

**Update: Appellate Project Budget Request**

June 3, 2015

To: Members of the Administrative Presiding Justices Advisory Committee

One year ago, the appellate projects, whose contracts have not increased since 2007, requested support from this Advisory Committee for a 5% increase in funding as a first step towards restoring the funding of their programs to adequate levels. Here, the projects renew and update that request, now seeking an increase of 12%, which would be the minimum needed to adequately fund their work in this era of skyrocketing rent, health care, and other costs. The projects also provide some clarification about the functions of the appellate projects and the need for additional funding.

**Supplemental Request for Funding Support**

The appellate projects have now gone eight years with no increase in their contracts. If the 2016-2017 fiscal year is the first opportunity for any increase, the project contracts that take effect January 1, 2017 (since those contracts correspond to the calendar, not fiscal, year), will be the first time the projects will have seen an increase in 10 years. Meanwhile, rent, personnel costs, technology expenses, and other costs of maintaining an office and providing services to the Court, to the panel, and to indigent clients in California have continued to climb. The projects are functioning law offices with income earned through billable hours (specified in their contracts) and with overhead, much of which is rising. The projects' income has not been sufficient to cover the overhead for several years now, and the disparity between the two keeps growing.

Like the courts, the appellate projects have worked to economize in every way they could, including reducing staff where possible. However, the needs explained in the appellate projects' previous request for support are, one year later, now even more critical.

The present contracts simply do not contemplate the large ongoing increases in rent since 2007 as the real estate market has roared back, or, in some cases, the moving expenses where some of the projects have been priced out of their locations. CCAP has already relocated its offices this year and is estimating the move to have cost in excess of \$100,000. For FDAP, rent in 2007 was \$160,484. That office now has to move, and the new rent for a smaller office more distant from the court, is estimated to be in excess of \$230,000, with 3% annual increases for the seven years of the lease. The present contracts do not support these increased costs. CAP/LA's rent in 2007 was \$261,141, while its rent this year is \$352,113, with a 5% escalation every year to 2020. SDAP will have to vacate its premises by October 31 of this year and has not yet found new space in the highly elevated Santa Clara/San Jose market. Again, the 2007 contract funding still found in the 2015 contracts no longer covers the cost of doing business.

Those contracts also do not envision and provide no budget to respond to the technological developments that have materialized over the past few years, requiring new equipment, new operating systems and software, new office management programs that respond to new and more complex JCC reporting standards, and a heightened level of very costly security protection. Electronic filing, in particular, requires increased staffing to manage the exploding number of electronic documents. FDAP, for instance, had obtained some cost-savings through a leaner

support staff but has now had to return back to the higher staffing levels particularly to respond to processing needs for electronic documents.

Each of the appellate projects has responded to the fiscal challenges in its own way, but uniformly the result has been to the detriment of the staff, whether lowering pensions and some benefits (ADI plans on eliminating pension contributions for 2014 and 2015 in order to provide staff with a cash sum for each of those years; CAP/LA and SDAP reduced pension contributions to 8%) or reducing salaries (CCAP reduced salaries in 2010 by 2%, and that change remains in place) or operating with leaner support staffs as CAP/LA and FDAP did or eliminating some tools that the staff previously found indispensable. As an example, CAP/LA's 21 attorneys (including directors) now share only six Daily Journals and must use a diminished in-house library of books, and FDAP has reduced its law library spending by 40%. While reductions in pension contributions have been a way to economize without staff feeling immediate financial consequences, as staff members reach retirement age, these actions ensure that the effects of the inadequate budgets will be felt long term. Reducing staff has sometimes helped but has placed a heavier work burden on those remaining.

The contracts have also not kept pace with the double-digit increases in medical insurance premiums year after year which, when passed on in part to staff members, have had the net effect of further decreasing compensation, notwithstanding the higher costs of goods and services for individuals during that period. CAP/LA has been told by Blue Cross to expect an increase close to 40% in July of this year. Kaiser's increase will be about 6%. The other appellate projects are similarly having to deal with these types of increases. Many staff members, both attorneys and support staff, are reaching an age at which the importance of a decent medical insurance package is elevated and often critical, making reduction of coverage benefits an unacceptable choice.

Salary increases are also important, not just because of the needs and the morale of staff, but this issue is especially highlighted when experienced staff members who retire must be replaced, and the projects find that they are no longer competitive in the workforce market. In the past eight years, the salaries of project personnel have largely remained stagnant. Notably CCAP has reduced its salaries by two percent, and SDAP's Executive Director has recently taken a voluntary ten percent pay cut. But this does not tell the whole story. In varying degrees at the various projects, significant portions of the double digit health insurance premium increases have been passed on to the staff, deductibles and co-pays have increased, parking and other costs employees must bear have gone up, and employer pension contributions have been lowered. Thus, the value of employee take-home has been deflated since 2007 and will continue to decrease until budget increases at the projects can be realized. Meanwhile, the number of hours worked and the quality expected have remained constant.

Other office expenses have also increased. The point is that even with the economizing efforts of the offices, they cannot continue to function in 2016-2017 on a 2007 budget. Last year's request for support of a BCP asked for a 5% increase, which would have taken effect in the January 2016 contracts. The amount was considerably less than what was needed but was suggested by the projects because of their sensitivity to the fact that the Court's own staff was still subject to austerity measures. The present request for a BCP, we are told, if granted, will not take effect until January 2017. That would mean 10 years of trying to function on a 2007 budget. In that light, a more realistic assessment of need across the projects, for all the reasons mentioned above and in the previous memo, would be 12 percent.

In 2007, the funding of all five appellate project offices was a total of \$17,468,187. In 2015, the funding was the same. With a 12% increase prospectively beginning with their January 2017 contracts (without compensating retroactively for 10 years of flat budgets), the total cost of the projects would be \$19,564,369, a growth of \$2,096,182 overall for the five appellate projects. This amount is below the 13.5% increase in the California Consumer Price Index from the time of the last contract increase through February of 2015.<sup>1</sup>

### **Funding the Appellate Projects Is Necessary to Maintain Quality Appellate Court Representation**

There is little question about the job the appellate projects do and the needs they fill. As described below, the work of the projects cannot be done without staff attorneys of the highest caliber, who bring a set of skills not easy to find in a single individual: the deepest knowledge of substantive law and appellate procedure, exceptional writing skills, and the ability to mentor and teach the panel attorneys in the contexts of individual cases and training sessions. The ability of the projects to staff their offices with such attorneys is in jeopardy without adequate funding.

The appellate projects are the Court of Appeal's quality-control mechanism for California's court-appointed counsel system. The high quality of appointed counsel representation, particularly the briefing, some sitting justices might remember, did not exist with any consistency prior to the advent of the appellate projects in the mid 1980s.

Before the creation of the appellate projects, as noted in the Judicial Council's 1970 annual report, a newly admitted lawyer could be appointed to represent a client convicted of murder simply by applying to the clerk's office, with little focus on or knowledge about that lawyer's qualifications and with no "matching" of attorney skills and experience to the complexity of the case. Payments were made at \$20 per hour without standards or guidelines as to the number of appropriate hours and as to expectations of the specific tasks that needed to be completed. The report cited testimony that 30 to 40 percent of the appointed counsel work fell "below an acceptable level of quality."

Also in 1970, the California Supreme Court decided *In re Smith* (1970) 3 Cal.3d 192, highlighting the infirmity of the pre-projects appointed-counsel system. Smith had been convicted of kidnapping and rape. The case was, in the Supreme Court's words, "bristling with arguable [appellate] issues." Appointed counsel in the Court of Appeal filed a 21-page opening brief, of which the first 20 pages were a recitation of the facts. Counsel's legal argument consisted of one page urging the "ludicrous proposition" (court's words, again) that a reversal was required because the prosecution failed to expressly prove that Smith was not married to the woman he had raped. The Supreme Court held, in this case of first impression, that counsel's representation was ineffective. Until 1985, the Courts of Appeal frequently relied on *Smith* to address piecemeal this systemic problem.

In 1984, the Judicial Council reported to the Legislature that for indigent clients, California still had an unacceptable "non-system," noting that the most significant improvements were generated by the California Appellate Project (CAP-SF), created to handle death penalty cases in

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<sup>1</sup> <https://www.dir.ca.gov/OPRL/CPI/EntireCCPI.PDF>

the California Supreme Court, and Appellate Defenders, Inc. (ADI), operating in the Fourth Appellate District. Then, in 1985, the U.S. Supreme Court explicitly expanded the right to counsel in indigent criminal appeals, requiring *competent* representation. (*Evitts v. Lucey* (1985) 469 U.S. 387.)

During the mid to late 1980s, appellate projects were created in each of the five other appellate districts.

Since that time, the appellate projects, pursuant to California Rules of Court, rule 76.5 (and later rule 8.300), have administered the court-appointed counsel programs in each district, overseeing and maintaining the panels of attorneys accepting such appointments. The projects have admitted and removed panel members based on the quality of their work, matched the attorney's skills to the needs of each case when making appointment recommendations to the Court, worked with counsel one-on-one in both "assisted" and "independent" cases, presented training sessions in both substantive and procedural areas, and developed materials for the education, development, and use of the panel. This work cannot be done without the projects being funded at a level that allows them to hire and retain exceptionally highly-qualified staff.

The appellate projects have also evaluated all claims for compensation and have recommended payment on a case-by-case basis pursuant to standards and guidelines adopted originally by Chief Justice Lucas and the administrative presiding justices in the early 1990s. These peer evaluations of appointed counsel's claims as well as the quality of their work product are a critical aspect of the projects' mandate. The evaluation process provides key information necessary for matching counsel to future cases (or not).

The appellate projects have been audited, evaluated, and analyzed by a Judicial Council task force, the justices in the districts, efficiency experts, and cost accountants provided by the State. A Judicial Council task force, the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC), has oversight responsibility for the court-appointed counsel system.

The appellate projects have passed every test, and in the process, have developed the skills and professionalism of court-appointed counsel, improving the quality of appellate work performed in the Courts of Appeal and aiding the appellate courts through administration of the court-appointed counsel system for almost 30 years. During that time, the mandate of the appellate projects has remained consistent: to ensure that indigent clients receive competent representation and that the court receive appropriate and useful briefing

The pool of about 62 appellate project staff attorneys statewide (not including executive and assistant directors) – highly experienced and skilled in substantive and procedural law as well as in mentoring, which are necessary attributes for maintaining credibility with the panel of about 900 private-sector attorneys – oversees and provides services on around 10,000 open cases at any one time. The level of expertise of the staff attorneys is reflected in their long history of work in criminal and dependency law. As an example, the average CAP/LA staff attorney has worked in the field for 33 years.

As further indication of the successful work of the appellate projects and of the significance of that work to the operations of the Court of Appeal, the Hon. Joan Dempsey Klein, Presiding Justice, Second Appellate District, Division Three, whose tenure on the appellate bench ranged

from 1978 until her retirement in 2015, wrote a letter to the Administrative Presiding Justice of the Second Appellate District and to Anthony Murray, President of the California Appellate Project Board of Directors, presenting her views regarding the importance of the appellate project in that district. Her observations would have similar application in the other districts. That letter is attached hereto.

### **Conclusion**

The appellate projects hereby request the support of the Administrative Presiding Justices for the above-described increase in the funding of the projects.

Most sincerely,

Elaine Alexander, ADI  
George Bond, CCAP  
Dallas Sacher, SDAP  
Jonathan Soglin, FDAP  
Jonathan Steiner, CAP-LA

Attachments: (1) Letter from Presiding Justice Joan Dempsey Klein (ret.); (2) Original request, dated April 17, 2014, for support of a BCP for the appellate projects; and (3) New appendices updating those previously attached to the April 17, 2004, request.



STATE OF CALIFORNIA  
**Court of Appeal**  
SECOND APPELLATE DISTRICT  
DIVISION THREE  
300 SOUTH SPRING STREET  
LOS ANGELES, CALIFORNIA 90013

JOAN DEMPSEY KLEIN  
PRESIDING JUSTICE

(213) 830-7473  
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October 1, 2014

Administrative Presiding Justice Roger Boren  
California Court of Appeal  
Second Appellate District, Division Two  
300 South Spring Street  
Los Angeles, California 90012

Anthony Murray, President, CAP Board of Directors  
Loeb & Loeb, L.L.P.  
10100 Santa Monica Boulevard, Suite 2200  
Los Angeles, California 90067

Re: California Appellate Project, Los Angeles

Dear Administrative Presiding Justice Boren and Mr. Murray:

I am writing to you as Administrative Presiding Justice of the Second Appellate District and as President of the California Appellate Project's Board of Directors to express my appreciation for the work of the California Appellate Project's Los Angeles office (CAP/LA). Since 1986, CAP/LA has administered the panel of lawyers who accept appointments to represent parties in criminal, juvenile delinquency and dependency appeals and other matters where the appointment of counsel for indigents is required.

I have been Presiding Justice of Division Three of this District since April 1978. As I am preparing to retire and as I am one of the few remaining justices who has seen in depth the work of appointed appellate counsel long before the advent of CAP/LA, I wanted to set down my views regarding the significance of CAP/LA so that a new justice appointed to this District will not take for granted the quality of work done by counsel under the supervision and inspiration of CAP/LA.

Barring the short time that the Office of State Public Defender handled roughly a third of our indigent appeals, the unsupervised work by lawyers appointed to handle felony and juvenile appeals led to some truly bad results. It was not uncommon for briefs to miss major issues or to present an unreliable or incomplete summary of the facts. All too often briefs were sloppily written and produced. Perhaps the greatest problem was that cases were assigned to counsel with no professional consideration given to the difficulty of the case and to counsel's experience and ability to handle such a case.

Administrative Presiding Justice Roger Boren  
Anthony Murray, President, CAP Board of Directors  
Re: California Appellate Project, Los Angeles  
October 1, 2014  
Page 2

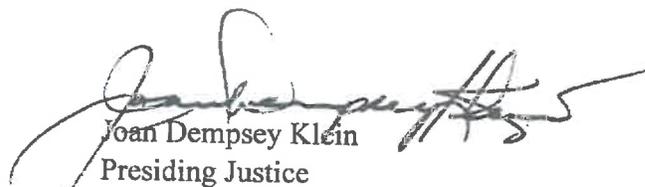
The effect of this was to shift the considerable burden on the authoring justice and his or her staff to review the record to ensure that a miscarriage of justice did not occur. Of course, this was not true of every case, but it was not uncommon for justices to receive a ten-page brief raising a single issue in a case with a record of thousands of pages chronicling a major felony or felonies. All this changed with the advent of CAP/LA. In its supervisory role, CAP/LA recommends an appointment that matches the complexity of each case with the particular skill set and knowledge of the lawyer appointed to handle the appeal. Then, depending on the attorney's experience level, CAP/LA provides appropriate substantive and procedural assistance designed to assure that the client receives quality representation and that the court receives useful and appropriate briefing.

There is another area in which CAP/LA renders critically important services. Prior to CAP/LA, compensation of appointed counsel was in the hands of the authoring justice who was required to pass on the request for compensation. Given that there were no guidelines and not even a standard form for making the compensation claim, this was a responsibility that no justice liked. CAP/LA now acts on behalf of the court in reviewing counsel's work and recommending payment pursuant to judicially created guidelines in all cases with the result that compensation to counsel is determined in a coherent, uniform manner. CAP/LA also uses this evaluation process to determine the complexity of cases to which a lawyer may be assigned in the future. I cannot imagine how this function could be performed today by the individual justices.

Further, many times a year, CAP/LA conducts training sessions specifically targeted at key issues in the criminal and juvenile law areas and actively trains the most able new attorneys to take on the more difficult cases as quickly as possible.

The fact of the matter is that CAP/LA has become an indispensable part of the operations of this court. That is quite an achievement.

Very truly yours,



Joan Dempsey Klein  
Presiding Justice

cc: Jonathan B. Steiner, Executive Director  
California Appellate Project/ Los Angeles

**Appellate Project Budget Request for FY 2015-16**  
April 17, 2014

To: Members of the Administrative Presiding Justices Advisory Committee

The appellate projects are writing in the hope that a Budget Change Proposal (BCP) for the projects might result in an increase for the projects in the Judiciary's FY 2015-16 budget. We believe a contract funding increase of approximately 5% is both reasonable and necessary. An even greater increase is supportable based on our needs described below, but we save for next year—when the state's recovery is hopefully more fully realized—a discussion of additional funding. The reasons for this request, which amounts to a cumulative total of approximately \$873,000 annually for all five appellate projects, are straightforward.

If no BCP is prepared this year to effectuate a change in FY 2015-16, the projects will experience their eighth consecutive year without any increase in funding. In the years of the fiscal crisis, the projects' contracts were frozen at the 2007-2008 level. At the same time, the projects continued to meet all of their contractual obligations, including the number of billable hours worked, with no reduction in services.

Unfortunately, the cost of doing business increased significantly over that period. With no increase in funding, maintaining their quality control function became increasingly difficult for the projects. Now, if they do not receive the requested funding change, the projects will be facing a significant crisis that will affect their ability to maintain their staffing. For example, recently, after the retirement of some staff attorneys, panel attorneys rejected offers to work as project staff attorneys because project compensation, including benefits, was less than what the attorneys could make on the panel, even considering overhead.

Before analyzing the needs of the appellate projects, a word about their differences is appropriate. The appellate projects are very much like the DCAs in that each has its own personality and approach to internal administration. Each project is a non-profit, public interest legal corporation with its own board of directors, and each has shaped itself over the past 27 to 30 years to be responsive to the particular needs and circumstances of cases, justices, staff, and clerks in the DCA to which it was assigned. The differences among the projects run the gamut, from their technological needs to the ways they provide assistance to panel attorneys and the clients. For that reason, comparing fiscal and administrative decisions among the projects as if they were a single unified agency, would lead to anomalous results.

Regional difference, along with the characteristics of each particular project's staff, both attorneys and support personnel, have played a key role in molding how each project

does its work. Thus, while all have substantial fiscal needs, those needs differ in the details. The differences among the projects over the years have been a source of strength to the overall court-appointed counsel system, creating a flexible organism in which the projects share what they learn with one another, i.e., a fertile and productive laboratory.

### **The Increased Cost of Doing Business**

From June 2007 (the end of the fiscal year before the last contract increase), through February 2014, the Consumer Price Index rose approximately 12.2% in California.<sup>1</sup> But the inflation experienced by consumers does not tell the entire story of increased expenses for the projects' small businesses. While costs have increased across all areas of the projects' budgets, several areas--health care, rent, administrative burdens, and technology--require special mention.

#### *Health Care*

Between 2007 and 2013, the average annual health care premium for family coverage for small businesses rose 31.6%.<sup>2</sup> For the projects, health care costs have been particularly painful. The projects face not only overall rate increases but growing costs from the "graying" of the employees. Facing significant double-digit increases in health-related costs during the last six and a half years, the projects have employed various strategies, such as changing carriers, increasing employee contributions to premiums, reducing benefits through less robust plans, and offering incentives to waive coverage or choose less expensive plans.<sup>3</sup>

#### *Rent*

The cost of renting office space has become a substantial issue. While present improvements in the State's economic condition may make this an opportune time for a BCP, the economy has also engendered less favorable office rental conditions. The projects face different circumstances depending upon the terms of their current leases as well as regional differences in the office leasing market. Some examples demonstrate the impact of economic conditions on office space for the projects.

Two years ago, CAP-LA was able to stay in its location only by negotiating a slightly lower initial rent but agreeing to an escalation clause increasing rent 5% per year until 2020. FDAP was able to negotiate a favorable fixed-rate lease extension in 2010, but that extension expires on June 30, 2015. A very hot rental market in the Bay Area has led FDAP's broker to estimate that FDAP is facing as much as a 100% increase (i.e. *an*

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<sup>1</sup> <http://www.dir.ca.gov/OPRL/CPI/EntireCCPI.PDF>

<sup>2</sup> Kaiser Family Foundation, 2013 Employer Health Benefits Survey, Exs. 1.12 and 1.13. (<http://kff.org/private-insurance/report/2013-employer-health-benefits/?special=exhibits>)

<sup>3</sup> Appendix C shows the increased costs as well as the specific cost-savings changes to health plans made by the projects.

additional \$140,000 annually) if FDAP remains at its current location in San Francisco. If FDAP were to relocate to Oakland, it would face at least a 30% rent increase, plus moving costs. CCAP's current lease also ends in 2015. The building owners have proposed, effective February 1, 2015, an 11.2% increase. CCAP is actively looking for new space. ADI's total rent under its lease starting in 2010 is 19% higher than the previous lease. SDAP's building is being sold, and that project expects to be evicted by October 31, 2015. The prospects for a favorable lease rate in the fall of 2015 are very uncertain.<sup>4</sup>

### *Administrative Burdens*

In the past decade, new administrative burdens have increased costs. Compliance work related to pension plans, labor laws, and IRS filings, as well as local government requirements, has become more complex and time consuming, burdening the projects with increased non-billable hours of work. The greater complexity of the regulations and compliance requirements, has led to the need for expensive outside professional consultations.

### *Technology*

Aging equipment, new AOC data-transfer protocols, and electronic filing programs instituted by the courts, have driven up project technology costs.

The technology infrastructure--computers, printers, servers, software, etc.--are the basic tools needed by attorneys and support staff. Without these, the number of staff needed to perform the various tasks would be exponentially larger. The hardware at some of the projects is now very old and often fails, leading to frustration and work product delays. In addition, Microsoft has ended support and security updates for Windows XP, thus putting most existing desktop computers at risk, further necessitating immediate replacement.

All DCAs are requiring more electronic documents. That movement has been slow but is now accelerating, requiring faster servers and computers at the projects, with larger memory and space capabilities. The sea change in the way documents are communicated and maintained has had a huge impact on project staff; the time needed to control and manage documents has greatly expanded, especially during these transition years in which both electronic and paper versions of documents are often required.

The AOC's development and implementation of new data transfer protocols--including for appointments, panel compensation claims, and monthly invoices--have required that the projects develop new and upgraded database systems and devote many hundreds of hours of staff time to adapting to new data requirements. In fiscal year

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<sup>4</sup> Appendix D shows each project's rent in the year of the last contract increase, the current year, and two years going forward.

2009-2010, the AOC provided \$20K to each project for developing and testing the first version of one of several protocols for transferring statistical data from the projects into the AOC's new database structure. All other database development for the projects, which includes design, analysis, coding, user interface implementation, testing, and data conversion, as well as creation and testing of the final AOC transfer engines that will actually be used, have taxed resources to date at the various projects to the extent of over \$750,000.

In the past, the AOC has recognized that the projects' contracts do not contemplate major capital investments, such as replacing old hardware (including photocopiers and telephone systems) and software. For that reason, the AOC has occasionally provided technology grants customized to the specific needs of each individual project, independent of the contracts. The last such equipment grant was in June 2007, but now the projects have been told such funds are unavailable. Without these grants, the projects have found it difficult or impossible to buy the needed equipment.

One example demonstrates the critical financial nature of the problem of aging technology infrastructures: CAP/LA could no longer put off updating its computer infrastructure. Without funds for computers, monitors, servers, related electronics, and associated software, CAP/LA had to negotiate an agreement with a vendor that will spread the expense over 4 years, thus incurring additional interest and finance charges. The annual cost under this plan is about \$40,788, an amount beyond CAP/LA's present budget, but significantly less than the full cost of an upfront purchase.

These examples--salaries (discussed more below), health care, rent, administrative burdens, and technology--illustrate the need for and purpose of the BCP.

### **Compensation Reductions**

Since 2007, with few exceptions, project salaries have been totally static. At the same time, compensation has been reduced through increased employee contributions to health care insurance premiums, and decreases in salaries and/or pension.<sup>5</sup> As small non-profit organizations, the projects can provide only defined-contribution retirement plans, not defined-benefit plans like CalPERS. The decreased contributions to pension thus dramatically impact the funds employees will have available in retirement. Thus, project employees have received a triple hit: salaries that have not increased, pensions and/or salaries that have been reduced, and increased payment for medical coverage. At the same time, staff attorneys have experienced no decrease in the number of billable hours they must complete, and support staff members have had only increased duties to perform, especially at projects that have reduced the number of support staff.

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<sup>5</sup> For a more detailed description of salaries at the projects and how each project reduced compensation, see Appendices A (Salaries and FTEs by Project), B (Current Salaries - Snapshot of all Projects), and E (pension history).

Needless to say, the immediate and long-term effect on employee morale is of great concern.

As mentioned above and discussed further below, the decreased value of the compensation the projects can offer is a tremendous impediment to retaining and hiring quality staff.

### **Cost Savings in Other Areas Cannot Make Up for the Increased Costs of Doing Business.**

In addition to the compensation and staff reductions mentioned above, all the projects have scoured their budgets for ways to save money.

For the most part, reducing attorney staff to save costs has not been a practical solution for the appellate projects. The primary constraint on attorney staff reduction is the contractual obligation to produce a fixed number of billable hours each year. In contrast, in these years of static funding levels, several projects have reduced support staff positions.

Further contraction of staff is not feasible; the present staff sizes provide no buffer for illness or other real life exigencies. For instance, long stretches of medical leave for two attorneys during 2013 made it difficult for FDAP to meet the contractual billable hours requirement. As a result, FDAP is now contemplating filling its vacant attorney position. In addition, electronic filing has complicated the processing of documents and created more work for support staff, especially in those projects still handling both electronic and paper versions. At this point, both CAP-LA and FDAP are considering adding a support staff person. Their personnel are the projects' most important assets, accounting for around 80% of their budgets. With aging employees and with salary resources becoming less adequate even for existing staff, the projects are at a point at which their viability depends on their being able to invest *more* in the people who do the work in their offices.

The projects have cut cost in every way they could, including eliminating large portions of their libraries, arranging for less expensive supplies, minimizing use of the fastest methods for delivery of transcripts to the panel, relying more on electronic documents whenever possible to reduce copying, shipping and storage costs, and other such measures. But the major issues remain: non-competitive salaries, declining employee morale, escalating costs of rent and health care, and inadequate technological infrastructures.

### **Ability to Retain Staff and Maintain Quality**

As mentioned above, a critical trend that demonstrates the effects of being underfunded is that multiple projects have had great difficulty filling staff attorney positions after an attorney has retired; prospective attorneys have declined project offers because

remaining on the panel can provide better financial security even when benefits are considered. This problem is not limited to attorney staff. One project lost an essential support staff member who was offered a better salary and benefits package by the Court of Appeal.

### *Background*

The appellate projects, as initially conceptualized by the Judiciary during the term of Governor Deukmejian in the mid-1980's, were designed to deal with the critical problem of insufficiently talented and inadequately trained attorneys being assigned to handle appeals in which the appellant's liberty or family interest was at stake. As early as 1970, a Judicial Council report had noted that legislative testimony indicated a third or more of criminal appeals "fell below an acceptable level of quality." By 1984, the Judicial Council's "Proposal for Appointed Counsel Administrator Services" (11/9/1984) observed that "appointed counsel have, on occasion, been inexperienced, overmatched by the appeal, or incompetent to render adequate services."

In 1983 the Legislature enacted Government Code section 68511.5, resulting in the establishment of the appellate projects as non-profit, public interest law firms whose job it was to administer and oversee the appointed counsel system for the courts. The work of the projects was to provide critical expertise in the form of training, resource materials, advice and assistance to the attorneys handling the criminal, juvenile delinquency, juvenile dependency, and any other appeals in cases in which the client has the right to appointed counsel. Those cases now number about 9000 annually. The mandate of the projects remains to help ensure that indigent appellants receive the benefit of competent representation and that the courts of appeal receive useful and timely briefing, i.e., providing a constitutionally mandated quality-control safety net.

The critical functions of the appellate projects on which the Court and the court-appointed counsel system rely include:

- (1) Helping the court ensure that both the case and the client qualify for an appointment;
- (2) Maintaining a panel of attorneys sufficiently skilled to handle the caseload;
- (3) Screening cases and matching their complexity with a panel attorney with the appropriate skill set and knowledgebase;
- (4) Providing general training and development for the panel;
- (5) Providing resources for the panel, by way of documents and materials designed to help on substantive and procedural law;
- (6) Working with panel attorneys one-on-one to provide quality control in individual cases, including review and evaluation of work product;
- (7) Reviewing, evaluating, and making recommendations on panel compensation claims using the Guidelines established by the Chief Justice and APJs;

- (8) Interacting with AIDOAC and the AOC, delivering the statistical data necessary for ongoing regular audits of the entire court-appointed counsel system, helping to maintain transparency, and providing the information necessary for budget development.

In addition, each of the projects assists its assigned court in a myriad of everyday ways, troubleshooting problems before they blow up, and following through on many requests for information and action initiated by the justices and clerks of the Court.

### *Analysis*

The nature of the work of the projects requires that the staff attorneys have a supervisory level of experience, expertise, and skill, along with the ability to teach, train, and coach panel attorneys in a collegial and encouraging manner. Hiring and retaining such experts is a critical duty of the projects' administration. The projects cannot rely on turnover and replacement of experienced attorneys with lower-paid inexperienced attorneys to save costs. Attorneys with these skills are not fungible.

As mentioned above, the projects cannot use unfilled positions or furloughs to offset inflationary costs or to provide salary increases. The projects' attorney workforce is small relative to the caseload. In addition, under their contracts with the state, the projects' income depends on billable attorney hours. Thus, a vacancy is detrimental, not beneficial. In order to meet contractual obligations, the projects have had to stretch what they could get out of their current employees and, on occasion, bring in temporary assistance to fulfill the contract hours when necessary.

With many project attorneys reaching retirement age, the projects must be prepared for retirements in the next few years, and that means being able to keep salaries competitive to attract those with the requisite experience and knowledge, and to discourage the younger attorneys on staff from leaving for more lucrative options.

### **Conclusion**

For all the foregoing reasons, the appellate projects ask that the judiciary support their request for an increase in their contract amounts for FY 2015-16.

Sincerely,

Elaine Alexander, ADI  
George Bond, CCAP  
Dallas Sacher, SDAP  
Jonathan Soglin, FDAP  
Jonathan Steiner, CAP-LA

## APPENDIX A – CURRENT SALARIES: SNAPSHOT OF STATE PROJECT SYSTEM (2015)

POSITIONS	FTE Annual Salary Range	
	Highest	Lowest
<b>Attorneys</b>		
0 to 4 years	\$103,797	\$48,000
4 to 8 years	\$133,000	\$60,000
8 or more years	\$133,080	\$56,000
Assistant executive director	\$151,693	\$130,733
Executive director	\$159,132	\$149,500
<b>Support Staff</b>	<b>Highest</b>	<b>Lowest</b>
Managerial non-attorney staff	\$94,504	\$68,453
General administrative and technical staff - paralegals, case and claim processors, clerical and secretarial personnel, bookkeeper, IT, etc.	\$64,857	\$21,977
Law clerks, law graduates	\$65,772	\$50,600

**APPENDIX B – HEALTH BENEFITS AND COSTS**

<b>COST TO PROJECTS OF HEALTH-RELATED BENEFITS</b>					
	<b>FDAP</b>	<b>CAP-LA</b>	<b>CCAP</b>	<b>ADI</b>	<b>SDAP</b>
<b>2007-2008</b>	\$ 306,594	\$ 580,651	\$ 351,989	\$ 299,561	\$ 172,376
<b>2013-2014</b>	\$ 475,243	\$ 606,663	\$ 492,928	\$ 346,930	\$ 235,922
<b>2014-2015 (projected)</b>	\$ 499,068	\$ 613,423	\$ 545,000	\$ 353,869	\$ 247,100
<b>COST TO EMPLOYEES OF HEALTH-RELATED BENEFITS</b>					
<b>% contribution paid by employee</b>	<b>FDAP</b>	<b>CAP-LA</b>	<b>CCAP</b>	<b>ADI</b>	<b>SDAP</b>
<b>2007-2008</b>	0.0%	0.0%	0.0%	5% to 15%, depending on coverage	0.0%
<b>2013-2014</b>	0.0%	Attorneys 10% for PPO, support 5%	0.0%	10% to 20% of least expensive plan	0.0%
<b>2014-2015 (projected)</b>	0.0%	Attorneys 10% for PPO, support 5%	0.0%	15% to 40% of least expensive plan (varies by age and type)	0.0%
<b>REDUCTIONS IN BENEFITS, to accommodate increased premiums</b>					
<b>FDAP</b>	n/a				
<b>CAP-LA</b>	Increased deductibles and copays every year for last few years. Increased employee payments for out-of-network providers.				
<b>CCAP</b>	CCAP has moved from PPO to HMO coverage.				
<b>ADI</b>	Increased at least twofold the co-pays, deductibles, and out-of-pocket maximum amounts payable by the policy holder.				
<b>SDAP</b>	Increased deductibles and co-pays in recent years.				
<b>INCENTIVES, if any to waive coverage or choose less costly plan</b>					
<b>FDAP</b>	FDAP is still considering whether to modify its cafeteria plan to create an incentive for employees to opt out of FDAP health coverage.				
<b>CAP-LA</b>	Office encourages HMO use by paying for it in full, but requiring employee contribution for PPO plans. Each year under this arrangement, more employees have switched to the HMO.				
<b>CCAP</b>	In 2008 CCAP began providing incentives for employees with dual coverage (e.g., through a spouse) to waive coverage through CCAP.				
<b>ADI</b>	ADI has moved to a system in which it pays a given % of the <i>least expensive</i> option available to the employee. The employee pays the balance for a richer plan. The employees' % has increased over recent years.				
<b>SDAP</b>	n/a				

**NOTES**

<b>GENERAL</b>	Some projects have plan years not corresponding with the state fiscal year. Health-related costs include health, dental, long-term disability, etc., insurance
<b>CAP-LA</b>	Premium costs increased between 8 and 10 percent beginning July 1, 2014. Again, CAP-LA has been informed that premium costs will increase up to 40% for Blue Cross and 6% for Kaiser beginning July 1, 2015.
<b>CCAP</b>	In 2011-12 and 2012-13, employees were required to make a 3% contribution. As of 4/20/2014, CCAP had 17 employees over age 60.
<b>ADI</b>	Employee contributions toward health insurance more than tripled between 2008 and 2014 (from \$27,912 to \$84,875), as a result of higher premiums and ADI's system of requiring employees to pay an increasing % for their costs and to bear the burden of choosing more expensive plans.
<b>SDAP</b>	As a matter of policy, the SDAP board has determined that employees should not be required to contribute for their health insurance. Because the staff has had only a minimal increase in salary in the past eight years, the board is of the view that a required payment for health insurance would adversely affect staff morale. SDAP has had little turnover in attorney staff: since 1999, the only two lawyers who left did so in order to retire. In the past eleven years, there has been no turnover in the support staff. The health benefit has played a key role in this retention level and in the morale and devotion of the staff.

## APPENDIX C – RENT

ANNUAL RENT (including pass-through share of utilities, taxes)					
	FDAP	CAP-LA	CCAP	ADI	SDAP
2007-2008	\$ 160,484	\$ 261,141	\$ 209,017	\$ 321,060	\$ 96,549
2013-2014	\$ 151,600	\$ 318,682	\$ 206,749	\$ 337,296	\$ 100,661
2014-2015	\$ 155,243	\$ 334,911	\$ 217,707	\$ 352,691	\$ 86,665
2015-2016	Est.: \$152,000 - \$186,300	\$ 352,113	\$ 231,517	\$ 354,161	Unknown
2016-2017	Est. \$230,000 - \$237,000	\$ 369,718	\$ 234,626	\$ 370,326	Unknown

### NOTES:

- FDAP** FDAP's current lease expires June 30, 2015, \$23.18 per square foot per year. The rent projected for 2015-2016 and 2016-2017 is estimated based on on-going lease negotiations. The 2015-2016 rate will be lower than future years for two reasons (1) June-September 2015 we will still be at our San Francisco location, paying \$33.00 per square foot per year (higher than our current rate, but below what we will pay in Oakland under the new lease) and (2) the proposed leases we are considering will include 2-4 free months of rent in the first year.
- CAP-LA** In order to stay in its present location, CAP negotiated a new lease in 2012, prior to the completion of its old one. The new lease expires in 2020 and includes an escalation clause amounting to a 5% increase per year. Added to the rent are the ever-increasing building pass-through expenses.
- CCAP** CCAP moved on Jan. 23, 2015. We estimate that the cost of that move will total about \$100,000.
- ADI** ADI has a 10-year lease starting in Nov. 2010. Specified step increases to 2020.
- SDAP** SDAP's prior lease terminated July 31, 2014. SDAP held a three year option to extend the lease. However, the landlord announced his plan to sell the building for conversion to residential housing. SDAP and the landlord contractually agreed that SDAP would forego its three year option and vacate the premises by October 31, 2015. As partial consideration for buyout of the three year option, the landlord agreed to reduce SDAP's rent for the period between August 1, 2014 and October 31, 2015. As of November 1, 2015, SDAP must lease new office space. At present, the cost of a new lease is unknown since an agreement has not been reached with a new landlord.

## APPENDIX D – PROJECT-FINANCED RETIREMENT CONTRIBUTIONS

% OF SALARY contributed to each employee's retirement fund					
	FDAP	CAP-LA	CCAP	ADI	SDAP
<b>2007-2008</b>	10.0%	10.0%	15.0%	11.0%	10.0%
<b>2011-2012</b>	10.0%	8.0%	20.0%	8.0%	8.0%
<b>2012-2013</b>	10.0%	8.0%	15.0%	7.5%	8.0%
<b>2013-2014</b>	10.0%	8.0%	15.0%	0.0%	8.0%
<b>2014-2015</b>	10.0%	8.0%	unknown/ see below	0.0%	unknown/ see below

**Notes:** All projects have defined-contribution plans, not defined-benefit.

**FDAP** FDAP's contribution was reduced to 9% for fiscal year 2008-2009.

**CAP-LA**

**CCAP** The pension contributions above were able to be made because, when it became clear that project funding would be flat or reduced, CCAP began an intense examination of all revenue streams and all cost and then made a number of substantial cost reductions.

As indicated in Appendix A, CCAP has reduced staffing levels for both the attorney and support staffs and reduced salary across the board by 2%.

CCAP's Board of Directors will not make a decision regarding the FYE 2015 retirement contribution until October 2015. Typically, CCAP has provided an annual retirement contribution of 15%.

**ADI** Employees are eligible after two years with ADI. The contributions vest 100% immediately. % contribution decided by board annually, based on project's finances.

The present plan is to eliminate the 2014 retirement contribution entirely. The same decision is likely for 2015. The majority of the savings will go to employees as a cash sum, to help alleviate hardships caused by increasingly inadequate compensation. Another part will be used to bolster reserves. Our hope is some day to make up for the 2014 and 2015 failure to contribute to retirement accounts, when ADI's contract becomes sufficient to cover the costs of doing business.

**SDAP** The SDAP Board will not vote on the 2014-2015 contribution until November 2015 or February 2016.



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## **CALIFORNIA APPELLATE PROJECT – SAN FRANCISCO**

### **Budget Change Request June 22, 2015**

#### **EXECUTIVE SUMMARY**

The Board of Directors of the California Appellate Project has regularly reviewed and approved the annual contracts with the Court for its San Francisco office (“CAP-SF”) since its inception. For the last eight years there have been no increases in contract revenue.

A number of cost factors over which the Board has no control cause great concern to the Board and compel this appeal for additional funding. We now face considerable risk of having to diminish services to the Court and inability to meet obligations.

Due to budgetary constraints, CAP-SF has maintained unfilled vacancies in its attorney and support staff positions alike. At the same time, changes in governing law and the dynamics of the appointment process have led to increases in the extent and complexity of the required assistance services and training. The inability to increase salaries has made it difficult to remain competitive with other agencies and has impeded CAP-SF’s ability to replace senior attorney staff members.

We also face sharply rising costs for healthcare, occupancy rate increases, and case-related supportive services.

The current contract amount for CAP-SF is \$5,585,218. Our best estimate of the actual annual increase necessary to fully realize the Court’s expectations of the level professionalism, expertise, and effectiveness that CAP-SF has historically provided is \$1,750,000. In light of our understanding of financial constraints and the practical realities of the budgeting process, CAP-SF is requesting a 17% increase in its annual budget, or \$935,500, which does not reflect the actual needs of CAP-SF to perform the services expected under its contract.

#### **CAP-SF’s Vital Role**

Representation in California capital postconviction proceedings is provided by private attorneys and public agencies. Appointments to automatic appeals to the California Supreme Court are made to the Office of the State Public Defender (“OSPD”), created in 1976, or to members of a panel of private attorneys. Appointments to habeas corpus proceedings, which in most instances are made after the conclusion of the automatic appeal, are made to the California Habeas Corpus Resource Center

(“HCRC”), created in 1998, or to the private attorney panel.

CAP-SF was established in 1983 by the State Bar of California at the request of the California Supreme Court to provide assistance to the members of the private attorney panel and to the Supreme Court. With a current staff of 37, including 17 attorneys, CAP-SF serves as a legal resource center for private counsel appointed in capital appeals, and habeas corpus and clemency proceedings. CAP-SF plays a vital role in implementing the constitutional right to counsel for indigent defendants in capital post-conviction proceedings, by:

- developing a staff with unique expertise and training, and the skill to share that expertise with court appointed counsel;
- producing training programs that impart the specialized knowledge and skills required for capital postconviction representation;
- creating, accumulating and sharing with appointed counsel both case-specific and general resources—electronic and hard copy—designed to enhance counsel’s ability to perform competently in the complex arena of capital litigation;
- providing private counsel with assistance and consultations on case-specific issues and procedures;
- serving as a liaison between appointed counsel and the courts;
- communicating with and responding to defendants on death row for whom counsel has not yet been appointed;
- engaging in an ongoing dialogue with the Supreme Court to help formulate rules and policies, including standards of representation, that apply to these cases; and
- evaluating for the Court, upon request, potential attorneys for appointment in these cases, and informing the Court about the progress of those attorneys already appointed.

Thus, CAP-SF assists attorneys by providing individual case services, training, and litigation resource materials. CAP-SF assists unrepresented death row inmates by collecting and preserving records and evidence for later post-conviction use, and by providing advocacy needed before counsel is appointed.

CAP-SF coordinates with OSPD and HCRC with respect to resource materials and training. CAP-SF presents a number of training programs, including its Capital Appellate Conference, which is presented annually and is the only conference in California devoted exclusively to California capital direct appeal work. The conference draws dozens of counsel from the private bar, from the HCRC and OSPD, and CAP-SF’s entire legal staff. Other programs added recently include the Oral Argument Skills Workshop and an annual Habeas Skills Workshop.

CAP-SF presents individualized case trainings and moot courts, customizing the trainings to the needs of each particular counsel and case team. Individual case workshops attended are among the most successful and popular forms of individualized trainings. CAP-SF conducts numerous moot court sessions annual to prepare appointed counsel for argument before the California Supreme Court for both automatic appeal cases and habeas cases in which argument is held.

CAP-SF maintains an extensive collection of litigation resources made available to appointed counsel. These materials include an exhaustive 2,000-page appellate and habeas corpus practice manual; a 5,000-page legal research capital case digest; a newsletter summarizing monthly developments in capital litigation; investigative guides; sample pleadings; and a prison resource handbook.

CAP-SF is currently providing assistance to 140 private panel attorneys, including 14 associate counsel. The panel attorneys being assisted by CAP-SF are appointed in approximately 300 active capital postconviction case components, including more than 175 appeals, nearly 120 habeas corpus, including more than 30 that have returned from federal court for exhaustion of additional state remedies, as well as a number of cases in which clemency petitions may become necessary.

As between the HCRC and OSPD, only CAP-SF provides services to the inmates who are awaiting the appointment of counsel. Because the influx of new death sentences handed down each year outpaces the rate at which attorneys appointed to represent inmates already on death row, CAP-SF's unrepresented inmate caseload increases annually. 261 condemned defendants are represented by appellate counsel, but not by habeas corpus counsel, for whom CAP-SF is responsible for record collection. CAP-SF provides assistance to 56 condemned defendants who are not represented by either appellate or habeas corpus counsel.

### **Workload Increases**

**Staff Reductions:** Due to funding constraints CAP-SF has suffered significant personnel losses during the past decade. CAP-SF today has 1.7 fewer FTE attorney positions than December 2009, amounting to nearly a 10% reduction in attorney staff. During the same time CAP-SF lost nine support staff members due to retirement, resignation, and other reasons. Currently, CAP-SF has only one general legal assistant who serves all 17 of CAP-SF's attorneys.

**Appointment Dynamics:** In years past, many of the Court's habeas appointments were concurrent with the appeal appointments, which allowed for an important measure of flexibility in the planning and timing of the habeas investigation. Currently, the majority of habeas appointments are three-year appointments, and those appointments serve to place much more rigorous and less flexible demands on counsel tasked with performing increasingly difficult and complex work. Moreover, a number of the recent appointments have been made –notwithstanding negative CAP-SF evaluations -- to attorneys unable to provide adequate representation absent an inordinate expenditure of CAP-SF resources. As a result of the ongoing delay in the appointment of habeas counsel CAP-SF's caseload of unrepresented inmates is steadily increasing.

**Executive Clemency:** As a result of recent litigation against the California Department of Corrections and Rehabilitation, the *de facto* moratorium on executions and clemency proceedings appears to be nearing the end. CAP-SF must therefore begin the process of equipping its attorneys to assist counsel in clemency proceedings. It is likely that CAP-SF will play a substantial role in many of the nearly 20 individuals for whom clemency is the last remaining option. Neither CAP-SF nor any of the other agencies have ever faced this magnitude of clemency cases, and CAP-SF is inadequately resourced to address this challenge of unprecedented scope and complexity.

**New training programs:** As indicated above, this year CAP-SF added several new training programs to its regular lineup: (1) a full-day Oral Argument Skills Workshop to improve appointed counsel's oral advocacy skills; (2) a one-day New Capital Appellate Lawyer Training session for attorneys, new to capital appellate practice, a program created at the Court's request; and (3) a Habeas Skills Workshop. The habeas skills workshop has been designed to train appointed counsel to conduct comprehensive and thorough investigations, to prepare adequate and timely petitions, and to manage resources effectively. These training sessions are invaluable and are well worth the time and effort

they require. The investment of time and resources is substantial, however, and it has had significant impact on the resources available for individual case assistance.

### **Cost Increases**

Since 2008 CAP-SF has experienced a 23% increase in rent and lease operating costs amounting to an increase of more than \$140,000 per year.

CAP-SF has experienced a significant increase in other costs of providing services, including the cost of materials and services used to manage office operations, case assistance, record collection, and interpreter fees.

CAP-SF has absorbed yearly increases in the cost of employee benefits.

### **Budget Increase Requests**

**1. Attorney staff:** To maintain the requisite level of habeas and appellate assistance services in light of the workload factors described above, CAP-SF is requesting one additional attorney to provide habeas and appellate assistance. Should executions resume within the next contract period CAP-SF will likely need to seek a contract supplement to hire an additional attorney with clemency expertise or assign one or more of its habeas or appellate assistance attorneys to clemency assistance. To meet contract requirements at the customary level of professionalism, expertise and effectiveness, CAP-SF estimates that a total of three attorneys would be necessary. Based on our understanding of budgetary constraints and the practical realities of the process, CAP-SF is limiting its current request to one attorney.

Estimated costs of one attorney (including benefits): \$260,000

**2. Support staff:** In order to meet current and projected demands, CAP-SF's best estimate is that we require (1) one investigator to the unrepresented project; (2) one investigator to the habeas team; (3) one legal secretary and one paralegal to replace staff lost through attrition; and (4) two case managers to work on digitizing documents and to focus on improving the management of CAP-SF's online and hard copy resources, which are utilized by the panel, or six support staff, total. Based on our understanding of budgetary constraints, we are limiting our current request to two paralegal staff positions.

Estimated cost of two staff positions (including benefits): \$200,000

**3. Raises:** In early 2014, CAP-SF undertook a comparative study of salaries paid at sister agencies (HCRC and OSPD) and at comparably sized Bay Area non-profit corporations. That research enabled CAP-SF to clearly understand pay discrepancies. Additional funding is necessary to bring the attorneys at CAP-SF to a comparable pay rate, and to permit salary increases for the attorneys who are currently at the top of their pay scales.

Without increases, CAP-SF risks losing some of its most experienced and skilled attorneys due to its

prolonged inability to offer raises or even cost of living increases. As to entry-level positions CAP-SF is similarly at a competitive disadvantage for attracting qualified and skilled attorney or support staff.

Estimated cost: \$110,000

**4. Training:** A corollary to the impact of legal developments on CAP-SF's practice is the need for ongoing training of both current and newly-hired staff across the organization. CAP-SF's role as an assisting entity and resource center for appointed counsel requires that CAP-SF staff be at the forefront of understanding and shaping legal developments. In order to fulfill that role, ongoing substantive and skills training of staff is essential. This is particularly true as CAP-SF experiences an unprecedented turnover of its legal staff. Many of the most intensive and useful training sessions for CAP-SF staff are multiday and held out-of-state.

Estimated cost: \$ 20,000

**5. Record Collection and Preservation:** The cost of collecting records continues to increase as caseloads grow and changes in the law emphasize the need to gather all relevant documents during the state proceedings. As a result of budget changes, various California courts have substantially increased the fees for collecting and/or copying documents; some courts charge as much as fifty cents per page. CAP-SF has few successes in negotiating lower fees. CAP-SF has absorbed the new fees charged by Courts, increased fees charged by state agencies, and fees charged by private copy agencies who are the only providers of certain types of records (e.g. medical). To offset fees charged by courts, CAP-SF currently pays a paralegal approximately \$1,000 a month to gather records in person in Los Angeles and Riverside Counties. This solution is not available everywhere. CAP-SF anticipates the money paid to that paralegal will increase two-fold over the next year, and also anticipates CAP-SF will incur fees in the other counties that do not allow for in-person collection.

Estimated cost increase: \$38,000

**6. Rental Costs:** CAP-SF's rent, which includes base rent and operating expenses under the terms of its lease, have increased substantially. For example, for 2007 to 2008 CAP-SF's annual rent was \$597,712 compared to the 2014 to 2015 projected rent of \$739,209. This is a difference of \$141,497. Since 2007, annual rent has increased in the amount of \$307,446. CAP-SF's base rent will continue to increase \$18,261 each year.

Estimated cost increase: \$141,500

**7. Benefits:** CAP-SF's benefits offered to employees including, Medical, Dental, Vision, Life and Long Term Disability have increased significantly. At the time of CAP-SF's last contractual revenue increase in 2007, these benefits cost CAP-SF \$457,303. In 2013-2014, the cost of these same benefits was \$623,252, a difference of \$165,949.

Estimated cost increase: \$166,000

## SUMMARY OF REQUESTED INCREASES

ITEM	AMOUNT
Rent increases	\$141,500
Employee benefit cost increases	\$166,000
Increased costs of record collection and preservation	\$38,000
Additional staff training costs	\$20,000
Salary increases	\$110,000
Two additional paralegal positions including benefits	\$200,000
One additional attorney position including benefits	\$260,000
<b>TOTAL</b>	<b>\$935,500</b>

Our best estimate of the actual annual increase necessary to fully realize the Court's expectations of the level professionalism, expertise, and effectiveness that CAP-SF has historically provided is \$1,750,000. In light of our understanding of financial constraints and the practical realities of the budgeting process, CAP-SF is limiting the current request to the amount indicated.



**REQUEST FOR SUPPORT FOR COMPENSATION INCREASE  
IN FY 2016-2017**

**INTRODUCTION:**

California Appellate Defense Counsel (CADC) is an organization comprising approximately 400 lawyers who accept appointments to represent indigent clients in criminal, delinquency, and dependency cases in the Court of Appeal and California Supreme Court. Our members handle a significant majority of the appointed criminal and dependency appeals. On behalf of the panel of attorneys who accept these appointments, CADC seeks your support for a long-overdue increase in our compensation rate in the FY 2016-2017 State Budget.

The compensation rate for attorneys appointed in these appeals in the Court of Appeal has remained the same since 2007. Adjusted for inflation based on the CPI Index for Urban Wage Earners, hourly rates have effectively fallen more than 12% since the last compensation increase. During the same time frame, the cost of doing business has risen sharply, a matter addressed further in the Appendix..

Although rates of inflation and other data support a greater increase, we now ask for your support for an increase of \$10/hour for each of the three levels of compensation. As will be explained further below, CADC asks that the Administrative Presiding Justices Advisory Committee recommend that this increase be pursued through a FY 2016-2017 Budget Change Proposal in time for consideration for inclusion in the Governor's proposed budget released in January.

As we will show, this increase will be critical to maintaining a strong panel to handle these cases in the near future. With that backdrop, CADC turns to its arguments in detail.

#### HISTORICAL PERSPECTIVE:

From 1989 to 1995, the hourly rate for all appointed cases was \$65. In 1995, a second tier was added at \$75/hour to differentiate between compensation in assisted and independent cases. A third tier at \$85/hour was initiated in 1998 for the most serious, complex, and lengthy jury trials.

As of 2005, the lowest rate had remained unchanged for sixteen years. The middle tier had not changed for a decade. And there had been no change in the highest rate since its adoption.

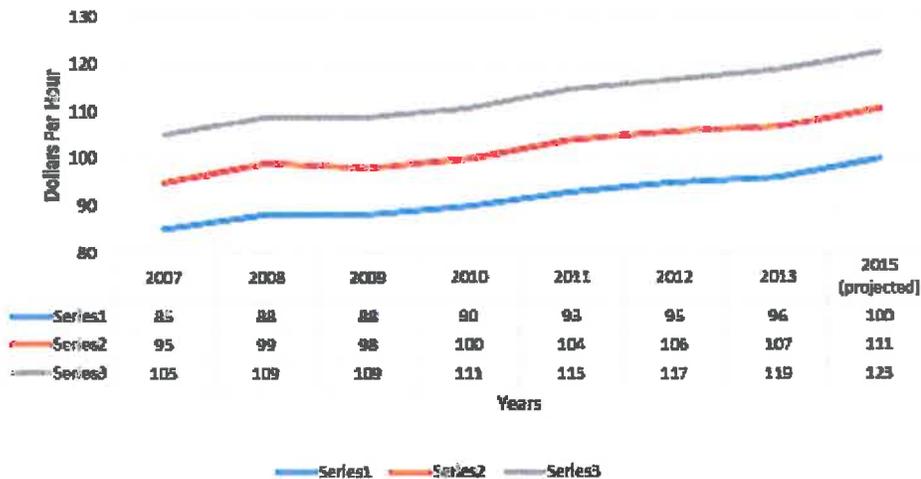
Between 2005 and 2007, hourly rates rose in three stages from \$65-\$75-\$85 to \$85-\$95-\$105. Yet even this increase failed to keep up with inflation. CPI calculations show the \$65/hour rate in effect in 1989 would have required an increase by 2007 to more than \$108/hour to have kept pace with inflation. The increases in 2005, 2006, and 2007, although greatly appreciated, still left panel attorneys seriously behind in compensation.

#### THE PROBLEM SINCE 2007:

In 2007, in recognition of the financial pressure on the Judicial Branch and the State as a whole, CADC suspended its effort to “catch up” in regard to hourly compensation. When FY 2016-2017 arrives, the pay rate for appointed attorneys will have remained unchanged for nine years. As noted, inflation since 2007 has eroded hourly rates by more than 12%. That erosion will be greater before any compensation is received at higher rates, because new rates apply only to new appointments, and interim compensation claims are not submitted and paid until several months after the date of appointment in most cases.

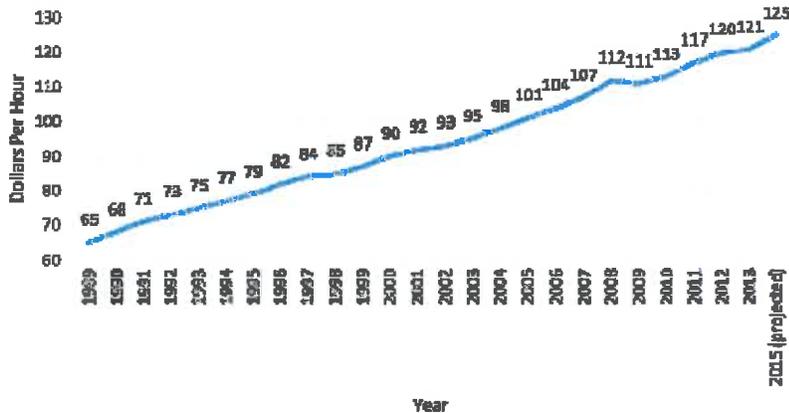
As is shown on the next page, if the 2007 hourly rates had kept pace with inflation, the \$85-\$95-\$105 rates set in 2007 would have risen to \$100-\$111-\$123 in 2015 (projected):

**If the 2007 Hourly Rates Had Kept Pace with the CPI**



As further illustrated below, the problem did not start in 2007. Panel attorneys have been losing ground for decades. If the \$65 hourly rate set in 1989 had kept pace with inflation, projected compensation would have risen to \$125/hour in 2015, which is almost exactly the hourly rate now paid by the federal courts:

**If the 1989 Rate Had Kept Pace with the CPI**



#### CADC'S UNSUCCESSFUL EFFORT LAST YEAR:

In the Spring of 2014, CADC requested that the Administrative Presiding Justices support a Budget Change Proposal ("BCP") for a compensation increase for appointed counsel in the FY 2015-2016 Judicial Branch budget. The Administrative Presiding Justices considered our request and supported the need for the additional funding. However, since Court of Appeal and Supreme Court staff had not received cost of living increases since 2007, it is our understanding that the APJs felt they could not seek an increase for the panel attorneys until they were certain that there were sufficient increases for staff in the Governor's proposed budget. If the increase equivalent to that provided to Executive Branch staff was included in Governor's January budget proposal, the APJs would recommend a subsequent Finance Letter to seek the compensation increase for appellate counsel.

#### LAST YEAR'S IMPLICATIONS FOR THIS YEAR:

We anticipate the remainder of the compensation increase for Court of Appeal and Supreme Court staff will be included in the Governor's January budget proposal, and we believe the Governor's proposal should include it.

CADC renews its request for a compensation increase for appointed counsel, for inclusion in the Judicial Branch's FY 2016-2017 budget. CADC requests that the increase be pursued in time for inclusion in the Governor's January budget proposal because the financial stress on appointed counsel has reached the point that a compensation increase should be a high priority.

Of course, the Court of Appeal staff will have received increases that are phased-in over two fiscal years. The question may arise whether appointed counsel should similarly receive phased-in increases over two fiscal years. In response, CADC submits that "phased in but a year behind" is inherently inequitable for appointed counsel in light of the compensation history since 1985.

For both court staff and for appointed counsel every year sees the dollar eroded by approximately 2%. Appointed counsel have fallen behind at that rate since 2007, and nine years at the 2007 rates should be enough.

#### EFFECTS ON RECRUITMENT AND RETENTION OF COUNSEL:

Recruitment of competent counsel willing and able to make a career of appointed indigent appeals, and retention of experienced counsel, are at the heart of an efficient and cost-effective appointed counsel program. It takes at least three years for a new panel attorney to become sufficiently experienced to earn a basic living. During this "training" period, the contract administrators ("projects") expend time and expense assisting these attorneys to become independent.

On the other end of the spectrum are the Level IV and V attorneys who are qualified to handle the most serious cases independently. To reach this level of competence takes at least five to seven years of steady appointed work, and some attorneys on the panel never do - either remaining at the mid-level or leaving appointed work. And because of age or economic factors, the most experienced panel attorneys face difficult choices among retirement, seeking different sources of income, and continuing full-time state-appointed work. The rate of compensation is surely a factor in the decision.

The number of attorneys on the panel may have remained fairly constant in recent years and there may be no indigent appellant for whom appointed counsel cannot be found today. But that does not tell the whole story.

Attorneys are not fungible. When a Level IV attorney no longer handles as many appointed cases, or none at all, a Level I attorney cannot fill the void. When a Level II attorney leaves the panel, the project has to expend additional resources to train the new Level I attorney who is added to the ranks. When there are insufficient Level V attorneys to represent appellants convicted of the most serious offenses, Level IV or III attorneys cannot handle the cases with the same efficiency, cost-effectiveness, and competence. And the courts and Attorney General ultimately must expend additional effort and expense to be certain the issues are properly addressed.

#### THE RISK OF DAMAGE TO THE APPOINTED COUNSEL PROGRAM:

Without a compensation increase, the appointed counsel program likely will not be able to sustain its current level of efficiency because the core group of very experienced attorneys will become unavailable to accept cases and the level of compensation will no longer attract attorneys willing to remain with the program for the years required to gain the expertise necessary to handle complex cases. While it is not possible empirically or statistically to predict the impact on the panel if a rate

increase is not approved, logic leads to the conclusion that although a current snapshot of the Court of Appeal panel reveals a system that is operating relatively smoothly, we expect in the relatively near term problems will arise in providing counsel with a level of skill and experience to maintain the current high quality of work on behalf of indigent appellants. Without action now, those problems will grow and become substantial in the next several years. The longer compensation increases are delayed, the greater the damage to the system.

A rate increase for appointed counsel would substantially alleviate the risk of erosion in the quality of work performed in these cases. It is important to note that the requested \$10 per hour increase would affect cases in which the appointment date is subsequent to June 30, 2016, if applied in the same way as the previous rate increases. However, because an attorney does not actually receive any compensation in most cases until after the opening brief is filed, the initial effect of the raise is likely not to be realized for at least several months into the new fiscal year. The requested rate increase should be approved sooner rather later in order to maintain the current strength and health of the panel for the benefit of the Court of Appeal system as a whole in managing its caseload involving indigent appellants.

The current Court of Appeal panel seems to have a sufficient number of Level IV and Level V attorneys to handle the most serious cases most of the time, with occasional short-term problems in coverage due to variances in the mix of cases in any given district. However, unless steps are taken soon, this picture almost certainly will change to the detriment of the system.

A significant portion of the current group of upper level panel attorneys is composed of relatively older lawyers who have been a part of the system for many years. Retirement looms for some. Further, as this group of lawyers ages, the prospect of death or debilitating illness becomes greater, and increasingly these factors will diminish the size of this group even among those who choose not to retire. Those who are deciding whether or not to retire likely would find incentive to continue this work if a rate increase is approved, so the drop-off of this group would not be so precipitous.

The long-term health of the panel depends upon the ability of the Court of Appeal projects to recruit and retain capable, committed lawyers who are newer to the system to fill the surely-to-be-depleted ranks of the group of Level IV and Level V attorneys. We understand the projects have used focused mentoring programs to bring carefully selected attorneys along more quickly, moving them up to Level III, Level IV,

and even Level V at a faster pace than historically has been the case. To continue to do so, however, the projects will need to find more candidates for these programs.

It is critical for these newer people to find financial viability in order to remain on the panel for the first three to five years, which is the typical time required to establish a full caseload and sufficient cash flow to make a moderate living doing this work. A rate increase would have a significant impact on the ability of these newer lawyers to generate sufficient cash flow to get through the early years so they can remain on the panel. Unless the system can attract, train, and retain these newer lawyers until they advance to the higher levels, the courts and the projects will find themselves with an inadequate number of lawyers to represent clients in the relatively more complex and serious cases, a problem that would require more work on the part of the courts to deal with a lower quality of work performed by court-appointed counsel. A rate increase would dramatically improve the success of this process of continuing to move newer people up the ladder of competence to handle these more complex and serious cases.

#### A COMPENSATION INCREASE AS SOUND "MANAGEMENT" POLICY:

CADC deems an increase in compensation necessary in light of principles of effective administration and management. In that regard, there is no question that panel attorneys are independent contractors. However, many panel attorneys would like to be able to make criminal and dependency appeals the focus of their practices, and the great majority of criminal and dependency appeals are done under court appointment.

For these reasons, CADC invites the Administrative Presiding Justices to consider the matter as if panel attorneys were part of the Court of Appeals' "workforce," albeit not as employer-employee. The Administrative Presiding Justices have an administrative role over the panel, but it goes much further.

The Administrative Presiding Justices indirectly influence panel compensation through the projects and AIDOAC, and directly influence compensation levels through decisions such as the one under consideration here. Thus, it could reasonably be said that the Administrative Presiding Justices have a "managerial role," with the panel as one part of the courts' "workforce." Panel compensation could, and perhaps should, be considered in those terms.

We are requesting the support of the Administrative Presiding Justices because the expenses of maintaining a practice continue to rise while our pay remains stagnant. But we are also requesting it because it is a wise administrative move. The question then

must be asked whether there is any management model that supports a ninth year without a compensation increase of any kind.

Administrators traditionally take multiple approaches to compensation: mixes of salary and benefits; merit increases; seniority increases; and productivity increases. None apply in the panel context, so we must approach compensation purely in terms of the hourly rate provided to the workforce, that is, the panel attorneys.

CADC urges the Administrative Presiding Justices to consider the proposed compensation increase for FY 2016-2017 as a matter of sound management policy in view of the bleak history of compensation increases since 1986 and the intense financial and psychological pressures of panel work. To add a tenth year of no compensation increases may ask more of the panel “work force” than it can absorb.

#### CONCLUSION:

CADC cannot predict the economic future, nor can anyone establish where the appointed counsel program would be if there had not been raises in 2005, 2006, and 2007.

But it is clear that the farther behind the program lags in compensation, the more expensive it will be to catch up. We believe:

- the panel system would be in serious distress without the compensation increases in 2005-2007;
- the current health of the system is the result of those three raises and the recent recession, which affected the legal profession as a whole;
- the program cannot continue to maintain its current effectiveness without compensation increases starting with FY 2015-2016; and
- if the appointed counsel program were allowed to go into distress because of a lack of experienced counsel, it would be an expensive and lengthy process to restore the current level of panel competence and cost-effectiveness.

The appointed counsel program must encourage long-term, full-time career attorneys for the program to continue to maintain quality.

A goal for the appointed counsel program should be a self-sustaining program of full time criminal, delinquency, and dependency appellate practitioners; this work cannot be a legal “sideline.” These areas of appellate law are highly specialized, and the quality of appellate opinions benefits from fully competent representation from both sides. The number of criminal, delinquency, and dependency cases remains high. To

maintain the level of representation required, appointed counsel must be adequately compensated.

Appointed counsel had not caught up with rising inflation in 2007 when the last increase was approved. We have waited patiently for seven years for the economic situation to improve before seeking an increase in hourly rates. An increase is not only long overdue, but essential to the vitality of the appointed counsel program.

Although the inflation rates and other data would support an increase to even higher levels, we are asking your support for an increase of only \$10/hour for each rate tier, to \$95-\$105-\$115.

## APPENDIX: ADDITIONAL OBSERVATIONS ON THE CHALLENGES AND COST PRESSURES OF APPOINTED WORK

### Disincentives Identified in the Strankman Report

In 1997, a task force chaired by former First District, Division One, Presiding Justice Gary Strankman produced the “Strankman Report” [Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program (1997)  
<http://cdm16254.contentdm.oclc.org/cdm/ref/collection/p178601ccp2/id/561.>]

The Strankman Report identified multiple “challenges unique to appellate indigent defense,” which it described as “disincentives” to work on the panel:

- Appellate work requires a unique combination of sophisticated skills in the areas of writing, legal research, analysis, and advocacy.
- The talents needed for this specialized work are not necessarily widespread among attorneys, and many attorneys do not enjoy or demonstrate competence for this type of practice.
- The area of criminal law is one of the fastest-changing areas of law, requiring the continual review of new legal opinions as well as an up-to-date knowledge of both initiatives and statutes.
- Appellate indigent defense presents a number of unique circumstances that tend to affect morale negatively: relatively low remuneration compared to other areas of law; low success rate (i.e., a high affirmance rate of lower court decisions); and isolation associated with solo practice.
- Time pressures, including new fast-track requirements in juvenile dependency appeals, have increased significantly in an effort to reduce appellate delay. Further, the timing of preparation of the record (which starts the actual briefing process) is variable and difficult to predict. Thus, attorneys may find themselves with timeliness problems when the transcripts or augmented transcripts for several appeals arrive at once. (Strankman Report, at pp. 23-24.)

### Other Financial Disincentives

In addition to the relatively low remuneration cited by the Strankman report, there is a broad range of other financial disincentives to panel work:

- A panel attorney must pay for all of his or her own business, medical, dental, and disability insurance, which - with the current cost of medical insurance - can easily exceed \$20,000 per year.
- A panel attorney pays all “self-employment tax” (SSI, SDI, and Medicare), which adds an effective 6.2% tax “surcharge” on net income (e.g., \$6200 for one with income of \$100,000), because there is no employer contribution. If incorporated as a professional corporation, the panel attorney must pay both the employee’s and employer’s shares of SSI, SDI, and Medicare, as well as any state and federal corporate taxes and fees.
- A panel attorney must finance computers, printers, scanners, software, and copiers; moreover, new court “efficiencies” such as e-filing and bookmarking require additional equipment and software, as well as uncompensated time to learn the new systems. The panel attorney must also pay for library, online research, supplies, insurance, dues, and MCLE. And the attorney must pay for copying, postage, and binding, much of which is reimbursed but is included as part of “gross income” on the panel attorney’s 1099. These costs can easily total \$12,000 annually.
- Many panel attorneys have substantial overhead for secretarial help and/or rent which can consume 30% of gross income.
- A panel attorney must forego a retirement plan or make all retirement plan contributions (up to 25% of net income). Panel attorneys who forego or under-fund their retirement plans are forced to postpone retirement.
- The payment schedule -- particularly in complex cases -- often results in lengthy delays between record review and the interim compensation claim, and between the reply brief and the final compensation claim.

### Rising Costs as Experienced by CADC Members

A 2014 survey of more than 150 CADC members - almost half in practice for more than 15 years and more than 75% devoting at least three-quarters of their practice to appointed appeals - revealed increases in such expenses equal to or exceeding the inflation rate. We believe these expenses have continued to rise in 2015 commensurate with the overall increase in the cost of living.

For example:

- 38% of respondents reported overall costs of doing business had risen 10-20% since 2007, and 42% reported increases exceeding 20% during that period.
- In actual dollars, 25% reported an increase in annual costs of \$3001-5000 compared to 2007, and 35% reported increases exceeding \$5001.
- As to specific expenses, increases in medical insurance appears to have had the greatest impact, with 64% reporting increases in excess of 20% since 2007, and these would not include those who qualified for Medicare during those years.
- Similarly, expenses for telephone, Internet, and legal research has increased 10-15% for 20% of respondents and increased more than 15% for another 49% of respondents.
- On the other hand, 60% reported no significant change in income from 2007 to 2014, and another 24% reported significant decreases in income.

As we concluded in the attached request, the longer appointed counsel have to wait for a rate increase, the heavier the financial burden of this practice becomes.