

SUPREME COURT OF CALIFORNIA

MEMORANDUM

Appendix to Supreme Court Policies Regarding Cases Arising From Judgments of Death Concerning Appointed Counsel's Duties

Counsel appointed in capital matters must be familiar with the duties set forth in the timeliness standards and compensation standards contained in the Supreme Court Policies Regarding Cases Arising From Judgments of Death, which are published periodically in Advance Pamphlets of the California Official Reports, in the "Rules" pages, and available on the website www.courts.ca.gov/5641.htm, and in desktop versions of the California Rules of Court. Important aspects of these policies are reiterated below in part I. Counsel is responsible for keeping up to date regarding any amendments to these policies. In addition, counsel must be familiar with the additional duties set forth in part II of this Appendix. For questions regarding the Policies or this Appendix, counsel should contact the court's Capital Appointment Coordinator/Advisor.

I. DUTIES STATED IN THE POLICIES

Appellate counsel in a capital case must take and maintain detailed, understandable, and computerized transcript notes, and must compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to appellate counsel's attention. Moreover, if appellate counsel's appointment does not include related habeas corpus/executive clemency representation, until separate postconviction habeas corpus/executive clemency counsel ("habeas corpus" counsel) is appointed, appellate counsel must preserve evidence that comes to his or her attention if that evidence appears relevant to a potential habeas corpus investigation. (Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, std. 1-1, 1st par.)

After separate habeas corpus counsel is appointed, appellate counsel must deliver to habeas corpus counsel copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation, and thereafter must update the "issues list" and the computerized transcript notes as warranted. Moreover, appellate counsel must consult with and work cooperatively with habeas corpus counsel to facilitate a timely investigation, and the timely preparation and filing (if warranted) of a habeas corpus petition by appointed habeas corpus counsel. (Policy 3, std. 1-1, 1st par.)

Appointed appellate counsel's scope of representation includes the preparation and certification of the record on appeal; representation in the direct appeal before the California Supreme Court; preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court, and, if certiorari is granted, preparation and filing of a brief or briefs on the merits, and preparation and presentation of oral argument; and representation in the trial court relating to proceedings to set an execution date pursuant to Penal Code section 1193. (Policy 3, std. 2-1, 1st par.)

Appointed habeas corpus counsel's scope of representation includes the investigation, and preparation and filing (if warranted), of a habeas corpus petition in the Supreme Court, including any informal briefing and evidentiary hearing ordered by the court and any petition to exhaust state remedies; representation in the trial court relating to proceedings to set an execution date pursuant to Penal Code section 1227; and representation in executive clemency proceedings before the Governor of California. (Policy 3, std. 2-1, 2d par.)

As noted, habeas corpus counsel in a capital case has a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel, and appellate counsel. (Policy 3, std. 1-1, 2d par.)

Habeas corpus counsel's duty to investigate does not impose on such counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment of death. Instead, habeas corpus counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim. (Policy 3, std. 1-1, 2d par.) A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of the appellant's reply brief on the direct appeal, or within 36 months after appointment of habeas corpus counsel, *whichever is later*. (Policy 3, stds. 1-1.1 & 1-1.2, as amended eff. Nov. 30, 2005; see also, *In re Robbins* (1998) 18 Cal.4th 770.)

In the event that more than one counsel is appointed to represent the same defendant jointly, either in a capital appeal, in related habeas corpus/executive clemency proceedings in the Supreme Court or in both classes of proceedings upon an "appellate/habeas corpus" appointment, one such attorney must be designated as lead counsel for each *separate* appointment. Lead counsel is responsible for the overall conduct of the case (i.e., the capital appeal, the related habeas

corpus/executive clemency proceedings or, in appellate/habeas corpus representation, both classes of proceedings) and for supervising the work of appointed associate counsel and any nonappointed, supervised counsel. (Cal. Rules of Court, rule 8.605(c)(2); see also, Advisory Com. com. to subd. (c).)

II. ADDITIONAL DUTIES OF APPOINTED COUNSEL

A. Cooperation with Assisting Entity or Counsel

Appellate counsel and habeas corpus counsel also have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Appointed counsel's cooperation and close working relationship with his or her assisting entity or counsel are important to achieving the common goal of maintaining a high level of legal representation in all capital appeals and related habeas corpus/executive clemency proceedings.

The Supreme Court requires the assisting entity or counsel to report to it periodically and in detail on appointed counsel's case progress. The court places considerable weight on these reports in determining compensation of counsel and whether counsel should be given additional capital case appointments.

Assisting entities that may be designated in this capacity include, as appropriate, the California Appellate Project (CAP) in San Francisco, the Office of the State Public Defender (OSPD), and the Habeas Corpus Resource Center (HCRC). (See Cal. Rules of Court, rule 8.605(c)(5).) In the event the designated assisting entity or counsel has a conflict of interest, the Supreme Court will designate an alternative assisting entity, or an experienced private capital appellate and/or habeas corpus practitioner, as appropriate.

Appointed counsel's obligation to cooperate with other appointed counsel and the assisting entity or counsel includes the following duties:

1. Appellate counsel must promptly make available to the assisting entity or counsel, for review, the above-described computerized transcript notes and detailed list of potentially meritorious habeas corpus issues, as well as a list of potential issues on the direct appeal.
2. Upon a request from the assisting entity or counsel, and after consultation with the Capital Appointment Coordinator/Advisor, appellate counsel must either make a copy of relevant portions of the record available to that entity or counsel for its review, or permit the assisting entity or counsel to photocopy the record.
3. Both appellate and habeas corpus counsel must promptly initiate and

maintain communication with the defendant/appellant, trial counsel, and any separately appointed counsel.

4. Both appellate and habeas corpus counsel must review carefully all manuals, newsletters, and other materials distributed by any assisting entity or counsel, and make appropriate use of the resources available in brief and information banks.
5. Unless the Supreme Court advises counsel otherwise, both appellate and habeas corpus counsel are expected to attend post-appointment training programs presented by the assisting entities or counsel.
6. Habeas corpus counsel must submit to the assisting entity or counsel a detailed outline of potential habeas corpus issues to be investigated and a proposed investigation plan, and must conduct a prompt investigation, as described above, of any potentially meritorious habeas corpus issues.
7. Appellate counsel must maintain ongoing consultation with the assisting entity or counsel regarding possible appellate issues; drafts of motions, pleadings, and briefs; and oral argument. The court anticipates that all appointed counsel will participate in a moot court in preparation for oral argument.
8. Both appellate and habeas corpus counsel must consult with the assisting entity or counsel regarding the amount of time appointed counsel plans to spend researching the direct appeal and/or conducting a habeas corpus investigation. In so doing, appointed counsel must consult, and be guided by, the Supreme Court's (a) Policy 3 timeliness standards and compensation standards, referenced above, as well as the court's (b) "time and costs" payment guidelines and (c) "fixed fee" guidelines. The time-and-costs payment guidelines and the fixed fee guidelines are published periodically in Advance Pamphlets of the California Official Reports, in the "Rules" pages, together with the Policies. These and related materials are available on the website www.courts.ca.gov/5641.htm, and in desktop versions of the California Rules of Court. The court's Internal Operating Practices and Procedures are published periodically in Advance Pamphlets of the California Official Reports in the "Rules" pages, and are available on the website www.courts.ca.gov/2007_Supreme_Court_Booklet.pdf, and in desktop versions of the California Rules of Court.
9. Both appellate and habeas corpus counsel must submit drafts of all motions, pleadings, briefs, petitions and replies, investigation plans, etc., to the assisting entity or counsel for review, allowing sufficient time for that review and for incorporating appropriate suggested changes into the final document.

10. Both appellate and habeas corpus counsel must provide the assisting entity or counsel with copies of all court orders, motions, pleadings, briefs, petitions, replies and responses, etc., filed by appointed counsel and by counsel for the respondent.

The Supreme Court anticipates that all appointed counsel will comply with these duties and provide the foregoing level of cooperation with other appointed counsel and with the assisting entity or counsel. The court will consider appointed counsel's cooperation and compliance with these duties in determining counsel's compensation (either fixed fee or time-and-costs) and counsel's suitability for subsequent appointments. Also, unless counsel has substantially complied with these duties, the assisting entity or counsel may be unable to submit the substantial compliance letter required under fixed fee guideline 5 ("Progress Payments").

If appointed counsel, or the assisting entity or counsel, identifies problems in complying with these duties, appointed counsel, or the assisting entity or counsel, should promptly notify the Capital Appointment Coordinator/Advisor.

B. Other Duties of Appointed Counsel Procedures as adopted by the California Supreme Court on August 22, 2001, and amended July 27, 2005, May 18, 2011, and March 19, 2014

1. Contents of Declarations in Support of Extension of Time (EOT) Applications

Any declaration submitted in support of an EOT request must include the following:

- a. The original due date for the uncompleted matter for which an EOT is sought; the total amount of time that has elapsed since that date; and the number of prior extensions requested and granted or denied.
- b. The number of pages in the record on appeal, as follows: (a) the number of pages in the combined record on appeal, both reporter's and clerk's transcripts, *including* juror questionnaires, and (b) the number of pages in the combined record on appeal, *excluding* the juror questionnaires. (This information is not required if the EOT request concerns only habeas corpus briefing.)
- c. A good faith estimate of the percentage of work accomplished to date, with regard to the uncompleted matter for which an EOT is sought. A good faith estimate of the amount of time required for the remaining work to be done, with regard to the uncompleted matter for which an EOT is sought, and a proposed target date for the filing of that matter.

Pursuant to the court's longstanding practice, extensions of time for briefing in automatic appeals and informal briefing and post-order to show cause briefing in habeas corpus proceedings will be granted in up to 60-day intervals.

2. *Confidential Status Report (CSR) of Appointed Counsel and Assisting Entity or Counsel*

In accordance with longstanding court practice, until appointed appellate counsel files the appellant's opening brief, and until appointed habeas corpus/executive clemency counsel files a capital-related state habeas corpus petition, a current CSR must be submitted every 60 days. Lead appointed counsel must serve a copy of the CSR on the assisting entity or attorney and on any appointed associate counsel, and must submit proof of service with the report. A CSR submitted by appointed counsel must include the following:

- a. Current case status, including a good faith estimate of the percentage of work accomplished to date with regard to each pending uncompleted task.
- b. Progress during the last 60 days.
- c. Problems and reasons for any delay.
- d. Future plans, including a good faith estimate of the amount of time it will take for the remaining work to be done as to each pending uncompleted task, and a proposed target date for completion of each such task.

Whenever appointed appellate counsel has filed a request for an EOT to file the appellant's opening brief or appellant's reply brief, or appointed habeas corpus/executive clemency counsel has filed a request for an EOT to file the reply to an informal response to a petition for a writ of habeas corpus, and the court has subsequently denied that request, appointed counsel must submit to the court and serve upon the assisting entity or attorney a CSR as described above 30 days after the court's order denying the request and every 30 days thereafter until the brief or reply has been filed.

In addition, the assisting entity or attorney must also submit to the court 30 days after the date of the court's order and every 30 days thereafter until the brief or reply is filed a CSR providing the following:

- a. The assisting entity's or attorney's assessment of current case status, including a good faith estimate of the percentage of work accomplished to date with regard to each pending uncompleted task.
- b. The assisting entity's or attorney's assessment of appointed counsel's progress during the last 30 days.

- c. The assisting entity's or attorney's views regarding any problems and the reasons for delay.
- d. Future plans and arrangements appointed counsel and the assisting entity or attorney have made, including the assisting entity's or attorney's good faith estimate of the date when the brief or reply will be filed.

The assisting entity or attorney must serve a copy of the CSR on the lead appointed counsel and any appointed associate counsel being assisted, and must submit proof of service with the report.

3. Supplemental Declarations and Confidential Status Reports

As appropriate, counsel of record may be requested to submit a supplemental declaration to establish good cause for any requested EOT. Similarly, appointed counsel, as appropriate, may be requested to submit a supplemental CSR.

4. Certification or Declaration of Contents of Confidential Status Reports are Made Under Penalty of Perjury

In all automatic appeals and capital-related habeas corpus proceedings in which appointed counsel of record is required to submit a periodic CSR, and in all such cases and proceedings in which appointed counsel is not required to submit a CSR but nevertheless chooses to do so, the CSR must contain a certification or declaration under penalty of perjury by lead counsel that the contents of the CSR are true and correct. (Code Civ. Proc., § 2015.5.)

5. Proof of Service

In all automatic appeals and capital-related habeas corpus proceedings in which counsel of record is required to provide the court with the original of a proof of service (Policy 4, Supreme Court Policies Regarding Cases Arising From Judgments of Death ["Service of process by counsel for defendant"]), such delivery must be evidenced by a certification or declaration under penalty of perjury. (Code Civ. Proc., § 2015.5.)