

CCAP New Panel Attorney Guide - Working With CCAP¹

What is the nature of an appointment on appeal and what is CCAP’s role? What does CCAP expect from a panel attorney? And what should a panel attorney expect from CCAP?

Most panel attorneys probably are vaguely aware of the projects’ role in the state Court Appointed Counsel (CAC) system². Naturally, the longer an attorney practices on the CCAP panel, the more he or she becomes familiar with the “ins and outs” of the bigger picture of panel-project relations, including working with CCAP. The goal of this article is to help bridge the expectations gap for newer panel attorneys working with CCAP, while also providing a refresher on the subject for panel attorneys at any level. At the end of this guide, the reader will find specific pointers for advancing from assistance status to independent status on the panel. Some of the tips apply for handling appeals at any level.

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¹ CCAP wishes to thank Appellate Defenders, Inc. (ADI) for their generous contribution to this article, particularly as to the history of the CAC system and panel-project relations.

² The panel-project system of Court Appointed Counsel (CAC) representation in California is unique in the United States. It delivers high-quality representation to as many as 10,000 clients a year in a remarkably flexible and cost-effective manner. Started in 1983 by Appellate Defenders, Inc. (ADI), which serves the Fourth Appellate District, the system quickly moved to all six Court of Appeal districts and the California Supreme Court.

I. Nature of Appointment and CCAP's Role

A. The Court Appointed Counsel System

Each Court of Appeal district has a contract with a project (a non-profit corporation created for the purpose of serving indigents on appeal) to administer the system of appointed counsel for its cases. Each project is administered by an executive director and has a staff of experienced appellate attorneys, ranging in number depending on the caseload and responsibilities of the project to their court. It also employs case processors, claims processors, and other support staff to assist with the office's workload. The project in turn oversees a panel of, typically, several hundred private attorneys who have applied to and been accepted on their panel.³

In addition to assisting the court in the recommendation for appointment of counsel for cases, the project will assist attorneys in their handling of individual cases and provides such resource help as websites, manuals, brief and/or issue banks, seminars, educational videos or webinars, newsletters, e-mail notices. The project recommends compensation for the panel attorney in each case, using judicially established statewide guidelines and individual court of appeal policies. In addition to administering the panel, the project assists the court, the Administrative Office of the Courts (AOC), the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC), and other parts of the judiciary; and provides some limited assistance to defendants with problems in filing notices of appeal.

When CCAP receives new cases, it first classifies them according to seriousness, difficulty, length, and any other relevant factors that can be quickly gleaned from the record. For each case, except those to be retained in-house, CCAP then ascertains the availability of and recommends to the court the appointment of the panel attorney. After the court makes the appointment, CCAP sends to the appellant the name of appointed counsel and public contact information.

The appointed counsel panel provides quality representation to indigent clients by using attorneys in private practice working with the assistance, administrative support, and oversight of a project such as CCAP. *Panel membership is not intended to, and does not, create any contractual rights or any employment relationship with CCAP, the Court of Appeal, the AOC, or any other part of the judiciary.* Appointed counsel works as an independent contractor or "vendor" for the state and will receive a 1099 form from the state at the end of the year for reported earnings.⁴

³ Counsel may apply to be on more than one panel, however, it is important to understand and be familiar with the specific policies and procedures for the different courts of appeal, implemented by the responsible project.

⁴ As an independent contractor, counsel is solely responsible for determining appropriate income tax laws for earnings. The AOC will accept either a Social Security number or a firm

B. Appointments in the CAC System

CCAP is not been able to provide panel attorneys with any assurance that they will receive as many appointments as they would like, or enough work to make a living doing only indigent appeals, as the amount of work that goes to each panel attorney is dependent on the overall size of the caseload, the overall size of the CCAP panel, and the qualifications of panel attorneys as well as their performance on the cases they handle. CCAP and the judiciary have full authority and sole discretion to determine the number and kind of cases, if any, offered individual attorneys and to remove attorneys from the panel at any time, with or without cause and with or without notice.

The Third and the Fifth Districts appoint panel attorneys to act solely as counsel of record to represent an appellant.⁵ Thus, once appointed by the Court of Appeal, *the panel attorney bears sole responsibility for the appeal, and must make final decisions in all aspects of representing the appellant.* This is true even in “assist” cases. (Assist cases are discussed further below.) In each case, CCAP assigns an individual staff attorney or “buddy” to assist, monitor, and evaluate the appointed panel attorney. (The buddy staff attorney is assigned by CCAP, not the Court of Appeal.) The attorney also continues to bear this responsibility when delegating work to associate counsel⁶ or law clerks or when consulting with the CCAP buddy.

CCAP anticipates that as a panel attorney gains more experience, he or she will need less assistance from the staff buddy. Eventually, a panel attorney, through experience and demonstrated proficiency, may begin receiving appointments on an independent basis.

Attorneys appointed on an independent basis may still seek some limited assistance from CCAP – particularly for feedback on complex substantive issues or advice on handling unusual procedural problems. But generally, CCAP expects that more experienced panel attorneys require less assistance. With some exceptions, in independent cases the record will be sent to counsel without a staff attorney’s prior review. As with assisted cases, the staff attorney eventually evaluates the work and recommends compensation.

C. Handling Staff Advice & Disagreements

Appointed counsel are expected to consider CCAP’s guidance unless counsel has a

employer identification number (EIN) for income tax reporting. For selection or a change of tax identification see: http://www.capcentral.org/claims/forms/certification_taxid.asp

⁵ This differs from at least one other court of appeal – the Sixth District – where the Sixth District Appellate Program (SDAP) is appointed as associate counsel in every case.

⁶ The Appellant Indigent Defense Oversight Advisory Committee (AIDOAC) has adopted a policy that severely restricts or prohibits the use of associate counsel in assisted cases. Consult the [CCAP Panel Manual](#) for details on this policy.

specific reason, based on the best interests of the case or client, to reject it. If a difference of opinion arises between appointed counsel and a CCAP staff attorney on the best way to handle a case, appointed counsel should listen to and give considerable weight to the staff attorney's opinion but need not yield if not persuaded. It is often helpful to step back and try to state the other person's position in the strongest possible light, then try to close the gap on the points of disagreement. Ultimately, the appointed attorney, as counsel of record, must follow his or her own professional judgment.

We expect that appointed counsel will conduct research (including checking the website for guidance) prior to contacting the assigned staff attorney for input. Doing so not only demonstrates the ability to conduct research independently, but also respects the fact that each CCAP staff attorney monitors a caseload of between 200 and 300 cases (assigned as a "buddy" on each case).

D. Case Coverage & Substitutions

The panel attorney, as counsel of record, must ensure their cases are covered when they are unable to handle them. If the attorney will be unable, for a variety of reasons, to handle the basic responsibilities of the case in the long term, the attorney must notify CCAP about being relieved and discuss whether or not the responsible approach is to seek withdrawal from the case to protect the appellant's interests as well as your reputation with the court.⁷ (See [sample motion to withdraw](#).) The Court of Appeal will only grant a motion to withdraw for good cause. It has the discretion to deny it. The process can also take time. At the request of our two courts, your original motion to withdraw is first sent to CCAP. They have asked that CCAP send the original to the court together with CCAP's recommendation for substitute counsel. You should be aware it may take some time for CCAP to find an attorney willing to substitute in on the case. The court will rule on the substitution after receiving both the original motion and the recommendation for substitute counsel from CCAP. In all cases, ***you will continue to be attorney of record until the court rules on your motion.***

For temporary coverage, such as vacations and short illnesses, extension requests are often the best solution. If that is not feasible, it is advisable to have standing arrangements with another attorney of equivalent experience to cover workload during absences. CCAP staff attorneys cannot provide coverage for your cases.

⁷ With rare exceptions, a "difficult" client is not usually considered sufficient justification for relief from counsel's appointment on a case. If you are having problems with your client you are welcome to discuss approaches on how to handle the situation with your assigned staff buddy. You are also welcome to contact CCAP's Supervising Attorney, Panel Administrator if you have questions about seeking a Motion to Withdraw or any other matters regarding your availability to accept case offers.

E. Duty to Stay Informed & Update Contact Information

Panel attorneys are responsible for staying abreast of all information CCAP makes available to them via e-mail, the websites, mailings, telephone, or any other methods of communication. They must maintain a valid e-mail address, since that is the way CCAP sends news alerts to the panel and court appointment orders.

Attorneys are responsible for keeping the project, the Administrative Office of the Courts, all courts in which they have active cases, and all current clients informed of any changes in contact information, tax identification, and other key administrative matters affecting them. (Attorneys must notify CCAP and the AOC with the official [change of address form](#). A change of address form does not constitute adequate notice of a [change in tax identification information](#), which must be submitted on a separate form.)

F. Duty to Maintain Active State Bar Membership

Appointed counsel must maintain an active California State Bar membership throughout the life of any court-appointed appeal. They must notify the project if their active status changes, including temporary suspensions for any reason, including failure to pay dues or certify MCLE compliance.

II. The Role of the Staff Attorney and the Panel Attorney

A. Assist Cases

On an assist case, the staff attorney conducts a relatively cursory review of the transcripts and prepares an “assistance memo.” The memo is sent to the panel attorney along with the transcripts. The memo has a variety of purposes:

- Identifying issues that may appear to be worth pursuing.
- Noting potential problems about the record, or other procedural complications.
- Providing some citations or legal analyses as a starting point for further legal research.
- Describing available resource materials that may be relevant to potential issues.

Because the staff attorney only conducts a quick review of the record before preparing the assistance memo, the memo is never considered a definitive legal analysis of the case – it is only a starting point. Of course, memos can vary in length and depth of discussion, depending on the complexity of the case and the time available of the assisting staff buddy.

The assisted attorney should read the memo carefully and consider the suggestions therein. In some cases the staff attorney who prepared the memo may want to discuss reasons an

issue was not raised, or a suggestion not followed. On the other hand, because the CCAP staff attorney usually has not read the record in-depth, it is anticipated that not everything will be done as suggested in the memo. In fact, CCAP expects and encourages independent thinking in the handling of the appeal.

Throughout the appeal, the staff attorney who prepared the memo will be available for feedback and input. Appointed counsel should always feel free to call the assigned staff attorney if there are any problems or questions. It is anticipated that unique circumstances arise in some cases where even the most experienced panel attorney may need to contact CCAP from time to time for assistance.

All appointed attorneys must send CCAP a copy of any document or pleading filed with the Court of Appeal and the Superior Court. Please remember with extensions of time, unless you are e-filing, you also need to send to the Court of Appeal sufficient copies so that CCAP receives the court's order regarding the extension.

1. Draft Opening Brief

On assist cases, CCAP expects appointed counsel to send a draft opening brief to the staff attorney two weeks (*10 working days*) before the due date. While CCAP recognizes that appointed counsel may not always be able to follow this rule, it should be the goal. We expect that you will have thoroughly researched the issues and that you have proofread and edited the draft and that it is in a form that you would be comfortable filing in the Court of Appeal, assuming CCAP does not have substantive suggestions regarding your legal arguments.

The staff attorney will review the draft and provide suggestions. As with suggestions provided in the assist memo, comments made regarding the draft should be viewed as suggestions.

2. Assistance After Filing the Opening Brief

In most assist cases, contacts initiated by CCAP diminish after the opening brief is filed. However, an assisted attorney should feel free to contact the assigned staff attorney regarding a reply brief, oral argument, or a petition for rehearing or review. This is particularly encouraged if you are new to the panel and appellate work. Drafts of reply briefs and petitions are not required, but you are welcome to ask your assigned staff buddy to review a draft if they have the time.

Special note on oral argument: In the Fifth District, appointed counsel should always consult with CCAP before requesting an in-person oral argument. In the Third District, counsel may contact CCAP about oral argument, but must do so if the court sends a letter urging counsel to consult CCAP before requesting argument.

B. Independent Cases

On independent cases, appointed counsel's first contact with CCAP often does not occur until after the AOB has been filed, such as something spotted in the AOB that needs treatment or when the compensation claim is processed. Appointed counsel in independent cases may call for assistance. In most cases, the staff attorney has never seen the transcripts, and will be relying on the AOB and whatever information that counsel provides about the case.

As previously mentioned, CCAP urges all appointed counsel to conduct research *before* contacting the staff attorney to discuss an issue or procedural problem. One good place to start is CCAP's website. The website contains charts, summaries, and articles covering procedural and substantive areas. Counsel should also check the comprehensive brief bank that contains sample motions and requests to the Court of Appeal. CCAP continuously updates the materials on the website and adds features regularly. Appointed counsel should watch for announcements on the homepage as well as email notifications. Conducting research before contacting CCAP helps narrow and define the issues at hand, and goes a long way toward finding a solution.

It's worth mentioning that staff attorneys have varying preferences on whether to discuss a matter via e-mail or telephone. Sometimes it simply depends on the staff attorney's availability at the moment. Appointed counsel may find that on more complex issues, putting thoughts into an email helps refine the problems and is a good way to get the communication started.

C. *Wende* Reviews & Abandonments

In both assist and independent cases, a no-issue brief, i.e. a *Wende* brief⁸, or an abandonment *may not* be filed without approval of the assigned CCAP staff attorney. This includes the situation where a co-appellant's attorney has already obtained authorization to file a *Wende* from another staff attorney assigned to the other case. The appointed counsel for the appellant must still contact their assigned staff attorney. (At CCAP in cases where there are multiple co-appellants, a different staff attorney is usually assigned for each appellant/appointment.)

CCAP expects a panel attorney submitting a case for a *Wende* review to submit a draft *Wende* AOB, along with a short memo regarding the issues considered and rejected. We ask that panel attorneys call the assigned staff attorney to let them know they are sending them a draft *Wende* and find out whether or not they should send the full record along with the *Wende* AOB draft. In most cases, appointed counsel will be asked to send the record or portion of the record, but there are instances where it may not be necessary. In any event, counsel should request a

⁸ A *Wende* brief in criminal cases, *Phoenix H.* brief in dependency cases, and *In Conservatorship of Ben C.* brief in mental health cases, are briefs that are filed when no viable arguable issue can be found in the record. Review the CCAP website for procedures prior to calling the buddy staff attorney about filing a no issue brief.

Wende review at least two weeks before the due date for the opening brief.

III. Compensation Claims

A. Audit Process Through the Administrative Offices of the Courts (AOC)

Every quarter, a random sample of final recommendations on claims is reviewed by the Appellate Indigency Defense Oversight Advisory Committee (AIDOAC) to monitor the compensation process. The committee is comprised of a justice from each Court of Appeal district, plus representatives from the projects, California Appellate Defense Council (CADC) and public attorney members. The committee reviews the selected claims, and either ratifies or makes adjustments – upward or downward. In some cases, the committee asks the appellate project for an explanation of its recommendation on a given claim.

B. Compensation Guidelines & the Importance of Panel Explanations

The guidelines are statewide but individual courts of appeal often have separate and distinct policies that affect, or in some situations limit, the breadth of counsel’s appointment order, which will ultimately affect appointed counsel’s compensation. This is certainly true in the Third and the Fifth where some activities may require either CCAP pre-approval or a formal expansion of the appointment order by the court.

The guidelines do not necessarily compensate a panel attorney for actual time expended. The guidelines are based on the time it would take a “reasonably *experienced* appellate attorney” to complete the task. Thus, it is not uncommon for attorneys new to appellate practice to expend some time not billable to the case to develop professional expertise.

Counsel should always provide an explanation for any amount claimed over guidelines in a category. An explanation should also accompany any amounts claimed for non-routine tasks. The staff attorney assigned to the case may contact appointed counsel during the claims review process for additional information supporting an amount claimed over guidelines. Generally, these calls or emails are to assist staff to understand an unusual claimed amount and thus to support a recommendation beyond guidelines.

C. Bill Actual Time

Appointed counsel should bill the time actually spent on the case, even if the number of hours seems higher than guidelines. CCAP urges counsel not to “self-cut,” as this can have an effect of validating the guidelines. There is no penalty for billing the actual time spent – appointed counsel will not be perceived negatively or lose standing on the panel for submitting claims for more hours than are recommended. The full amount should be claimed. During the claims review process, CCAP will determine if any reductions are needed in order to meet guidelines. Sometimes an amount that seems high may nonetheless be compensable with adequate explanation.

IV. Tips for Advancing From Assisted to Independent Status

New panel attorneys often ask what they can do to maximize their chances of advancing on the panel and becoming “independent,” i.e., receiving appointments on an independent basis. It should be noted that no prescribed time period applies for becoming independent on CCAP’s panel. An appeal can cover a long period of time – ranging from a few months to a year and a half or more for appeals with large records. Since CCAP evaluates a panel attorney’s performance as the appeal progresses, it can sometimes take a while to determine whether a panel attorney is ready for advancement on the panel.

Although not all encompassing, here are a few tips:

1. An assisted panel attorney should always strive to turn in a draft opening brief that is “file-ready.” This means that a draft should not be in rough-draft form. CCAP will be evaluating the panel attorney’s ability to prepare a brief in final form to be filed with the court.

2. Become familiar with the rules of citation and format for appellate briefs. The *California Style Manual* (preferred over Blue Book style in the Third and Fifth Districts) has sections covering the proper citation of cases and statutes, with examples. There is also a sample opening brief on CCAP’s website.

3. Review the record promptly after it is received to decide what documents are missing, how to obtain those documents, and what is needed for potential issues on appeal. A motion to augment and/or a request for supplemental records should nearly always be filed within 30 days after counsel’s appointment on the case; often the appointment order will specify when a motion is due. And of course, *the motion should be filed before any separate extensions are needed.* (Remember that both a motion to augment and a supplemental record request will automatically toll the due date for the opening brief until the additional record is received. A separate extension of time request therefore is not necessary as a part of this process.) On the other hand, be mindful of whether a request to settle the record may be required and extension requests *will* be necessary as that process unfolds. Are there sealed documents in the Court of Appeal that need to be requested? Or are the documents already lodged with the court?

4. Use as few extensions as possible. In assist cases, it is anticipated that a panel attorney will need at least one extension as a result of the extra time required by the assist process (including review of the draft opening brief). Counsel should strive to seek no more than two extensions, unless required by unusual circumstances.

CCAP understands that occasionally a third extension will be needed (and a fourth, albeit rarely), especially if important communication is still needed from the client or trial attorney. However, the goal should always be to keep extensions to a minimum. It goes without saying that an attorney who obtains successive extensions, citing the press of business as the main reason may cause CCAP to conclude that he or she is too busy for more cases!

5. Strive to work independently. Counsel is encouraged to check the website, know the record, and conduct legal research before contacting CCAP. Contacts with the staff attorney should be saved for discussing issues and unique procedural hurdles. Primary to becoming independent is giving us the confidence that you can identify issues and properly analyze them.

6. Always remember that the assist memo is not the definitive legal analysis of the case!

7. Submitting a list of considered but rejected “unbriefed issues” along with a draft opening brief is highly recommended (short explanations on each issue also help). A list of unbriefed issues should also be turned in for a *Wende* review, as discussed above.

8. Just a few writing tips: Of course, a whole seminar could be devoted to effective appellate writing, but here are a few things that are oft repeated in this area by experienced practitioners (and the justices):

- Remember to acknowledge and deal with facts and authorities adverse to the appellant. Whether or not this is good strategy in other types of law practice, it is always true in appellate practice.
- Remember to fully develop the prejudice part of an argument.
- Discuss the standard of review.
- Consider using sub-points if it will help the reader and organization of a brief. Try to avoid excessively long paragraphs.
- Strive to make a brief succinct without sacrificing completeness. Appellate practitioners function primarily on the written word. The most effective appellate practitioners are able to present a complex argument thoroughly while keeping a brief as easy to read as possible.
- Statements should cover only relevant events and facts to the case and issues raised on appeal. They should be concise and well edited. The statement of facts should be a narrative.

The CCAP article “[Tips for Happy Judicial Attorneys](#),” is also an excellent source of tips for advancing your appellate skill set.

Conclusion

Handling appeals in the CAC system can be a rewarding endeavor. It is truly worth putting in the time to develop the skills in this challenging but interesting specialty. We look forward to working with you and wish you continued success!