the application, cover letter, 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(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.

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#### **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 and agreement to take the appointment. 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 by email if the record is electronic. The client is notified of the name and contact information for appointed counsel. Prior to appointment of counsel, CAP-LA fields the appellant's questions about the appellate process.

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#### **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, noting any missing portions of the record that the assisting attorney identified in the initial review of the record.

**NOTE: Appointed Counsel is personally responsible for the case. CAP-LA is not your co-counsel. Counsel is responsible for all client communication and compliance with court deadlines. Counsel must thoroughly review the record as soon as possible and determine whether all required portions of the record are contained in the transcripts provided. Second District Court of Appeal, Local Rule 2(b) requires filing of any motion to correct an incomplete record or augment the record with additional necessary material within the first 40 days of counsel being appointed. Thereafter, counsel must do the comprehensive legal research necessary to determine what legal issues are presented and address those issues in the Opening Brief. CAP-LA will provide preliminary help and assistance throughout the appeal.**

- (2) The CAP-LA assisting attorney who sends the initial assistance letter remains available to discuss every aspect of the appeal, including:
  - (a) substantive issues;
  - (b) procedures;
  - (c) rules and norms of practice;
  - (d) briefing requirements; and
  - (e) available resources.
- (3) On an assisted case, counsel must send a draft of the Opening Brief to the assisting CAP-LA attorney 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 “ready to file” and not a “rough draft.” The CAP-LA attorney assists the case and does not draft or re-write the brief. Thus, while the draft need not include tables of contents or authorities, which must be included in the final filed version, it should be complete, proofread and prepared with proper citation to current legal authority. The standard legal style in the California Appellate Courts is the California Style Manual so citations in briefs and letters are expected to be in that format.

- (4) Appointed counsel is personally 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, the CAP-LA assisting attorney *must* review the Opening Brief before it is filed and may also request or offer to review other pleadings. Appointed counsel must also serve CAP-LA an electronic copy of all other pleadings at [capdocs@lacap.com](mailto:capdocs@lacap.com), including extension of time requests, motions to augment, Rule 8.340 letters, reply briefs, and petitions. Please directly email CAP-LA ([capdocs@lacap.com](mailto:capdocs@lacap.com)) with all service documents as opposed to using Truefiling to serve us.
- (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.

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## 6. CASES APPOINTED ON AN INDEPENDENT BASIS

Generally, 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) Although CAP-LA does not have to be consulted before a substantive Opening Brief is filed, counsel is welcome to contact CAP-LA any time to discuss the case, potential issues, new developments in the law or ask for other specific assistance.

In criminal appeals, each independent case is assigned to a CAP-LA Staff Attorney who will be available to discuss the case and, upon request, may review drafts, pleadings, or other documents related to the appeal. The assigned Staff Attorney will be the person reviewing the filed briefs for the purposes of evaluating the compensation claim. Appointed counsel can always call CAP-LA to inquire who is the assigned Staff Attorney on a case designated as independent. If the matter is urgent and the assigned Staff Attorney is not available to answer a question or review a draft, the Duty Day Attorney can step in to help.

Similarly, in dependency appeals, appointed counsel should contact the CAP-LA attorney that is designated as the contact at the time of appointment.

- (3) Appointed counsel must serve CAP-LA at [capdocs@lacap.com](mailto:capdocs@lacap.com) with a copy of all pleadings, including extension of time requests, motions to augment, Rule 8.340 letters, opening and reply briefs, and petitions.
- (4) CAP-LA requests that counsel contact us if the Court of Appeal asks for additional briefing. CAP-LA does not always get served with a Court's request for briefing after the briefs are filed, so please alert us if you get such a notice.
- (5) CAP-LA attorneys will review the compensation claim based upon the Guidelines for Appointed Counsel Compensation.
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## **7. SPECIAL RULES FOR “NO ISSUE” BRIEFS AND ABANDONMENTS**

It is critical for attorneys assigned to both assisted and independent cases to know that under no circumstances may a “no issue” brief be filed without first getting approval from CAP-LA. Similarly, even if you believe there is an adverse



consequence to going forward with an appeal, no appeal should be officially abandoned without first consulting with CAP-LA.

In California, there are various state and federal rights associated with appeals. Counsel has a duty to advocate on behalf of an appointed client and to raise non-frivolous issues, but the reality is that sometimes there are no arguable issues. In those cases, you have to file a brief in the court communicating that you have found no issues to argue, without making arguments adverse to your client. Depending on the type of case, there are different procedures and consequences for filing a “no issue” brief. In all cases, a “no issue” brief requires the filing of a brief with special language on the cover page, as well as the inclusion of a declaration from the appointed attorney affirming that there are no issues to raise. Sample “no issue” briefs for both criminal and dependency cases are found on CAP-LA’s website.

If you have reviewed the record in a case, completed the record, done appropriate legal research and consulted with the client and trial counsel, but nevertheless have found no legal issues to argue, contact the CAP-LA Staff Attorney assigned to the case to seek approval to file a “no issue” brief. First, confirm with the Staff Attorney that they have access to the electronic records in your case. Second, when asking for a “no issue” brief case review, it is requested that you email a draft copy of the Statements of Case and Facts in your case, as well as the declaration you will be attaching to the proposed filing. You should also attach a memo to the Staff Attorney briefly addressing the issues you considered and why they were rejected. Like with a draft AOB in an assisted case, please allow 10 days for a Staff Attorney to process a “no issue” review. In order to competently approve a “no issue” filing, the Staff Attorney needs time to closely review all the same transcripts and case documents that you considered. When you send the initial request to the Staff Attorney, let them know the due date for the brief. Be advised, you may need to seek an extension to allow the Staff Attorney time to review the case. In that case, do not reveal to the Court of Appeal that you are considering filing a “no issue” brief. Say only that you have reviewed the whole record, researched possible legal issues and need time for

further communication with project staff. This same review process should be followed when requesting permission to file an abandonment.

Once you receive approval from a Staff Attorney to file a “no issue” brief, you remain appointed unless the Court of Appeal removes you. In your letter to the client with the “no issue” brief, you have to inform them of their rights going forward and the timeline for their opportunity to file a pro per supplemental brief. The Court of Appeal will order a copy of the record be sent to the client. You will have to print out the complete record and mail it to the client in a timely manner so the client can prepare a supplemental brief in the timeframe allowed by the Court of Appeal. (If your client needs an extension of time to file their supplemental brief, it is appropriate for you to file an extension request on their behalf.)

The different types, and different consequences, of the court’s acceptance of “no issue” briefs are as follows:

(1) *Wende* brief: In *People v. Wende* (1979) 25 Cal.3d 436, 441, the California Supreme Court held that the Courts of Appeal must conduct an independent review of the entire record whenever appointed counsel submits a brief on direct appeal which raises no specific issues. This procedure applies to a first appeal as of right and is compelled by the constitutional right to counsel under the Fourteenth Amendment. After receiving a *Wende* brief, the court allows the client 30 days to file a supplemental brief. The court undertakes an independent review of the record and, if no issues are discovered, it will issue an opinion affirming the lower court’s ruling. If the client files a supplemental brief, the court will address those issues. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110.) If the court finds an issue to consider, you may be asked to brief the issue or the client may seek to have a different attorney brief the issue.

(2) *Phoenix H.* brief: In *In re Phoenix H.* (2009) 47 Cal.4th 835, the Supreme Court laid out the necessary steps for filing a “no issue” brief in a dependency case. In a *Phoenix H.* case, after receiving a “no issue” brief from appointed counsel, the court has discretion to allow the filing of a supplemental brief by the client. If a supplemental brief is not filed, the court will dismiss the appeal.

(2) **Delgadillo brief:** Based on the case *People v. Delgadillo* (2022) 14 Cal.5th 216, the Supreme Court approved a review practice specific to orders denying postconviction relief under remedial ameliorative legislation. Different than in *Wende* reviews, the court does not necessarily perform an independent review of the record to decide whether to affirm, although you can and should ask for the court to conduct an independent review of the record. In a *Delgadillo* case, the court will dismiss an appeal if there are no arguable issues presented.

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## 8. LIABILITY INSURANCE

CAP/LA has obtained 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.

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## 9. 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 Adminstrating Presiding Justices of the 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 in the [statewide claims manual](#). 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 \$140/hour. All other independent cases are paid at the rate of \$130/hour, and all assisted cases are paid at the rate of \$120/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. It is understood, however, that every case is different; the difficulty of a specific task in a specific case will determine whether compensation will be under or over 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 write an explanation in the space provided on the claim; if there is no explanation, the claim may be cut to the guideline default. Compensation may be claimed only for hours actually worked and expenses actually incurred, even if the claim is below the guidelines. A billing claim is submitted under penalty of perjury.

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**

There are four types of interim claims that may be submitted:

1. **Pre-AOB:** An interim claim may be submitted before the filing of the Opening Brief under two circumstances: (1) where the record length exceeds 1,500 pages, or (2) where counsel has been waiting for an augmented or corrected record longer than 90 days. For these types of early interim claims, counsel will only be compensated for time spent on record review (Line 2). All other categories of work and expenses can and should be billed on the interim claim submitted after the AOB is filed.
2. **Post-AOB:** An interim claim may be submitted for all hours and expenses incurred after the opening brief is filed, including unbriefed issues.
3. **Post-ARB:** An additional interim claim may be submitted after the reply brief is filed. The only additional time billed should be for time spent on drafting the reply brief itself (Line 8) and for reviewing the opposing brief (Line 10). No additional time or expenses may be claimed with this claim.
4. **Exceptional Circumstances:** In exceptional circumstances, the JCC/ACS may approve other early claims on the project director's recommendation on a case-by-case basis. The normal justification for an exception would be a long, unavoidable delay between appointment and the claim, causing substantial hardship to the attorney.

At the interim stage, 5% of the recommended amount for attorney services is held back as a protection against inadvertent overpayment; the holdback is paid with the final claim. Expenses are paid in full as recommended at the post-AOB interim claim.

No interim claims may be filed in NO-ISSUE CASES. In these cases, a panel attorney may file a final claim either: (1) 30 days after the brief is filed, or (2) after the opinion issues. If the claim is submitted before the opinion is filed, the attorney thereby waives any claim for later services, such as reading the

opinion or communicating with the client, unless the court orders supplemental briefing. If the court does so, counsel may file a supplemental final claim after the opinion issues.

Final Claims should be submitted upon completion of services, after all of the pleadings in the direct appeal have been filed, including the petition for review and, if applicable, the 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.

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 of Claims**

Compensation claims are made through the E-claim program found on the CAP-LA website at <https://new.lacap.com/eClaims/login.cfm>.