

RESPONSIBLE USE OF ASSOCIATE COUNSEL AND LAW CLERKS

The Appellate Indigent Defense Oversight Advisory Committee (AIDOAC) provides the following guidelines for appropriate use of associate counsel and law clerks. The guidelines are based on principles articulated by the California Supreme Court and Courts of Appeal and reflect the appellate projects' standards for assessing the performance of appointed counsel. They are based, as well, on the broad ethical responsibilities of attorneys, recognizing that the failure adequately to supervise the work of subordinate attorney or non-attorney employees or agents is a failure to act competently on behalf of a client. (See Rules Prof. Conduct, rule 3-110, "Discussion," and cases cited therein.)

Special considerations:

- *Court- or project-specific requirements:* Individual courts or projects may have additional or more specific requirements. Counsel must consult with the applicable project for such requirements.
- *Limitation for assisted cases:* AIDOAC has determined that attorneys in assisted cases may not use associate counsel, except with prior approval of the project executive director upon a showing of extraordinary circumstances.

Basic Principle of Personal Responsibility

The attorney of record at all times has complete, final, and personal responsibility for the case. It is acceptable for the attorney in an independent case to employ others to *assist* in any of the attorney's functions. The attorney personally, however, is fully accountable for what has or has not been done on the case. The projects use a detailed, comprehensive method of evaluating attorneys' performance and selecting them for particular cases. The projects' quality controls would be undercut if attorneys were to allow others, not subject to this system, to take over important aspects of a case. The projects examine every category for which associate counsel or law clerk time is claimed, to determine whether appointed counsel has been sufficiently engaged to fulfill expectations.

The projects expect the quality of an attorney's work at all stages to reflect his or her own experience and other personal qualifications. This policy of personal accountability applies, not only to final filed documents, but also to preliminary drafts, if any, submitted to the projects and discussion of cases with a project staff attorney. Appointed counsel must be prepared to communicate personally with the project on all substantive, legal, strategic, ethical, and other important matters related to the case.

Drafts and communications must conform to what is reasonably expected of attorneys at the experience level of appointed counsel.

Over-delegation may negatively affect the project's evaluation of appointed counsel's performance. Any substandard work produced by associates will damage the standing of the panel attorney personally.

Specific Responsibilities of Appointed Counsel

The appointed counsel is responsible for the following tasks, among any others the handling of a case may require: reviewing the entire record, completing it, and selecting issues; filing appropriate briefs, motions, applications, and other pleadings; reviewing all filings; making any personal appearances that adequate representation might require, including oral argument; and ensuring prompt, proper, and thorough communication with the client, the project, counsel for all parties, trial counsel as necessary, and the court. In performing these tasks, counsel must also ensure all applicable deadlines are met. To expand on some of these areas:

Reviewing the entire record, completing it, and selecting issues

Review of the entire record for issue selection and mastery of essential facts is an especially critical aspect of representation. Counsel must ensure the record is adequate for performing this task and complete it if necessary. While associate counsel may assist in record completion and review by performing such functions as taking notes on the transcript or writing a summary of the case and facts, ultimate delegation of this supremely important responsibility to another is unacceptable. The time appointed counsel spends personally reviewing the record must be adequate to assure *all* potential issues in the record have been spotted and considered. Counsel must also be familiar with the details of the record to understand nuances of fact that might affect the assessment and drafting of arguments.

Filing appropriate briefs and other pleadings

The opening brief is usually the pivotal document in an appeal, and counsel must put substantial personal effort into filing a product of appropriate quality. It is the attorney's own responsibility to confirm that the facts are stated appropriately, in accordance with appellate standards, and are supported by accurate citations to the record; to ensure all appropriate authorities have been considered and all citations are accurate and up to date; and to see that the document is proper and complete in both form and substance, complies with all requirements of the Rules of Court, accurately states all facts and law, and is argued intelligibly, coherently, grammatically, and

persuasively. Similar responsibilities apply to reply briefs, petitions for rehearing or review, motions and applications, and any other filing.

Reviewing all filings by others

Other aspects of representation also require close personal attention. Decisions about reply briefs, oral argument, rehearing and review, etc., cannot be made properly unless appointed counsel reviews such filings as the respondent's brief and the opinion, plus any co-appellant's briefing, court orders, and any other filing that may affect counsel's exercise of judgment.

Making personal appearances

Personal appearances (such as oral arguments) require special care, because supervising another's work in a courtroom is essentially impossible. Unless advance arrangements have been made, the projects and the courts expect appointed counsel to make all appearances personally. The panel attorney must consult with the project before using associate counsel at oral argument. The court may have to pre-approve the appearance of associate counsel, as well. In certain circumstances, the court or project may also require the client's consent. Requirements may vary from one court and project to another.

Engaging in proper communication with the client, court, project, and others

Counsel is personally responsible for ensuring prompt, proper, and thorough communication with the client, the court, the project, counsel for all parties, trial counsel as necessary, and any other person or entity the needs of the case may require. Counsel must fully comply with the ethical requirements of adequate client communication, including providing copies of significant documents and keeping the client informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subs. (m) & (n); rule 3-500, Cal. Rules Prof. Conduct.)

Compensation

Appointed counsel must report on all compensation claims any usage of associate counsel and indicate how much of that counsel's time is included in the hours claimed. These principles apply:

Meaning of "associate counsel": Associate counsel must have been an active member of the California State Bar at the time the services were performed for that

individual's time to be billable as "counsel" time. If that was not the case, the time is billable only as law clerk or paralegal time – an expense not to exceed \$25 per hour.

Compensable costs of associate counsel: A claim with associate counsel time will be judged under the same guidelines and standards of reasonableness as those applicable to single-attorney claims. The use of associate counsel does not increase the time payable for any service performed.

Claiming associate counsel's time: Associate counsel time is reported as a part of appointed counsel's time for any specific task. Associate counsel time included in the claim is then itemized in the associate counsel attachment, which must state the name and California State Bar number of the associate counsel. These special rules apply:

- *Counsel must first claim all of his or her own billable time and only then add any associate counsel time deemed billable on top of that:* It is essential for the project to know how much time appointed counsel personally spent on the case, in order to assess counsel's compliance with these associate counsel policies. Counsel must not cut his or her own time in order to claim associate counsel time: doing so will understate appointed counsel's own involvement and cause the project, AIDOAC, or court to question whether counsel exercised appropriate control over the case.
- *In the attachment for itemizing associate counsel's time, the hours shown must be only those actually claimed (as opposed to those spent):* In determining how much time appointed counsel personally spent on each function, the projects take the total hours reported for each function and subtract the itemized hours for associate counsel. That calculation requires that the itemized hours be only those actually included in the hours claimed. If counsel wishes to state unclaimed associate counsel time to show the extent of work performed on the case or give the attorney due credit, the comments are the appropriate place, not the itemization chart.