

**REPORT ON THE EFFICIENCY AND
EFFECTIVENESS OF THE COURT
APPOINTED COUNSEL PROGRAM**

February 1997

**Appellate Indigent Defense Oversight Advisory
Committee**

Hon. Gary E. Strankman, Chair
Hon. Charles S. Vogel
Hon. Rodney Davis
Hon. Thomas E. Hollenhorst
Hon. Thomas A. Harris
Hon. William M. Wunderlich
Mr. Jonathan Steiner, Esq.
Mr. Michael Kresser, Esq.
Ms. Victoria DeGoff, Esq.
Mr. Gordon Brownell, Esq.

Court Appointed Counsel

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EXECUTIVE SUMMARY

The 1996 Budget Act directs the Judicial Council to report to the Legislature on several operational aspects of the court appointed counsel program.¹ This report responds to legislative requirements contained in both Budget Control Language and Supplemental Report Language. This report describes management reporting systems and consistency standards already in place, identifies areas for future development, and provides recommendations for continued enhancements of the appellate indigent defense program.

This report was prepared by the Appellate Indigent Defense Oversight Advisory Committee, a special committee appointed by the Chief Justice and charged with providing policy recommendations on the operations of the appellate indigent defense program in the California Courts of Appeal. In addition to its function as an auditing body of court appointed counsel claims, the indigent defense oversight committee gives direction to the appellate projects² regarding supervision of appointed counsel and makes recommendations for containment of program costs. The indigent defense oversight committee reports to the Chief Justice and the Administrative Presiding Justices Advisory Committee.

Under the direction of the Appellate Indigent Defense Oversight Advisory Committee, the appellate projects should design a plan for further developing the panel of attorneys capable of handling complex appeals. This plan should include exploration of ways to attract and retain experienced appellate practitioners and to advance the skills of the promising attorneys now on the panel. Development of a broad-based plan, to include the input and participation of California Appellate Defense Counsel³ and panel attorneys, should focus on recruitment, outreach, training, and retention.

The Appellate Indigent Defense Oversight Advisory Committee supports establishment of three payment tiers in the compensation system for Court of Appeal panel attorneys as means of (1) retaining and attracting skilled,

¹ The Budget Control Language and Supplemental Report Language state a January 1, 1997 deadline. This report will be presented at the February 20, 1997, Judicial Council meeting and, once approved, forwarded to the Legislature. The Legislature has been informed of the progress and timeline.

² The appellate projects are nonprofit organizations that assist the Supreme Court and Courts of Appeal in the administration of the appellate indigent defense program. The projects are described further in section I of this report.

³ California Appellate Defense Counsel (CADC) is a nonprofit organization comprised primarily of attorneys who accept appointments in criminal and juvenile dependency cases in the California Courts of Appeal and in capital cases in the California Supreme Court.

experienced attorneys, and (2) encouraging promising counsel to acquire the necessary skills for handling increasingly complex cases on an independent basis.

Finally, the Appellate Indigent Defense Oversight Advisory Committee supports continued management oversight of the appellate indigent defense program and the appellate projects, with particular emphasis on standardizing statewide reporting systems in the areas of panel management, case assignment, and training.

The Administrative Presiding Justices Advisory Committee has reviewed the report and concurs in the recommendations.

I. INTRODUCTION

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings as a matter of constitutional right. In California, the appellate courts are responsible for providing representation when an indigent defendant appeals a judgment following a felony conviction or in certain civil cases. A judgment of death is automatically appealed to the Supreme Court.

To assist the courts in the administration of the appellate indigent defense program, five nonprofit organizations—known collectively as the appellate projects—have provided services under contract to the Supreme Court and Courts of Appeal since the mid-1980s.⁴ The appellate projects recruit (except in capital cases), supervise, and assist private attorneys in cases where representation of indigent appellants is required by the Constitution, statute, or case law. In addition, the projects provide services to the Courts of Appeal, such as locating defendants, assisting defendants with filing of notices of appeal, recommending to the court the appointment of attorneys to cases, matching counsel with cases, reviewing compensation claims, and making recommendations regarding payment. In 1995–96, the Courts of Appeal appointed private counsel to represent indigent appellants in more than 9,900 cases. In the Supreme Court, 34 new judgments of death were filed and 26 private counsel were appointed to capital appeals and related state habeas corpus investigations.

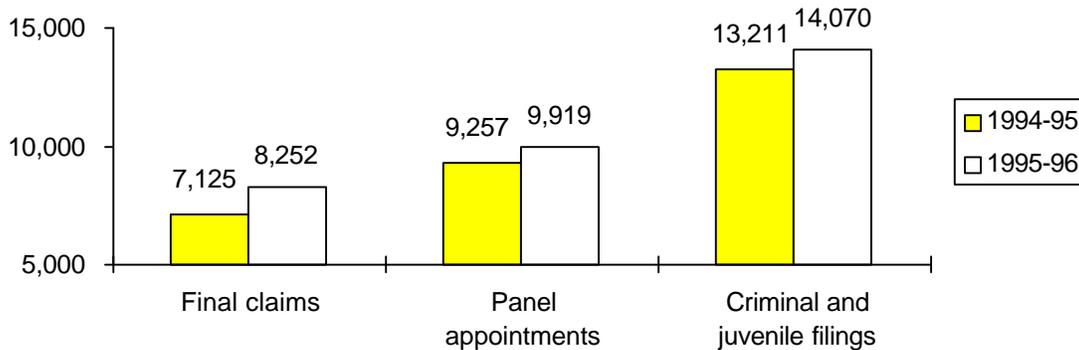
Due to the complexity and unique characteristics of capital cases, the Supreme Court court appointed counsel program for capital appeals functions separately from the Courts of Appeal, with distinct rules governing appointments and a centralized internal process for making appointments. The Supreme Court appointed counsel program will be discussed separately in section II owing to the substantially different nature of its operations.

The greatest challenge facing the appellate indigent defense program in the Courts of Appeal is resource availability. Caseload, which in this decade has grown both in numbers and complexity, continues to outstrip the resources of highly skilled and experienced panel attorneys. By all measures, the appellate projects are facing

⁴ The California Appellate Project–San Francisco office (CAP–SF) serves the Supreme Court; the First District Appellate Project (FDAP) serves the First Appellate District; the California Appellate Project–Los Angeles office (CAP–LA) serves the Second Appellate District; the Central California Appellate Program (CCAP) serves both the Third and Fifth Appellate Districts; Appellate Defenders, Inc. (ADI) serves the Fourth Appellate District; and the Sixth District Appellate Program (SDAP) serves the Sixth Appellate District.

an increasingly heavy workload: final compensation claims⁵ filed in 1995–96 totaled 8,252, up 16 percent from the 7,125 final claims filed in 1994–95; private panel cases appointed by the appellate projects⁶ increased overall by 7 percent, from 9,257 in 1994–95 to 9,919 in 1995–96; and filings in criminal and juvenile appeals⁷ are on the rise, from 13,211 in 1994–95 to 14,070 in 1995–96, representing an overall increase of 6.5 percent. Caseload growth is shown in Figure 1 below.

Figure 1. Caseload Growth, 1994–95 to 1995–96



As caseload grows, so does the cost of the court appointed counsel program. In the last two fiscal years, court appointed counsel claims have far exceeded allocations. A \$400,000 deficiency appropriation was granted in 1994–95 but permanent funds were not built into the baseline allocation, resulting in a greater deficiency the following year. A \$4.5 million deficiency appropriation covered a

⁵ While extensive and informative data are culled from final compensation claims, they are not representative of the “live” caseload but rather only those cases closed during a given fiscal year. On average, it takes approximately six months before the first (interim) claim is submitted and 14–18 months from the time a case is appointed to the time the final claim is submitted. Therefore, claims in the most recent full fiscal year data (1995–96) likely represent cases initially appointed in fiscal year 1994–95. Final claims data serve as the basis for significant baseline measurements (e.g., cost per case, assistance hours per case, case assignment ratios) but cannot be used to draw conclusions about current caseload trends.

⁶ Panel cases include all appointments made to panel attorneys as well as appellate project staff attorney cases handled outside of their contracts with the judicial branch. Not included in panel appointment figures are appellate project staff cases handled within the projects’ contracts: there were 405 such cases in 1994–95 and 573 in 1995–96.

⁷ Both criminal and juvenile figures include appeals with records and original proceedings. Criminal filings grew by 2.5 percent from 1994–95 to 1995–96, from 11,185 to 11,466; juvenile filings spiked more markedly, from 2,026 in 1994–95 to 2,604 in 1995–96, representing a 29 percent increase. About one-half of the juvenile filings will require court-appointed representation in the Courts of Appeal.

portion of the \$5.9 million shortfall in 1995–96; the remainder was funded through internal sources. Although \$3.2 million in baseline funding for caseload growth was received in 1996–97, the Judicial Council is seeking a deficiency appropriation to make up the expected shortfall in the current fiscal year.

The Legislature has signaled its interest in receiving information on the current operations of the court appointed counsel program in the form of two reporting requirements contained in the 1996 Budget Act. Budget Control Language directs the Judicial Council to enhance the efficiency of the court appointed counsel program by implementing management reporting systems as described below:

On or before January 1, 1997, the Judicial Council shall provide recommendations to the Legislature for improving the efficiency and effectiveness of the appointed counsel programs for the courts of appeal and the Supreme Court. To this end, the Judicial Council shall implement management reporting systems that delineate case assignments and attorney workloads, including legal training and attorney advancement and attrition. The reporting systems also shall include, but shall not be limited to, expenditure and operations data for each of the five appellate projects and the Supreme Court appointed counsel program, and the criteria by which appellate cases are measured and matched with attorneys.

A second reporting requirement in the 1996 Budget Act related to court appointed counsel comes in the form of Supplemental Report Language, specifying the following:

The Judicial Council shall develop consistency standards for measuring the experience and qualifications of private attorneys handling indigent defense appeals, and for measuring the complexity of cases received by the Court-Appointed Counsel Program. The council shall also use the standards and rankings to develop an incentive system to retain experienced attorneys in the program. The council shall report to the Legislature's fiscal committees by January 1, 1997 regarding the implementation of the standards and the incentive system.

As will be illustrated in this report, a number of the specified requirements are addressed by reporting systems or standards already in place. The extent to which these systems have been completed will be described, with particular attention paid to the areas currently under development.

II. SUPREME COURT INDIGENT DEFENSE PROGRAM

The Supreme Court maintains an indigent defense program consisting of members of the private bar appointed to provide representation to indigents under sentence of death, and an appellate project that provides professional assistance to private counsel appointed in capital appeals. The Office of the State Public Defender, in the executive branch, also provides representation in approximately 40 capital cases.

As of October 1, 1996, there were 467 defendants on death row. Of the 284 direct appeals pending in California, there were 146 awaiting appointment of counsel. There are 32 to 36 new judgments of death entered each year and 19 to 26 counsel appointed per year. Thus, each year the number of defendants without counsel grows larger.

Criteria for Appointment of Counsel in Capital Appeals

The California Standards of Judicial Administration, section 20(c) sets forth the minimum qualifications for appointment in death penalty cases:

- (1) active practice of law for four years in the California state courts or equivalent experience;
- (2) attendance at three approved appellate training programs, including one program concerning the death penalty;
- (3) completion of seven appellate cases, one of which involves a homicide; and
- (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

The court uses this standard as the initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal. The court considers attorneys meeting the professional qualifications on an individual basis, and, after review by the full court, appoints them as the capital case warrants and as the attorney's schedule permits.

Most attorneys handle only a single capital appeal, although approximately 15 very experienced counsel have more than one appointment. The Supreme Court is unable to maintain a panel list of attorneys awaiting appointments in capital cases because all eligible attorneys who apply are appointed as soon as possible.

Case Classification

Capital appeals are not subject to the case classifications used by the appellate projects serving the Courts of Appeal. Capital appeals have longer records, averaging 10,000 pages, multiple issues surrounding both the appeal and the habeas corpus investigation, special circumstances, and sometimes multiple defendants. The average appeal remains before the Supreme Court from six to eight years from the date counsel is appointed.

Even after the appeal has concluded and the remittitur has been issued, additional investigation in the habeas corpus proceeding may take place. If counsel continues to handle the case during proceedings in the federal courts, they may remain involved with the case for another five to seven years. As a result, there is little attorney “turnover” in cases because counsel’s involvement with a single case is of such lengthy duration. The length and complexity of the proceedings, the intensity of work at various stages, and other caseload demands limit the number of cases that a single private attorney can undertake at one time. For this reason, an ever larger pool of new attorneys is required from which to make appointments in capital cases.

Measures to Attract Counsel

The growing number of cases without counsel is a matter of serious concern to the court, and every effort is being made to secure additional appointments for capital cases. Since resuming the responsibility for actively seeking counsel for capital appeals in June 1992, the Supreme Court has adopted a number of innovations to enhance this effort.

- The court established an Automatic Appeals Monitor whose specific function is to recruit counsel for capital appeals, to determine their qualifications, and to make recommendations to the court for their appointment.
- The court eliminated the requirement that appointed counsel continue to represent the appellant in federal court on habeas corpus proceedings. This change allowed counsel to concentrate their efforts before the California Supreme Court without the necessity of proceeding in an unfamiliar forum or committing the additional years necessary for such representation.
- The court sought and obtained funding from the Legislature in 1995–96 for an increase from \$75 per hour to \$95 per hour in the rate paid to court appointed counsel to make appointment to capital appeals more attractive financially. Effective January 1, 1997, the rate for capital appeals was raised to \$98 per hour. Attorneys billing under the hourly rate option may file claims every 90 days for work done in the preceding quarter.

- The court has made a fixed fee option for payment available to attorneys in lieu of the hourly rate method of billing. This option provides for set milestone payments when attorneys have completed work to a particular point, such as record certification or filing the appellant's opening brief. The fixed fee option provides counsel with greater predictability, consistency, and control over compensation and expenses and significantly reduces counsel's administrative paperwork.

There is a range of fixed fees, based on five categories of cases, which, effective January 1, 1997, runs from \$87,700 to \$232,100, depending on the category.⁸ There are 69 fixed fee cases as of October 1996. Descriptions of the fixed fee categories in capital cases are attached as Appendix B.

- The court instituted an expedited procedure for paying 75 percent of counsel's requested fees (i.e., up to 75 percent of the upper benchmark for the activity) immediately after the claim is filed, and paying the remainder after complete review of the documentation and evaluation of the claimed hours. The benchmark range for each activity is attached as Appendix A. This procedure has eliminated the delays in payment to counsel while reserving sufficient latitude to allow for thorough review by the court before final payment. In 1995–96, payments to the panel attorneys under both payment options totaled \$3,341,458.
- The court has released a training videotape (at no cost to counsel) to assist and train counsel who have been appointed to their first capital appeal and related state court habeas corpus proceedings. The tape, *Handling Death Penalty Appeals and Related Habeas Corpus Proceedings Before the California Supreme Court*, provides a comprehensive overview of appointed counsel's procedural (but not substantive) responsibilities at each stage of the capital representation. The tape also reviews the procedural aspects that distinguish capital appeals from all other criminal appeals, and is used to provide an orientation to those experienced appellate/criminal law practitioners who are considering an application for appointment to their first capital appeal.

In the 1995–96 legislative session, there were two bills that would have expanded the Office of the State Public Defender to handle all capital appeals, created a new Office of Post Conviction Counsel to handle all habeas corpus proceedings, and

⁸ Prior to the January 1, 1997 rate increase to \$98 per hour, fixed fees ranged from \$85,000 to \$225,000. Category V is reserved for exceptional cases in which counsel may present justification for a fixed fee above the base fee.

provided funding for the court to increase the rate paid for new appointments to \$125 per hour. Neither bill became law last session, but similar legislation is expected in 1997. This potential for new legislation is having an impact on the court's ability to make new appointments as counsel wait to see what changes may occur in the capital appointed counsel program, either structurally or financially, before applying for appointments in capital cases.

The Appellate Project

The Supreme Court contracts with the California Appellate Project–San Francisco office (CAP–SF), which provides services only for capital cases. This project furnishes professional assistance to counsel at all stages of the appeal and related state-court habeas investigation through a staff of attorneys, paralegals, and mitigation specialists. In addition to directly assisting counsel, the project maintains an extensive brief bank and has compiled written manuals to assist appointed attorneys in the preparation of capital appeals and the related habeas corpus investigation. It also conducts periodic training seminars on various aspects of capital practice.

Under its contract, CAP–SF bills the court monthly. The billing rates are currently \$100, \$65, and \$35 per hour for attorney time, mitigation specialist time, and paralegal time, respectively. CAP–SF uses the summary form included as Appendix F in its monthly billing to the court. Its billing also provides detailed information about the hours of assistance provided to appointed counsel in each case each month. In 1995–96, the CAP–SF contract was valued at \$1,855,874. [NOTE: Appendix F is not included on Web site.]

Summary

The California Supreme Court has taken an active role in maintaining and enhancing the quality of the capital court appointed counsel program. Standards are in place for the minimum professional qualifications of attorneys applying for appointment in a capital case. Cases are matched with counsel on an individual basis. The court has made changes in the payment options available to counsel and has obtained funding to raise the rate of compensation to counsel. The unique nature of capital appeals requires the court's ongoing attention to ensure that measures are in place to attract well-qualified attorneys to apply for appointments in capital cases. The court will continue to evaluate the capital court appointed counsel program, and will make changes as necessary to improve the efficiency and effectiveness of the program.

The remaining discussion in this report applies specifically to the operations in the Courts of Appeal court appointed counsel program.

III. CRITERIA FOR MEASURING ATTORNEYS' QUALIFICATIONS AND FOR MATCHING COUNSEL TO CASES

The matching of attorneys to cases is one of the principal functions of the appellate projects, as specified in California Rules of Court, rule 76.5⁹ and the appellate projects' contracts with the court. The projects jointly developed a statewide classification system for both counsel and cases to facilitate the matching activity. These uniform classification standards—in place since July 1994—provide clear direction to appellate project staff attorneys regarding counsel's eligibility and case complexity. A related function mandated under rule 76.5 is the ongoing evaluation of attorneys' performance.

Attorney Classification System

The appellate projects assign each panel attorney a rank from level I to V, with level V designating the most highly qualified counsel. The attorney classification standards for each level include descriptive and objective qualifications, work product expectations, designation of eligibility for types of cases, and the ability to work independently or, conversely, the need for assistance. Requisite experience and qualifications for each level are summarized in Table 1 on page 12.¹⁰ (See Appendix C for Court of Appeal Attorney Classifications in full detail.)

California Rules of Court, rule 76.5 requires the projects to assess all attorneys' ongoing work and to move them to different levels based on changes in skills and variations in work quality, or, when necessary, to remove attorneys from the panel. Therefore, an attorney's rank is continually in review, with changes made to rank as needed to reflect the attorney's current level of performance.

Selecting an attorney for a given case, determining the level of assistance to be provided, designating the case assignment status (assisted or independent), and fixing an attorney's ranking are all based on performance-related standards, including:

- ability to identify and evaluate issues;
- quality and completeness of legal research;

⁹ Section (d) of rule 76.5 gives the appellate courts the option to contract “with an administrator having substantial experience in handling criminal appeals” to perform the administrative functions related to the appointment of counsel in criminal appeals.

¹⁰ Experience level alone does not determine panel ranking; experience is weighed against work quality. Thus, attorney classification is not automatic and ranking can vary depending on the quality of work actually produced.

- quality of legal writing, including organization, persuasiveness, use of authority, accurate and appropriate presentation of facts; and
- responsibility, including timeliness, proper augmentation, and appropriate communications with the court, the client, the project, and trial counsel.

These highly individual performance standards are monitored by project staff attorneys for each case assigned to counsel. A more detailed explanation of performance standards is attached in Appendix D, Court of Appeal Attorney Evaluations: Specific Factors.

Those attorneys requiring little or no assistance on complex cases are ranked IV or V, while level I and II attorneys rarely obtain independent appointments. Level III attorneys typically may need little or no assistance on routine cases but may require tailored assistance on more complex ones.

Case Classification System

The complementary component of the matching system is the uniform case classification system. Criminal cases, rated on a continuum of complexity, are designated class A through E. Consistent with California Standards of Judicial Administration, section 20,¹¹ the following factors are considered in assessing complexity within each class:

- length of record,
- type of crime,
- length of sentence,

¹¹ California Standards of Judicial Administration, section 20 establishes guidelines “to match each appointed attorney’s skills and experience with the demands of the case.”

Table 1. Attorney Classification Standards

Level	Ability	Experience and Qualifications	Work Product	Presumptive Eligibility
I	Requires substantial assistance; can handle only simplest cases	Little to no relevant experience: <ul style="list-style-type: none"> – Less than two years in the practice of law – Fewer than three opening briefs; <i>or</i> Lowest performers on probationary status	Must demonstrate promising writing, research and analytical skills and make steady progress toward higher classifications; <i>or</i> Must correct deficiencies disqualifying them from higher levels within a reasonable time	Class A cases of no more than five days' trial on an assisted basis
II	Requires some assistance in all cases; can handle somewhat more difficult than the simplest cases	Modest experience with promise of attaining higher-level skills: <ul style="list-style-type: none"> – One to four years of practice – Three to 10 opening briefs; <i>or</i> Substantial experience but does not show promise of attaining higher-level skills: <ul style="list-style-type: none"> – More than four years of practice – More than 10 opening briefs 	Must produce work of at least standard quality, requiring little assistance to perform basic duties	Class A or B cases on an assisted basis
III	Able to handle case of intermediate complexity on an assisted basis and/or simple cases on an independent basis	Moderate amount of relevant experience: <ul style="list-style-type: none"> – 10 or more opening briefs or the equivalent 	Must consistently produce work of at least good to very good quality, requiring assistance only to perform the most complex duties	Class A and B on an independent basis and class C on an assisted basis
IV	Able to handle cases of substantial complexity on an assisted basis and/or cases of intermediate complexity on an independent basis	Superior qualifications and considerable relevant experience: <ul style="list-style-type: none"> – 20 or more opening briefs or the equivalent 	Must consistently produce work of at least very good quality, requiring assistance only to perform the most complex duties	Class A through D on an independent basis and class E on an assisted basis
V	Able to handle the most complex cases on an independent basis	Highest qualifications and extensive relevant experience	Must produce work of consistently good to excellent quality and use assistance when requested only at sophisticated levels	Any case on an independent basis

- type of proceedings (court or jury trial, guilty plea, probation violation, etc.),
- complexity of issues (based on motions and arguments in lower court, statements of trial counsel and the client, etc.), and
- “three strikes,” special circumstances, or similar complicating factors.

Classification of noncriminal cases, such as juvenile dependency appeals, are assessed by such features as length of record, complexity of probable issues, and “fast-track” status. These case-related factors help to determine the general skill level (attorney ranking) from which to choose counsel to appoint.

The case classification standards, detailed in Appendix E, provide clear direction while offering sufficient flexibility in each class to accommodate exceptional cases or updates required by changes in legislation (e.g., “three strikes”).

Standards for the Assignment of Assisted and Independent Cases

While the classification standards for attorneys and cases establish clear guidelines statewide for the matching function, their original drafting did not sufficiently delimit the two discrete case types, assisted and independent. Generally, cases in which counsel worked with minimal assistance¹² were designated independent; assisted cases were considered to be those in which an appellate project staff attorney provided substantial research and writing assistance to appointed counsel. In the fall of 1995, a subcommittee to the Appellate Indigent Defense Oversight Advisory Committee was appointed to draft standards to define more clearly assisted and independent cases. The Administrative Presiding Justices adopted seven recommendations from the subcommittee regarding assistance levels in independent cases which now are being implemented statewide.

The subcommittee formalized the de facto definition of the two case types by adding two quantifiable measures that (1) specify expected services provided to counsel by the appellate projects¹³ and (2) establish presumptive levels of

¹² Assistance provided by project staff attorneys to counsel in independent cases is more in the nature of consultation between experts on specific issues or procedural problems.

¹³ By definition, independent cases are those cases for which project staff attorneys do *not* perform the following: initial review of parts of the record; preparation of a research memo; and review of a draft of the appellant’s opening brief before filing (except occasionally for purposes of monitoring quality assurance). Cases for which the project provides any or all of these services are designated assisted.

assistance¹⁴ by case type. Other key recommendations expanded statistical reporting categories to isolate assistance to counsel, set a target case assignment ratio (assisted:independent), and mandated quarterly monitoring by the indigent defense oversight committee of statewide case assignment patterns and levels of assistance.

The determination of how much assistance, if any, an attorney needs in a given case is a function of both the complexity of the case and the abilities of counsel. An attorney may require considerable assistance with a complex case and none with a simple one. The subcommittee's work provides a significant refinement to the matching activity by establishing clear definitions of case type in terms of expected services and levels of assistance. These definitions, coupled with the projects' attorney and case classification guidelines, provide for a consistent and uniform approach to statewide case assignment.

Application of the Attorney and Case Classification Standards to Current Caseload

The attorney and case classifications standards provide clear guidelines to the appellate projects for matching counsel to cases. Two complex sets of variables—the profile of the attorney and the profile of the case—must be joined to produce a satisfactory match. In addition to performance factors discussed above, consideration during the matching process must also be given to the attorney's area of expertise or strength. Some attorneys are experts in juvenile dependency law, while others accept only criminal representations. There are counsel who have considerable knowledge of the law and thus excel at issue spotting, but who have difficulty in crafting satisfactory argumentation; other attorneys have the reverse problem. The appellate projects endeavor to appoint the maximum number of cases on an independent basis, reflecting a desirable match of skills and experience to case complexity. However, the present mix of cases, panel composition, and saturation of cases in the upper panel ranks render the matching function an ongoing challenge.

The appellate projects have witnessed a particularly marked increase in the complexity of caseload in the past two years, ascribed in large part to the three-strikes legislation. Statistics gathered by the projects indicate that the percentage of the most complex cases (classes D and E) in the overall caseload has nearly doubled since 1994.¹⁵

¹⁴ The subcommittee proposed a period of study to measure the cumulative effects of its recommendations and will evaluate the presumptive level of assistance in assisted cases in June 1997.

¹⁵ In sheer numbers, approximately 1,000 additional such cases will be in the 1995–96 caseload, compared to the 1994–95 caseload.

Period	D and E Cases
July-December 1994 ¹⁶	13.6%
July-December 1995	22.7%
July-September 1996	24.4%

During this same two-year period, the population of attorneys capable of handling complex cases on an independent basis (levels IV and V) grew only slightly. The increase in D and E cases has caused a significant additional burden to the appellate projects in finding experienced counsel to manage the complex cases.

The current case-to-attorney relationship (many to few) presents a situation in which demand far outpaces supply. Ideally, the proportions of cases (by complexity) and attorneys (by level) would be more similar. If, for example, the mix of cases were weighted generally in the same way as panel composition—with about 15 percent of cases in the two highest (most complex) categories, about 20 percent in the mid-range of difficulty, and the remaining half in the routine or simple class—the matching function would be relatively simple. A further discussion of resource availability and saturation at the highest levels is provided in section IV.

The current attorney and case classification standards thoroughly articulate criteria for (1) assigning attorney rank based on measurable experience and qualifications and (2) designating case complexity. The difficulty with the matching function resides in areas that are neither controllable nor susceptible to a formulaic approach—the continued increase in case complexity and caseload coupled with the difficulty in attracting and retaining experienced appellate practitioners to the panel. Efforts should focus on broadening and retaining the population of skilled attorneys at the highest ranks, those capable of assuming the most complex cases on an independent basis.

IV. PANEL COMPOSITION, PANEL MOVEMENT, AND RESOURCE AVAILABILITY

With ongoing evaluation of attorneys' work—and subsequent changes to rank, admission of new panel members, and the voluntary and involuntary departure of attorneys, panel composition is in a constant state of flux. In recognition of the growing imbalance between an increasingly large and complex caseload and the pool of attorneys capable of handling such cases, the indigent defense oversight

¹⁶This is the period just before the appellate impact of “three strikes” began to be felt.

committee has begun to monitor panel composition closely with an eye toward developing the panel at the upper levels. This section describes current panel composition and its evolution over the past two years, discusses panel movement, and quantifies resource availability.

Statewide Panel Composition

All appellate projects assign each panel attorney a rank from level I (low) to V (high) based on statewide classification standards described above (p. 12). The attorney evaluation system and the electronic recording of rankings—both standardized statewide in 1994—allow for analysis and tracking of statewide trends.

Each appellate project maintains its own panel list since each project must evaluate the work performed in its own district. Some attorneys are on a single district’s panel; others accept appointments from multiple districts. Currently available data—from July 1994—permit comparison of panel composition over two years. Refer to Table 2 below for a detailed breakdown of panel ranking over the last two years.

Table 2. Statewide Panel Rankings: July 1994–July 1996¹⁷

	Level V		Level IV		Level III		Level II		Level I		NR*		Total
	N	%	N	%	N	%	N	%	N	%	N	%	N
July 1996	88	5.3%	150	9.0%	378	22.7%	485	29.2%	336	20.2%	225	13.5%	1,662
Jan. 1996	82	4.8%	141	8.3%	361	21.3%	541	31.9%	449	26.5%	123	7.2%	1,697
July 1995	82	5.0%	142	8.7%	361	22.0%	542	33.1%	472	28.8%	40	2.4%	1,639
Jan. 1995	81	4.9%	134	8.2%	363	22.1%	515	31.4%	483	29.5%	49	3.0%	1,625
July 1994	81	4.9%	126	7.7%	357	21.8%	530	32.3%	471	28.7%	27	1.6%	1,592
Average	83	5.0%	139	8.4%	364	22.2%	523	31.8%	442	26.9%	93	5.6%	1,643

* No rank recorded.

Figure 2 (see p. 32) also displays statewide panel rank over the same two-year period, clearly showing a shift from a panel once weighted more heavily toward the lower ranks to a leaner, more current panel. The low-performing or inactive panel members have been removed.

Panel Movement: Attorney Advancement and Attrition

Panel movement results from one of the following events: elevation or reduction in rank, voluntary or involuntary removal, and request for “voluntary hold.” Reasons for attorney advancement are summarized in Table 1 (p. 12). Elevations occur when attorneys acquire the necessary skills and experience for the next

¹⁷ If an attorney on multiple panels is ranked differently among projects, the highest rank is used for statewide reporting.

highest level. Reductions and involuntary removal typically result from a diminution in work quality or continued difficulty in meeting deadlines. Counsel leaving the panel voluntarily have cited various reasons including new employment or relocation; insufficient compensation; excessive workload in another area of practice; and dissatisfaction with reductions in compensation or with appellate practice in general. Finally, counsel may request a “voluntary hold”—generally due to excessive caseload—for a specified period of time (usually several months) during which the project will extend no appointment offers to the attorney.

Several notable changes in panel composition have taken place in the most recent reporting period. The projects’ efforts to increase the population of experienced appellate practitioners have met with modest success—level V attorneys increased by 6 and level IV by 9. While the level IV and V attorneys combined remain rather scarce—constituting less than 15 percent of the panel, the net gains in the latest reporting period show the most significant growth at the two highest levels since the ranking system was standardized. Growth was also seen in the level III attorneys, up a net 17 attorneys since the last reporting period. The middle rank accounts for nearly a quarter (23 percent) of the panel.

At the lower ranks (levels I and II), the projects have made great strides recently to remove low performers or inactive panel members. A total of 169 attorneys were taken off the panel. At the same time, the number of attorneys with no rank (NR) spiked—up from a low of 27 to 223. This jump can be attributed in large part to those attorneys moved from the low end of the active panel (level I) to a probationary status (with no associated numerical designation). Net changes to the panel in the past two years are positive, showing gains in the upper levels and attrition at the lower levels.

The appellate projects’ current procedures for monitoring in-district panel movement vary. In some projects, changes to individual rank as well as additions to or removals from the panel are recorded electronically in the compensation claim system. Some projects keep written records of only the current rank while others maintain a cumulative history of each attorney’s level from the date of panel admission. In one district, development is underway to permit the electronic reporting of movement from one level to another (rank elevations and reductions), as well as total additions to and deletions from the panel. Another project¹⁸ has recently introduced plans for a similar reporting system with an added feature to record the reason for departure.

¹⁸ Appellate Defenders, Inc.

Reports from the projects on in-district panel movement indicate that most movement on and off the panel takes place at the lower levels. Level IV and V attorneys tend to specialize in appointed appeals and thus are less likely to leave the panel permanently; typically, high level attorneys may request a voluntary hold due to excessive workload but remain on the panel. Involuntary departures, for the most part, occur in the lower ranks of the panel. At each project, movement of panel attorneys between levels is ongoing, subject to changes resulting from continued performance evaluations. Generally, panel movement by the projects over the last 18 months shows that net elevations in rank exceed reductions. Changes to a single district's panel may not be evident in the aggregate statewide figures because the net change resulting from all movement tends to minimize the effects of individual panel updates.

A reporting system for panel composition and movement should be incorporated into the electronic compensation claim program, with standardized reporting features to include the number of attorneys by rank, movement between levels, and the capability to track the reasons for departure from the panel.

Resource Availability

While raw numbers of attorneys at each level are informative, they do not speak to resource availability. Panel composition detailed in Table 2 above theoretically identifies those attorneys eligible for independent (some counsel at level III; all at levels IV and V) versus assisted (levels I, II, and some counsel at level III) work. The limited pool of level IV and V attorneys also is the most in demand. These attorneys are called on to take the more lucrative capital appeals (currently compensated at \$98 per hour) and federal habeas work (\$125 per hour), pulling them away from Court of Appeal work for substantial periods of time. Since July 1994, for example, 49 total capital appointments have been made. Of these, 20 (or 41 percent) were appointed to a level IV or V Court of Appeal panel attorney. Furthermore, the vast majority (72 percent) of level IV and V attorneys accept appointments from multiple panels, greatly restricting their availability.

Once a case is appointed, the court requires strict adherence to deadlines. These time constraints limit counsel's ability to accept numerous appointments, especially multiple complex cases, within a short time frame. The characteristics of cases assigned to level IV and V attorneys—typically with lengthy records and numerous and complex issues on appeal—generally limit counsel's availability during several months. In the Fourth District, for example, statistics from the appellate project for January through September 1996 show a rejection rate of level IV and V attorneys of nearly 25 percent:

Cases Offered	Cases Rejected
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This rejection rate understates the situation considerably because the projects do not extend offers to those attorneys who either have requested a “voluntary hold” or, based on the project’s knowledge of counsel’s open caseload, clearly cannot assume an additional case of any complexity. Thus, the rejection rate above reflects only the refusal of cases offered to attorneys who were presumed available for new appointments. If the projects were to offer complex cases to all eligible attorneys regardless of stated availability, the rejection rate is estimated to exceed 50 percent.

The First District offers another telling picture of the problem of resource availability. Of the level IV and V attorneys, 23 (approximately 25 percent of the highest-ranked attorneys on the First District Appellate Project’s panel) were able to take only two or fewer cases in the first nine months of 1996. A number of those attorneys had taken no cases as of October 1996. Seven of the attorneys are appointed to a death penalty case.

Caseload Distribution

The matching of attorney rank with final compensation claims is one indicator of caseload distribution. Caseload data reported in Table 3 below are drawn from final claims only; these numbers do not reveal counsel’s overall open caseload but rather only those cases closed (final claim submitted) during the 1995–96 fiscal year. Comparison of the numbers of claims submitted as a function of attorney rank to the number of attorneys at each level clearly illustrates that the majority of the caseload (66 percent) is handled by levels III, IV, and V attorneys (representing 36 percent of the panel). Levels I and II attorneys, who comprise 61 percent of the panel, assume 28 percent of the caseload.¹⁹ This comparison is also shown in graphical format in Figure 3.

Table 3. Caseload (Final Claims) by Attorney Rank, 1995–96

Attorney Rank*	# of attorneys	% of panel	# of claims	% of final claims	# claims per attorney
Level V	81	4.9%	955	11.6%	11.8
Level IV	134	8.2%	1,667	20.2%	12.4
Level III	363	22.1%	2,797	33.9%	7.7
Level II	515	31.4%	1,770	21.4%	3.4
Level I	483	29.5%	540	6.5%	1.1

¹⁹ While level IV and V attorneys are an invaluable resource, mid- to lower-level counsel also play an important role on the panel. This group dispatches the simple to routine cases effectively and efficiently, and serves as the ranks from which level IV and V attorneys are developed.

No rank	49	3.0%	incomplete data ²⁰
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* Rank as of January 1, 1995.

The data in Table 3 demonstrate that cases overwhelm resources at the upper levels of the panel. The rate of saturation in the upper ranks is of serious concern. Current reporting systems do not readily allow queries of open caseload regarding case assignments to attorneys. To better evaluate attorney workload and resource availability, the electronic compensation claim program should be expanded to provide statewide figures on attorney workload by rank²¹ and by range of cases (e.g., the number of attorneys who currently have 1 to 5 open cases, 6 to 10, 11 to 15, etc.). This expansion should be completed simultaneously with the changes recommended above regarding a standardized panel management and reporting system.

V. INCENTIVE SYSTEM: RECRUITMENT, TRAINING, AND COMPENSATION

A key mechanism for improving the efficiency and effectiveness of the appellate counsel program is the continued development of incentives. This section describes current efforts to build and retain a pool of experienced attorneys, with an emphasis on recruitment, training, and compensation, and provides recommendations for enhancement of the systems already in place.

Recruitment

Recruitment of panel attorneys is ongoing. As described above, panel composition is never static—counsel may join or leave the panel, move up or down in level based on performance, or voluntarily refuse some or all appointment offers. Depending on a variety of factors, principally caseload and resource availability, the appellate projects will seek to augment their panel to meet demand.

The appellate projects often receive unsolicited applications for panel membership. In fact, the problem with resource availability is not as much a dearth of applicants as a dearth of *experienced* applicants. The experienced appellate practitioner is a rarity, and there are limited training grounds from which to draw these attorneys. Consequently, the projects do not necessarily focus on expanding resources at the lower levels, but instead may target their active recruiting efforts to identify

²⁰ Missing or incomplete information did not permit accurate match of claim to panel attorney.

²¹ To provide a consistent statistic, the reporting system would reflect attorney rank at the time of the appointment.

experienced attorneys—the few appellate specialists capable of handling more complex cases with minimal assistance.

All projects undertake recruiting activities to identify new talent. One project makes a presentation at a local bar association program put on for new admittees to the bar. Most projects recruit actively through criminal defense bar associations as well as through minority bar associations and publications. Often, recruitment takes place informally through classes taught by staff attorneys, seminars at which project staff lecture, bar association programs, and other professional activities.

Once admitted to the panel, an attorney's subsequent advancement depends on a variety of individual performance factors. Elevation through the ranks is commensurate with ability, timeliness, and work quality. One avenue the projects pursue to accelerate attorney advancement is to "fast track" promising panel members. When a project identifies a new-to-the-panel attorney who demonstrates extraordinary potential, this attorney is accorded specialized attention. Cases appointed to counsel identified for the "fast track" increase in difficulty on a much shorter time scale to expedite the movement from the entry-level to the advanced levels.

Training

Training of panel attorneys, outside the ongoing skill-building provided through tailored assistance to counsel, takes many forms. Bulletins or quarterly newsletters in all districts provide information and updates on matters of substantive law as well as on in-district operations. Several projects offer on-line brief banks, and at least one project has developed an appellate practice manual. Two projects disseminate information through telephone "hotlines," either through a recorded message with pertinent, up-to-date information or through designating a subject-matter expert to field calls on a specific area of interest. All projects have distributed information through specialized mailings to all panel members following a late-breaking issue (e.g., the *Sandoval*²² and *Romero*²³ decisions).

All projects organize between one and six appellate seminars annually targeted to beginning and advanced counsel or to juvenile dependency specialists. Normally one-day events, the seminars may focus on a single matter or cover a range of substantive and procedural topics. Attorneys receive Minimum Continuing Legal Education (MCLE) credit for their participation in the training programs. Sample topics covered at appellate training seminars in the last two years include:

²² *People v. Sandoval* (1992) 4 Cal.4th 155 (decision on writ of certiorari in *Victor v. Nebraska* (1994) 114 U.S. 1239).

²³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

- Standards of Review and Standards of Prejudice for Instructional Error
- Ineffective Assistance of Counsel and the Appellate Process
- Dealing with Clients and Trial Counsel
- Juvenile Dependency Writ Procedure
- Using the Brief Bank
- “Three Strikes” Update
- Billing Procedures
- General Appellate Practice in Specific Districts
- Law Office Management for the Appellate Practitioner
- Ethical Concerns in Appellate Advocacy
- Evidentiary and Sentencing Issues
- Vicarious and Imputed Liability
- Legal Resources on the Internet
- Legislative History

Panel attorneys’ participation in training provided by the projects is tracked. As is required of all MCLE providers, attendance records to specific seminars are maintained at the local project. It is feasible for the projects to electronically record counsel’s participation in training; such a feature should be included in the panel management system.

Compensation

When the attorneys whose claims had been selected for a quarterly audit recently were asked about incentives to remaining on the panel and to attracting other members, the vast majority responded with a request for higher compensation. Some progress has been made in increasing pay to panel attorneys who, prior to July 1995, had not seen a rate increase since 1989.

Starting with cases appointed on or after July 1, 1995, two complex case categories were designated for a \$10 per hour increase, from \$65 to \$75 per hour: PC 187s (murders) and cases in which the appellant was sentenced to life without the possibility of parole (LWOPs). The higher hourly rate applies only to independent appointments in cases which follow a jury trial. The second payment tier was further expanded, for independent appointments made on or after August 1, 1996, to include two additional case categories: (1) major sex crimes²⁴ following a jury trial and (2) jury trial cases with records of 3,000 pages or more.

²⁴ Following convictions under Pen. Code, §§ 208d, 261–269, and 281–294.

The Judicial Council is seeking funding for 1997–98 to establish a three-tier compensation system with the highest tier at \$85 per hour for counsel appointed to cases currently designated for the upper tier; a second tier at \$70 per hour for counsel appointed to cases on an independent basis; and a first tier set at \$65 per hour for assisted cases.

A three-tiered payment system would more closely match the varying degrees of case complexity and the varying levels of attorney experience and capabilities than does the current two tier system. An entry-level rate paid to new and assisted counsel for routine cases would provide further payment differential based on case complexity and counsel’s skills. A higher rate for the most complex cases will help attract and retain experienced counsel on the panel. A moderate raise in the rate paid for the mid-range cases appointed on an independent basis would provide a bridge to the highest classification and encourage attorneys to qualify for the higher rate. The Judicial Council urges legislative support for funding the proposed three-tier system as the single-most identifiable inducement for the already limited pool of appellate specialists to remain on the panel.

Challenges Unique to Appellate Indigent Defense

Appellate indigent defense work requires specialized legal skills and a certain fortitude to face the particular challenges of this area of law. Some of these challenges are quantifiable—such as the growing complexity of caseload and required performance measures. However, a complete discussion of the appellate indigent defense program warrants mention of the more hidden challenges—indeed *disincentives*—that face panel attorneys:

- 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., 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.

The appellate projects provide the following services and support to panel attorneys. To the greatest extent possible, these services address the challenges articulated above.

- The projects' assistance function helps overcome the isolation of panel attorneys and provides a vehicle for attorneys to get feedback on issues and approaches, something that is a matter of routine for attorneys who practice within firms or public defender offices.
- The projects conduct training seminars and produce resource materials.
- The projects monitor deadlines and try to restrict the number of cases offered to attorneys who are having timeliness problems.
- The projects remove attorneys from the panel who continue to need a significant amount of assistance and demonstrate little prospect for significant improvement.
- The projects often receive inquiries or complaints from clients which would otherwise need to be addressed by the courts. The projects usually are able to resolve the problems by reassuring the client about the attorney's work, and by ensuring that the attorney properly responds to client concerns.
- The projects have worked with the courts to help draft local and statewide rules that streamline the appellate process.

The appellate projects, through their continued efforts to customize assistance and promote panel development, have enhanced the efficiency and effectiveness of the appellate indigent defense program. Examination of additional incentives or of expanding the incentives already in place would serve to further benefit all interested parties—the courts, appellate projects, panel attorneys, and, ultimately, the appellants. Development of a broadened incentive program should focus on recruitment, outreach, training, and retention.

VI. EXPENDITURE AND OPERATIONS DATA

The five appellate projects serving the Courts of Appeal and providing assistance to panel attorneys in the six appellate districts are 98 percent funded by the state. These five nonprofit corporations operate under contracts with the judicial branch that fix both the services to be provided and the allowable billing rate for these services. From the contract billings, the projects must cover personnel and operating expenses, maintain necessary reserves, and provide services in all cases in which the courts make an appointment of counsel.

The judicial branch recently contracted with a cost accountant to examine the operations of the five appellate projects serving the Courts of Appeal, and to recommend possible modifications to the funding of the projects. The accountant evaluated the projects' salary and benefits structures, spending levels, and equipment vintage; recommended appropriate levels for operating reserves; and equalized any imbalances through efficiency adjustments. The cost accountant recommended new contract levels beginning in 1996–97.

Contract Values

The appellate projects, in whole or part, have shown balance sheet losses in every fiscal year since 1993–94. In Table 4 below, operations data from 1992–93, the last year in which no losses were sustained, are compared to data from 1995–96 to illustrate that while overall funding has contracted, caseload has increased. Over the four-year period, panel appointments have increased 20 percent overall²⁵ and funding levels have decreased slightly more than 5 percent.

Table 4. Contract Value and Case Appointments, 1992–93 and 1995–96

	1992–93			1995–96		
	Contract Value	Appointments Panel*	Total**	Contract Value	Appointments Panel*	Total**
FDAP	\$2,025,132	1,313	1,341	\$1,837,152	1,461	1,468
CAP–LA	\$3,329,107	2,814	2,862	\$3,504,670	2,809	3,039
CCAP 3	\$1,323,421	952	982	\$1,130,521	1,203	1,203
ADI	\$3,316,937	1,838	1,973	\$2,956,224	2,734	2,936
CCAP 5	\$1,195,532	765	790	\$1,176,664	1,150	1,150
SDAP	\$1,070,218	584	655	\$1,000,823	562	696
Total	\$12,260,347	8,266	8,603	\$11,606,054	9,919	10,492

²⁵ If total appointment figures are compared, the increase from 1992–93 to 1995–96 is 22 percent.

* Panel appointments include appointments to private attorneys and to appellate project attorneys outside the project's contract.

** Total appointments include panel appointments as well as appellate project staff attorney cases under contract.

The appellate projects report their hourly expenditures, as billed against the contract value, to the Administrative Office of the Courts (AOC) on a monthly basis. Services are billed in two categories: (1) individual case services, including assistance to counsel, evaluation, and compensation review; and (2) common case services including but not limited to recruiting and classifying counsel, classifying cases, and assisting defendants with the filing of notices of appeal. A sample monthly invoice summary, including several pages of case-specific detail, is attached in Appendix F. [NOTE: Appendix F is not included on Web site.]

Currently under development at the AOC is a relational database system that will provide greater connectivity between the projects' billing and hourly expenditures and the AOC's internal financial systems. Presently, data from the monthly invoices are manually entered at the AOC and stored in a custom-written COBOL system on a Wang platform. Payments to the appellate projects—as well as the panel attorneys' compensation claims—are processed on an Oracle-based government financial system that resides on a Sun/Solaris system. With the new database system, the billing and financial systems will be joined, permitting electronic transfer of data from the appellate projects to the AOC. The modernized database system will permit greater access to historical data and will allow more accurate financial forecasting.

Caseload Operations Adjustments

The overall staffing level of the appellate projects under their contracts has not increased between fiscal years 1992–93 and 1995–96, while panel appointments have increased 20 percent overall in that same time period. (See Table 4.) In the last full fiscal year, statewide staffing levels at the appellate projects numbered nearly 142 full-time positions; attorneys accounted for 58 percent of total staff (or 82 positions), while all other staff represented the remaining 42 percent (or 60 positions). Thus, the projects have had to make adjustments in their operations over the last several years to provide services for the increased caseload while their contract funding has decreased during the same period.

The projects have responded in a number of ways to do more with less. Assistance in individual cases has decreased and a higher percentage of cases are appointed on an independent basis. There is an increased focus on training and providing resource materials. At the request of the courts, the projects screen certain categories of appeals and handle in-house those cases that are likely to

result in no-merit *Wende*²⁶appeals. A greater emphasis has been placed on training and promoting promising attorneys and removing from the panel those attorneys whose poor performance has required a greater amount of project time and resources. (See Table 2.)

In addition, the appellate projects have assumed a majority of the workload associated with the recently adopted system for reviewing panel attorney compensation claims. Processing of most claims is now centralized at the AOC, with quarterly audits undertaken by the Appellate Indigent Defense Oversight Advisory Committee to ensure uniform, consistent application of payment standards statewide. The change in the processing of claims which, prior to January 1995, flowed from the projects to the court and then to the AOC, required substantial procedural modifications at the project level. The projects were required to alter their forms, update computer programs, change internal workflows, and expand data entry procedures. Their clerical workload increased substantially because of the requirement that all claim data be entered into a database to generate a standardized worksheet. Costs associated with these new procedures were absorbed internally by the projects.

The appellate projects will have to continue to make these and other adjustments in their operations in order to provide services for a growing caseload and to improve the efficiency of the appellate indigent defense program. However, the cost accountant's review of appellate project operations concluded that to ensure the projects' continued financial viability, additional funding for core operations must be provided.

Monitoring by the Appellate Indigent Defense Oversight Advisory Committee

The Appellate Indigent Defense Oversight Advisory Committee provides judicial oversight to the appellate indigent defense program in the Courts of Appeal. This committee is comprised of appellate justices from each district, and representatives from the private bar and the appellate projects. Under the management oversight of this committee, the court appointed counsel program has benefited from quantifiable cost-savings measures and operational efficiencies. Claims processing and payment procedures have been centralized and streamlined; overall levels of assistance have declined markedly; more cases are being appointed on an independent basis; and overall costs per case have decreased.

²⁶ *People v. Wende* (1979) 25 Cal.3d 436. In this case, the Supreme Court held that in an appeal in which assigned counsel formally advises the court that counsel can identify no argument of any merit to present on appeal, the Court of Appeal must then conduct an independent review of the record to ascertain whether there are arguable issues and, if so, ask counsel to brief them.

Other program achievements resulting from committee oversight, albeit intangible, are just as significant to the overall enhancement of the appellate indigent defense program: greater communication between the courts, appellate projects, and panel attorneys on policy matters; better understanding of the business operations of the appellate projects; and increased standardization of statewide procedures. The indigent defense oversight committee provides a useful forum for discussing and modifying procedures, identifying discrete issues for study, and monitoring statewide trends.

The management oversight of the appellate indigent defense program by the Appellate Indigent Defense Oversight Advisory Committee should be continued. Specifically, the committee should oversee the development of standardized management reporting systems described in this report centering on panel management, case assignment, and training.

VII. CONCLUSION

The appellate indigent defense program continues to develop and adapt to the challenges presented by an increasingly complex mix of cases in the California Courts of Appeal. The appellate projects have established consistency standards that assure a uniform statewide approach to attorney and case classification and to the matching function. Further enhancement of the appellate indigent defense program can be achieved by strategizing new ways for attracting and retaining experienced appellate practitioners and for developing the skills of mid-level counsel already on the panel. The development of standardized reporting systems in the areas of panel management, case assignment, and training, coupled with the development of the AOC court appointed counsel database system, will provide expanded access to data, thus permitting more sound policy and management decisions.

The oversight of the Appellate Indigent Defense Oversight Advisory Committee has promoted efficiencies in the appellate indigent defense program. The Appellate Indigent Defense Oversight Advisory Committee makes the following specific recommendations.

VIII. RECOMMENDATIONS

The Appellate Indigent Defense Oversight Advisory Committee recommends that:

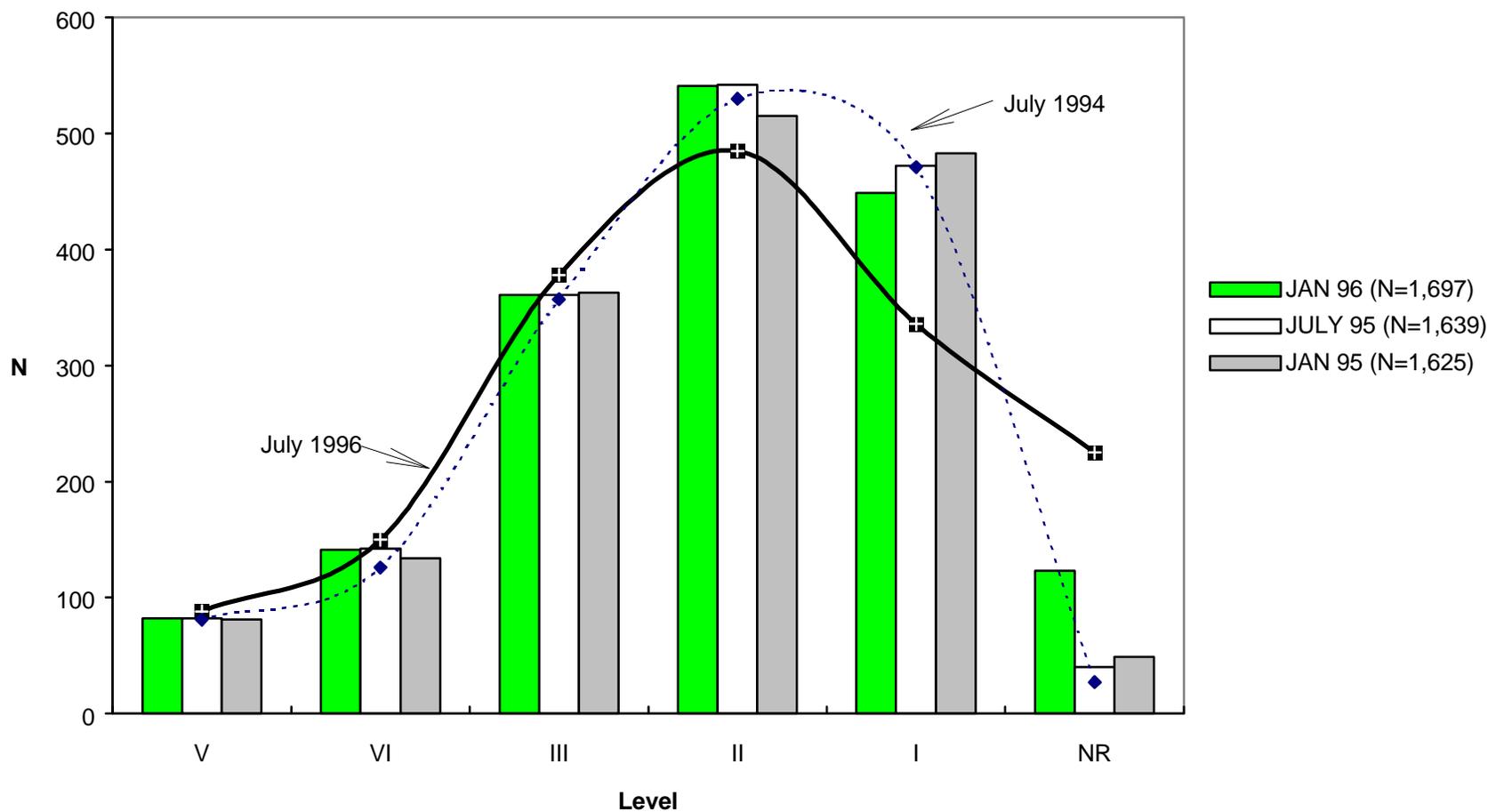
1. The appellate projects, under the oversight of the Appellate Indigent Defense Oversight Advisory Committee, design a comprehensive plan for further developing the upper ranks of the court appointed counsel panel. This plan should include exploration of ways to attract and retain experienced appellate practitioners and to advance the skills of promising attorneys now on the panel. Development of the plan, to include the input and participation of California Appellate Defense Counsel and panel attorneys, should focus on recruitment, outreach, training, and retention.
2. The current compensation program for the Courts of Appeal panel attorneys be expanded to three tiers, with the highest tier at \$85 per hour for counsel appointed to cases currently designated for the upper tier; a second tier at \$70 per hour for counsel appointed to cases on an independent basis; and a first tier set at \$65 per hour for assisted cases.
3. The appellate projects standardize their statewide reporting systems in the areas of panel management, case assignment, and training under the direction of the Appellate Indigent Defense Oversight Advisory Committee.

IX. FIGURES

Figure 2. Statewide Panel Rank, July 1994 to July 1996

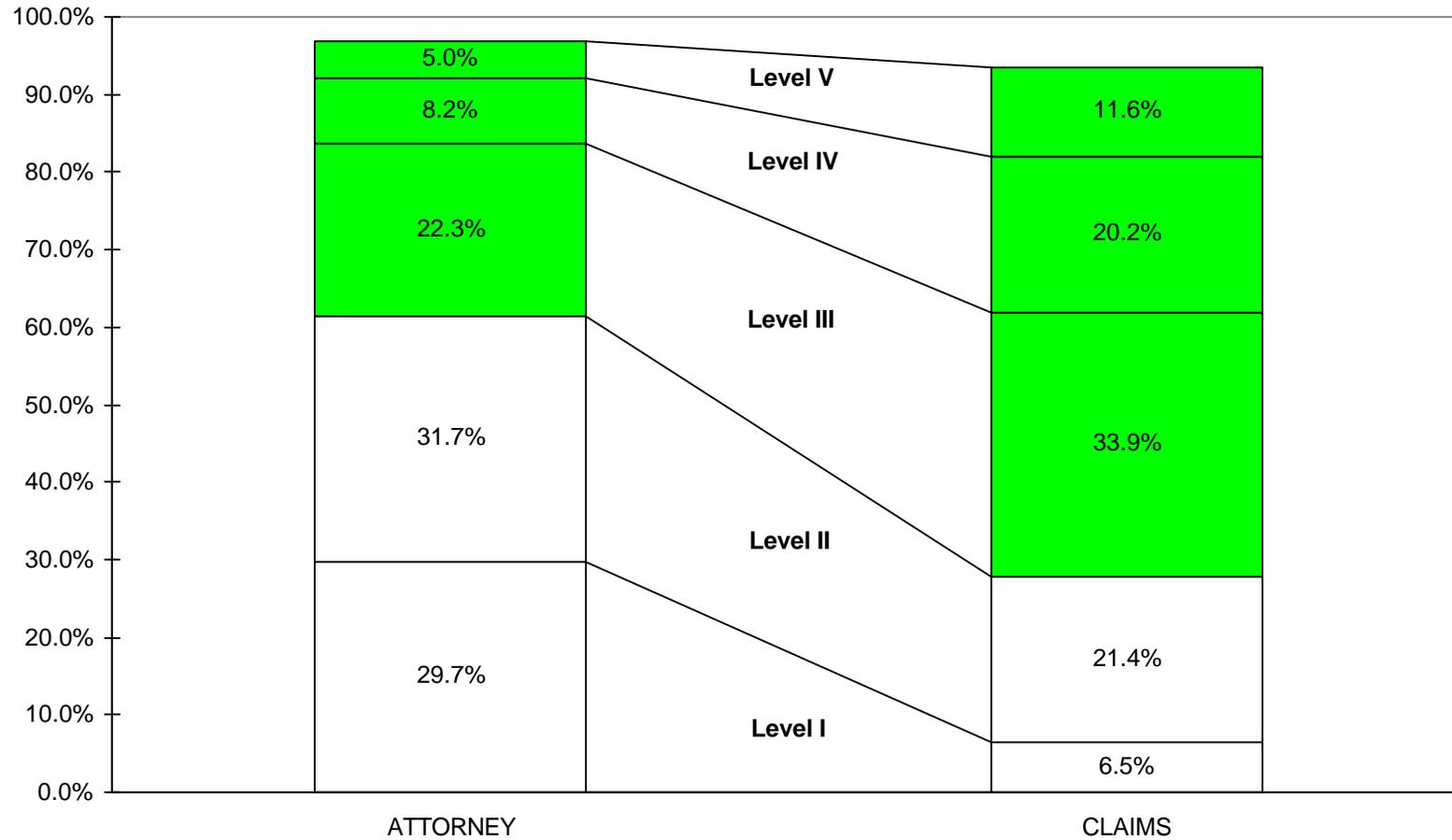
Figure 3. Comparison of Attorney Rank to Caseload, 1995–96 Final Claims

FIGURE 2. Statewide Panel Rank, July 1994 to July 1996



- When an attorney is ranked differently among projects, the highest is used to assign statewide rank.
- For purposes of comparison, the baseline data (July 1994—dotted line) and current rankings (July 1996—solid line) are contrasted with mid-point data (January 1995–January 1996) shown in bar format.

FIGURE 3. Comparison of Attorney Rank* to Caseload, 1995-96 Final Claims



* Attorney rank as of January 1, 1995.

- SHADED AREA: Level III, IV, and V attorneys comprise 36 percent of the panel and carry 66 percent of the caseload.

X. APPENDICES

- Appendix A** Benchmark Ranges for Allowable Hours in Capital Cases
- Appendix B** Fixed Fee Categories for Capital Cases
- Appendix C** Court of Appeal Attorney Classifications
- Appendix D** Court of Appeal Attorney Evaluations: Specific Factors
- Appendix E** Court of Appeal Case Classifications

BENCHMARK RANGES FOR ALLOWABLE HOURS IN CAPITAL CASES

APPEAL	
– Record review	50 pages per hour
– Record correction	20–80 hours
– Client communication	15–30 hours
– Appellant’s opening brief	260–600 hours
– Appellant’s reply brief	55–160 hours
– Oral argument	40–80 hours
– Supplemental briefs	20–80 hours
– Rehearing petition	25–75 hours
– Certiorari petition	40–75 hours
HABEAS CORPUS BRIEFING	
– Investigate and present habeas petition	140–330 hours
– Traverse/informal reply	50–120 hours
HABEAS CORPUS EVIDENTIARY HEARING	
– Preparation	150–300 hours
– Evidentiary hearing	72–144 hours (i.e., 3–6 days)
– Post-hearing litigation before the referee	75–125 hours
POST-HEARING IN THE SUPREME COURT	
– Brief on the merits, response brief, & supplemental brief	50–150 hours

FIXED FEE CATEGORIES FOR CAPITAL CASES

Category I

- A. An appeal from a judgment based upon a guilty plea and penalty phase;
or
- B. An appeal from a judgment on remand following a reversal limited to
penalty; or
- C. An initial appeal or an appeal from a judgment on remand following a
reversal of guilt, in which the combined record on appeal is under
2,500 pages.
- D. Caveat: An appeal from a judgment on limited remand for a new
hearing on the automatic motion to modify the death verdict (Pen.
Code, § 190.4, subd. (e)) will likely be valued well below the base fee
for this category.

Category II

- A. An appeal from a judgment on remand following a reversal limited to
the special circumstance finding(s) and penalty; or
- B. An appeal otherwise in category I(A), I(B), or I(C) that presents a more
complex case, in the Court's view, by reason of, but not limited to, one
or more of the following factors: the combined record on appeal is
6,000 or more pages; there was more than one homicide victim, and the
homicides occurred in more than one incident; there were a high
number of penalty phase motions; the appellant has a history of
difficult relations with appointed counsel; the existence of multiple
defendants and/or appellants; or
- C. An initial appeal or an appeal from a judgment on remand following a
reversal of guilt, in which the combined record on appeal is between
2,500 and 6,000 pages.

Category III

- A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is between 6,000 and 15,000 pages; or
- B. An appeal otherwise in category II(A) or II(C) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: the combined record on appeal is 10,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were a high number of penalty phase motions; the appellant has a history of difficult relations with appointed counsel; the existence of multiple defendants and/or appellants.

Category IV

- A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is 15,000 or more pages; or
- B. An appeal otherwise in category III(A) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: the combined record on appeal is 10,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were a high number of penalty phase motions; the appellant has a history of difficult relations with appointed counsel; the existence of multiple defendants and/or appellants.

Category V

Exceptional cases that occur infrequently, involve many victims and incidents, and have a combined record on appeal of 25,000 or more pages. In this category, appointed counsel may present a justification at the outset for a fixed fee higher than the base fee.

COURT OF APPEAL ATTORNEY CLASSIFICATIONS

LEVEL I. Attorneys who need substantial assistance and are able to handle only the simplest cases. Two categories: (a) Relatively new attorneys with little or no relevant experience, (less than two years in the practice of law, fewer than 3 opening briefs); (b) Lowest performers on probationary status.

Work product: Category (a): must demonstrate promising writing, research, and analytical skills and make steady progress toward skills required of higher classifications. Category (b): must correct deficiencies disqualifying them from higher levels within reasonable time in order to remain on panel.

Presumptive Eligibility: May be given class A cases of no more than five days' trial on an assisted basis.

LEVEL II. Attorneys who need at least some assistance in all cases and whose work indicates the ability to handle cases somewhat more difficult than the simplest. Two categories: (a) Attorneys who have a modest amount of experience (1-4 years of practice and/or 3-10 opening briefs), but demonstrate promise of attaining skills of higher levels. (b) Attorneys who have substantial general experience (more than 4 years of practice and/or more than 10 opening briefs), but do not show promise of attaining skills of higher levels.

Work product: Must produce work of at least standard quality, requiring little assistance to perform basic duties.

Presumptive Eligibility: May be given class A or B cases on an assisted basis.

LEVEL III. Attorneys with a moderate amount of relevant experience (10 or more opening briefs or the equivalent), whose work indicates ability to handle cases of intermediate complexity on an assisted basis and/or simple cases on an independent basis.

Work product: Must consistently produce work of at least good to very good quality, requiring assistance only to perform more complex duties.

Presumptive Eligibility: May be given cases through class C on an assisted basis, and/or cases through class B on an independent basis.

LEVEL IV. Attorneys of superior qualifications and considerable relevant experience (20 or more opening briefs or the equivalent), whose work indicates ability to handle cases of substantial complexity on an assisted basis and/or cases of intermediate complexity on an independent basis.

Work product: Must consistently produce work of at least very good quality, requiring assistance only to perform the most difficult and complex duties.

Presumptive Eligibility: May be given cases through class E on an assisted basis, and/or cases through class D on an independent basis.

LEVEL V. Attorneys who may be considered appellate specialists, with the highest qualifications and extensive relevant experience, whose work indicates ability to handle the most complex cases on an independent basis.

Work product: Must produce work of consistently very good to excellent quality and use assistance when requested only at sophisticated levels.

Presumptive Eligibility: May be given any case on an independent basis.

**COURT OF APPEAL ATTORNEY EVALUATIONS:
SPECIFIC FACTORS**

A. ISSUES: SELECTION AND DEFINITION

1. Identifies Standard Issues

Identifies standard issues which would be apparent to an attorney having knowledge of the record and a reasonable awareness of existing procedural and substantive law.

2. Identifies Subtle Issues

Shows depth of insight and analytical skill in identifying and developing issues. Identifies issues that are not obvious and perceives their implications.

3. Identifies Current Issues

Identifies current issues which would be apparent to an attorney having knowledge of the record and familiarity with recent trends and the cases then pending in the appellate courts of California and the United States.

4. Evaluates Issues Properly

Exercises sound judgment in determining the merit of each issue and treating each issue according to its merits. Gives each issue its share of the brief but no more. Arranges issues in the brief in an appropriate order. Eliminates issues which are only marginally arguable if they detract from the remaining issues or the tone of the brief as a whole.

5. Defines Issues Clearly

Demonstrates competency in framing each issue. Defines the scope of the issue. Clearly understands and phrases the exact question to be decided by the Court. Uses effective argument headings.

B. RESEARCH

1. Performs Thorough Research

Thoroughly researches all relevant aspects of each potential issue, becoming familiar with the law on related issues or 'sub-issues' when necessary. Finds the most recent cases. Shows resourcefulness and knowledge of available materials.

2. Selects Appropriate Authority

Cites adequate authority for the principles relied upon, neither string-citing unnecessarily nor making statements without support. Whenever possible uses cases which are factually on point as well as legally relevant. Takes account of adverse authority.

3. Cites Authority Accurately

Cites and quotes legal authorities accurately, does not intentionally or negligently misrepresent the facts or law contained in authorities.

4. Checks Current Validity of Authority

Uses Shepard's, etc. Cites no cases which have been overruled, depublished, or granted review in the California Supreme Court.

C. ARGUMENTATION

1. Organizes Argument

Presents position in a coherent manner. States facts, sets forth legal principles and authorities, argues, and summarizes in a logical, orderly progression. Keeps objective of argument in mind; does not ramble or dwell on marginal matters.

2. Covers All Points Essential to Position

Is aware of and addresses all points logically or legally necessary to the argument. Applies law to facts. Argues prejudice. Anticipates and discusses failure-to-object, waiver issues.

3. Handles Authority Skillfully

Analyzes authorities accurately and perceives their implications. Argues from analogy and distinguishes or challenges adverse authority skillfully.

4. Demonstrates Proficiency in Advocacy

Shows confidence in position. Presents strong arguments forcefully, weak ones credibly. Takes controversial stand where necessary. Maintains appropriate tone and balance. Handles facts sympathetic to opposition capably, without adopting defensive or insensitive posture.

5. Is Consistently Professional in Manner

Maintains decorum without being pompous or overly formal. Is respectful to the Court and opposing counsel. Concentrates on merits and refrains from personal attacks.

D. STYLE AND FORM

1. Writes Fluently

Shows mastery of written language. Presents ideas clearly and concisely. Avoids legalese.

2. Uses Correct Grammar, Diction, Spelling, Capitalization, and Punctuation

Demonstrates command of the structure and formal elements of the English language. Does not detract from professional image by displays of carelessness and illiteracy. Proofreads carefully.

3. Presents Statement of the Case Properly

Summarizes only those procedural facts relevant to the appeal itself or the specific issues to be decided. Cites to record.

4. Presents Statement of Facts Properly

Summarizes in the Statement of Facts only those facts supported by the record. Adequately cites to the record. Is scrupulous in presenting the facts accurately and in the light most favorable to the respondent. Clearly separates and labels the defense evidence. Writes the pertinent facts in narrative form, not a witness-by-witness account.

5. Uses Correct Citation Form

Uses correct citation form for both legal authorities and the appellate record.

6. Rules and Good Practice on Form and Technical Aspects of Pleadings

Follows prescribed format and formal requirements as to typing, binding, copying, and distributing of briefs and other Pleadings. Gives briefs neat, orderly, professional appearance.

E. RESPONSIBILITY

1. Makes Sure Record Is Adequate

Whenever necessary reviews the trial exhibits and the superior court file. Augments the record as needed.

2. Makes Use of Opportunities for Reply Briefs and/or Oral Argument

Orally argues or files a reply brief whenever necessary. Bases the decision to request or waive oral argument upon the appropriateness of argument, not upon convenience.

3. Is Reliable and Cooperative in Working with Project

Promptly answers letters and returns phone calls. Keeps appointments. Meets informal interim deadlines within a reasonable time. Accepts reasonable recommendations and suggestions which are not in conflict with the attorney's duty to his or her client or the attorney's professional judgment.

4. Observes Deadlines

Files all motions, briefs, and petitions on or before the date due, requesting extensions of time if, but only if, necessary.

F. RELATIONSHIP WITH CLIENT

Writes the client soon after appointment, answers correspondence, and provides the client with copies of all filings. When the Court's opinion is issued, promptly advises the client; explains how to file his or her own petitions if the attorney sees no merit in proceeding further. Selects issues to maximize effectiveness of appeal for client; acts zealously and conscientiously in fulfilling obligation to client, regardless of perceived rewards in case for attorney.

COURT OF APPEAL CASE CLASSIFICATIONS

Criminal and Juvenile 602

A: Sentence of less than 5 years for trials, less than 10 years for pleas

B: Sentence of at least 5 but less than 10 years for trials, at least 10 but less than 20 years for pleas

C: Sentence of at least 10 but less than 20 years for trials, at least 20 but less than 30 years for pleas

D: Sentence of 20 years or more for trials, 30 years or more for pleas, or any with life maximum

E: Life Without Possibility of Parole (LWOP)

Cases with records of 2,500 to 7,500 pages will be placed in the next higher category.

Cases with records of more than 7,500 pages will be placed two categories higher.

Other classifications:

- Dependency and termination of rights
- LPS/developmentally disabled
- People's appeals
- Habeas
- Miscellaneous