**SUPREME COURT POLICIES REGARDING**
**CASES ARISING FROM JUDGMENTS OF DEATH**

**Adopted by the Supreme Court effective June 6, 1989**

**Amended effective September 28, 1989, September 19, 1990, January 27, 1992, December 21, 1992, July 29, 1993, December 22, 1993, June 20, 1996, January 22, 1997, January 22, 1998, February 4, 1998, August 23, 2001, December 19, 2001, January 16, 2002, July 17, 2002, July 26, 2002, November 20, 2002, November 30, 2005, and January 1, 2008**

**Policy 1. Stays of execution**

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The court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

**Policy 2. Withdrawal of counsel**

In the absence of exceptional circumstances — for example, when an appointed counsel becomes mentally or physically incapacitated — the court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and willing to accept appointment for the balance of the representation for which the withdrawing attorney has been appointed (i.e., appellate representation, habeas corpus/executive clemency representation, or both). *[As amended effective Jan. 22, 1998.]*

**Policy 3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions**

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

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**1. Timeliness standards**

**1-1.** Appellate counsel in a capital case shall take and maintain detailed, understandable and computerized transcript notes and shall compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to appellate counsel's attention. In addition, if appellate counsel's appointment does not include habeas corpus representation, until separate counsel is appointed for that purpose, appellate counsel shall preserve evidence that comes to the attention of appellate counsel if that evidence appears relevant to a potential habeas corpus investigation. If separate "post-conviction" habeas corpus/executive clemency counsel (hereafter "habeas corpus" counsel) is appointed, appellate counsel shall deliver to habeas corpus counsel copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation, and thereafter shall update the issues list and transcript notes as warranted. Appellate counsel shall consult with and work cooperatively with habeas corpus counsel to facilitate timely investigation, and timely

preparation and filing (if warranted) of a habeas corpus petition by habeas corpus counsel.

Habeas corpus counsel in a capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel and appellate counsel. The duty to investigate does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim. All petitions for writs of habeas corpus should be filed without substantial delay. *[As amended effective July 29, 1993, and Jan. 22, 1998.]*

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**1-1.1.** A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later. *[As amended effective Sept. 19, 1990, Jan. 22, 1998, July 17, 2002, and Nov. 30, 2005.]*

**1-1.2.** A petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or more than 36 months after appointment of habeas corpus counsel, whichever is later, may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim. *[As amended effective Sept. 19, 1990, July 29, 1993, Jan. 22, 1998, July 17, 2002, and Nov. 30, 2005.]*

**Official Note No. 1:** The amendments to standards 1-1.1 and 1-1.2, effective July 17, 2002, changing "90 days" to "180 days," shall apply to all petitions for a writ of habeas corpus arising from a judgment of death that were pending before the Supreme Court on July 17, 2002, and to all such petitions filed after that date. *[Note added by Supreme Court order, July 26, 2002.]*

**Official Note No. 2:** The amendments to standards 1-1.1 and 1-1.2, effective November 30, 2005, changing "24 months" to "36 months," shall apply to all petitions for a writ of habeas corpus arising from a judgment of death that were pending before the Supreme Court on November 30, 2005, and to all such petitions filed after that date. *[Note added by Supreme Court order, Nov. 30, 2005.]*

**1-1.3.** *[Standard repealed effective Jan. 22, 1998.]*

**1-2.** If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

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**1-3.** Any petition that fails to comply with these requirements may be denied as untimely.

**1-4.** The court may toll the 180-day period of presumptive timeliness for the filing of a capital-related habeas corpus petition (which begins to run from the final due date to file the appellant's reply brief in the appeal) when it authorizes the appellant to file supplemental briefing. The court will not toll before the 180-day presumptive timeliness period begins to run or after it has finished running.

Ordinarily, the court will toll the 180-day presumptive timeliness period only when the appellant is represented by the same counsel on appeal and also for related habeas corpus/executive clemency proceedings.

If the court determines that it will toll such 180-day presumptive timeliness period, it will so provide in its order authorizing the appellant to file supplemental briefing.

When the court provides for tolling of the 180-day presumptive timeliness period in its order authorizing the appellant to file supplemental briefing, it will determine a reasonable period of time for the appellant to devote to whatever supplemental briefing is authorized, add that period of time to the final due date to file the appellant's reply brief in the appeal, and indicate the new date by which the appellant may file a presumptively timely habeas corpus petition.

Other than under these circumstances, the court will not toll, or otherwise extend, the period in which to file a presumptively timely capital-related habeas corpus petition. *[Standard adopted effective Nov. 20, 2002.]*

## 2. Compensation standards

**2-1.** This court's appointment of appellate counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court and, if certiorari is granted, preparation and filing of a brief or briefs on the merits and preparation and presentation of oral argument; and (iv) representation in the trial court relating to proceedings pursuant to Penal Code section 1193.

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This court's appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter. The appointment of habeas corpus counsel is for the following: (i) investigation, and preparation and filing (if warranted), of a habeas corpus petition in the California Supreme Court, including any informal briefing and evidentiary hearing ordered by the court and any petition to exhaust state remedies; (ii) representation in the trial court relating to proceedings pursuant to Penal Code section 1227; and (iii) representation in executive clemency proceedings before the Governor of California.

Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading

in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court. *[As amended effective Dec. 22, 1993, Jan. 22, 1998, and Feb. 4, 1998.]*

**2-2.** Habeas corpus counsel should expeditiously investigate potentially meritorious bases for filing a petition for a writ of habeas corpus. If the timing of separate appointments permits, this investigation should be done concurrently with appellate counsel's review of the appellate record and briefing on appeal, and in any event, in cooperation with appellate counsel. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

**2-2.1.** In all cases in which counsel was appointed on or after the October 12, 1997, enactment of Senate Bill No. 513 (Stats. 1997, ch. 869), counsel, without prior authorization of the court, may incur expenses up to a total of $25,000 for habeas corpus investigation, and may submit claims to the court for reimbursement up to that amount. Investigative expenses include travel associated with habeas corpus investigation, and services of law clerks, paralegals, and others serving as habeas corpus investigators. The reasonable cost of photocopying defense counsel's trial files is not considered an investigative expense, and will be separately reimbursed. The court will reimburse counsel for expenses up to $25,000 that were reasonably incurred pursuant to the duty to investigate as described in standard 1-1, but it will not authorize counsel to expend, nor will it reimburse counsel for, habeas corpus investigation expenses exceeding $25,000 before the issuance of an order to show cause. This policy applies to both hourly ("time and costs") and fixed fee appointments.

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The policy described in the foregoing paragraph shall also apply to those cases in which counsel was appointed prior to October 12, 1997 (the enactment of Sen. Bill No. 513), and in which, by January 22, 1998, the effective date of the above-described policy, the defendant has not filed a habeas corpus petition in this court and no more than 90 days [now 180 days] have passed since the final due date for the filing of the appellant's reply brief on direct appeal.

As to those cases in which, by January 1, 2008 (the effective date of Assem. Bill No. 1248), the defendant has not filed a capital-related habeas corpus petition in this court and the date by which to file a presumptively timely petition has not yet passed, counsel may be reimbursed up to $50,000 for those investigative services and expenses incurred on or after that date. Such investigative funding for expenses incurred after January 1, 2008, also is available in those cases in which a presumptively timely petition has been filed by January 1, 2008, but petitioner's reply to the informal response has not been filed and the time to do so (with any extensions of time) has not passed as of that date. *[As amended effective Jan. 16, 2002, and Jan. 1, 2008; standard adopted effective Jan. 22, 1998.]*

**2-2.2.** In all cases in which counsel was appointed on an hourly basis prior to October 12, 1997, and in which, by January 22, 1998, either a petition for a writ of habeas corpus has been filed in this court, or more than 90 days have passed since the final due date for the filing of the appellant's reply brief on direct appeal, requests by appointed counsel for authorization to incur, and reimbursement of, investigation expenses shall be governed by the following standards (2-2.3 through 2-4.4): *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

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**2-2.3.** Without prior authorization of the court, counsel may incur expenses up to a total of $3,000 for habeas corpus investigation relating to a death penalty judgment, and may submit claims to the court for reimbursement up to that amount. The court will reimburse counsel for expenses up to $3,000 that were reasonably incurred pursuant to the duty to investigate as described in standard 1-1. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

**2-2.4.** If after incurring $3,000 in investigation expenses (or if $3,000 in reimbursement for investigation funds previously has been granted on behalf of the same defendant/petitioner with regard to the same underlying death penalty judgment), counsel determines it is necessary to incur additional expenses for which he or she plans to seek reimbursement from the court, counsel must seek and obtain prior authorization from the court. As a general rule, the court will *not* reimburse counsel for expenses exceeding $3,000, without prior authorization of the court. Requests by appointed counsel for prior authorization to incur investigation expenses

shall be governed by the following standards. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

**2-3.** Counsel shall file with this court a "Confidential request for authorization to incur expenses to investigate potential habeas corpus issues," showing good cause why the request was not filed on or before the date the appellant's opening brief on appeal was filed. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

**2-4.** The confidential request for authorization to incur expenses shall set out: *[As amended effective Dec. 21, 1992.]*

**2-4.1.** The issues to be explored;

**2-4.2.** Specific facts that suggest there may be an issue of possible merit;

**2-4.3.** An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

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**2-4.4.** (a) An itemized listing of all expenses previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner. *[As amended effective Jan. 27, 1992, and Dec. 21, 1992.]*

**2-5.** Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus. *[As renumbered effective Dec. 21, 1992.]*

**2-6.** When a petition is pending in this court to exhaust claims presented in a federal habeas corpus petition, a request by counsel for investigative funds to bolster or augment claims already presented in the petition normally will be denied absent a showing of strong justification for

the request. A request for investigative funds may be granted if the petitioner demonstrates that he or she has timely discovered new and potentially meritorious areas of investigation not previously addressed in the petitioner's federal or state petitions. This has been the internal operating policy of the court since December 16, 1992. *[Standard adopted effective June 20, 1996.]*

**2-7.** Each request for fees relating to a habeas corpus petition must be accompanied by: (a) An itemized listing of all fees previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner. *[As renumbered and amended effective Dec. 21, 1992, and as renumbered effective June 20, 1996.]*

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**2-8.** In a case in which the court orders an evidentiary hearing, and counsel and the court do not enter into a "fixed fee and expenses agreement" covering the evidentiary hearing (see "Guideline 10" of the "Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court"), requests for reimbursement of necessary and reasonable expenses incurred in preparation for and presentation of the evidentiary hearing shall be governed by the following standards: *[Standard adopted effective Jan. 22, 1997.]*

**2-8.1.** Counsel may incur "incidental" expenses (i.e., travel to and from the evidentiary hearing and related hearings before the referee, meals and lodging during the hearing, telephone charges, photocopying, etc.) without prior approval, and the court will reimburse counsel for such itemized, reasonable and necessarily incurred expenses pursuant to the court's "Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court," part III ("Necessary Expenses"). *[Standard adopted effective Jan. 22, 1997.]*

**2-8.2.** Counsel should seek and obtain from this court prior approval for all investigation and witness expenses, including, but not limited to, investigator fees and costs, expert fees and costs, and expert witness fees and costs. *[As amended effective Jan. 22, 1998.]*

**2-8.3.** Counsel may submit requests for reimbursement of expenses every 60 days to this court, and will be reimbursed for necessary and reasonable expenses consistently with part III of the "Payment Guidelines," *supra*. *[Standard adopted effective Jan. 22, 1997.]*

**Policy 4. Service of process by counsel for defendant**

Consistently with longstanding practice and court policy, except as specified below, counsel for the defendant must serve his or her client, any separate counsel of record in any matter related to the same judgment, counsel of record for every other party, the trial court, the assisting entity or attorney for counsel for the defendant and any separate counsel of record, and trial counsel, with a copy of each motion, request for extension of time, brief, petition or other public document filed in this court or in the trial court on the client's behalf, including any supporting declaration, with attached proof of service. A declaration submitted in support of any motion or request may refer to and incorporate by reference matters set forth in a current "confidential 60-day status report" simultaneously provided only to this court. Counsel also must serve any additional person or entity as requested by this court.

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Counsel for the defendant need not serve (1) trial counsel with any matter upon or after the filing in this court of the certified record on appeal; (2) the trial court with any extension-of-time request related to appellate briefing; and (3) the trial court or trial counsel with any matter related to habeas corpus briefing.

If counsel for the defendant elects to serve the defendant personally with the document, counsel may indicate on the proof of service the date by which counsel will so serve the defendant (not to exceed 30 calendar days), and counsel shall thereafter notify the court in writing that the defendant has been served. In the alternative, counsel for the defendant need not serve the defendant with any specific document to be filed if counsel for the

defendant attaches to the proof of service for that specific document (1) a declaration by the defendant stating that he or she does not wish to be served with that specific document, and (2) a declaration by counsel for the defendant stating that he or she has described to the defendant the substance and purpose of that specific document. *[Policy amended effective Dec. 19, 2001.]*

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**PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS IN THE CALIFORNIA SUPREME COURT**

**Revised September 19, 1990, and December 22, 1993**

**Amended effective September 1, 1995, January 1, 1997, July 30, 1997, January 22, 1998, February 4, 1998, January 16, 2002, August 25, 2004, October 1, 2005, November 30, 2005, July 1, 2006, October 1, 2007, July 23, 2008, and August 27, 2008**

## I. INTRODUCTION

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The California Supreme Court determines the compensation of appointed counsel representing indigent criminal appellants. The guidelines set forth below are a general statement of the factors considered by the court in determining appropriate compensation for the time devoted to indigent criminal appeals (and related habeas corpus representation) and the reasonable and necessary expenses incurred by appointed counsel. In reviewing these guidelines, counsel should bear in mind the following:

**A.** Although most of the guidelines apply routinely, the application of others, such as the reimbursement of travel expenses or of the cost of expert witnesses and investigators, depends on the circumstances of each case.

**B.** The rates in the guidelines are subject to periodic change. These include the hourly compensation of appointed counsel, mileage and per diem rates for travel, and rates for the reimbursement of the cost of services by others.

**C.** For the most current information concerning these matters, and the payment guidelines generally, counsel are encouraged to contact the

California Appellate Project (CAP). CAP is the appointed counsel administrator that assists private counsel with automatic appeals. CAP's address and telephone number are as follows:

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105
(415) 495-0500

## II. REASONABLE COMPENSATION

**A. Compensation rate** The compensation rate for members of the State Bar of California who are appointed as counsel in indigent criminal appeals is the same allowable-hour rate appointed counsel received or was eligible to receive in the Court of Appeal, except for automatic appeals and/or related habeas corpus/executive clemency proceedings, for which the rate is $145 per allowable hour. *[As amended effective Sept. 1, 1995, Jan. 1, 1997, Jan. 22, 1998, Oct. 1, 2005, July 1, 2006, and Oct. 1, 2007.]*

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**B. "Allowable hours"** The compensation rate is multiplied by the number of "allowable hours" of appellate work to determine a reasonable sum for compensation. Benchmarks for "allowable hours" in capital cases (i.e., an estimate of the time an attorney experienced in the handling of criminal appeals might devote to the various stages of capital litigation) are set out below, in part II.*I*.3.

**C. Recording of hours** Appointed counsel should record the number of hours devoted to the following phases of appellate work:

1. Record review

2. Record correction

3. Motions and applications

4. Sixty-day status reports

5. Researching and writing opening brief

6. Researching and writing reply brief

7. Researching and writing supplemental brief(s)

8. Investigating and writing habeas corpus petition

9. Reply to response(s) to habeas corpus petition

10. Evidentiary hearing

11. Oral argument (includes preparation)

12. Post-oral argument representation

13. Rehearing petition or opposition

14. Certiorari petition or opposition (and briefing and argument in the United States Supreme Court after grant of certiorari; see post, subpart *I.3.(ii)* *[As amended effective Aug. 25, 2004.]*

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15. Client communication

16. Travel

17. Other services (specify)

**D. Factors considered by the court** The following factors are considered by the court in determining the number of allowable hours:

1. Whether the billed hours are within the benchmarks, or whether there exists good cause to depart from the benchmarks.

2. Length of the record.

3. Complexity and novelty of the legal issues.

4. Quality of work.

**E. Exceptional procedural matters** Counsel should provide the court with an explanation of the time spent on exceptional procedural matters, such as repeated applications for augmentation of the record on appeal.

**F. Travel time** Travel time will be compensated to the extent that the time could not reasonably be spent working on the case.

**G. Circumstances warranting additional compensation** If counsel believes there exist extraordinary circumstances that justify compensation beyond that set out in these guidelines, counsel should bring such factors to the attention of the court at the time a claim for payment of compensation and expenses is presented. Counsel's showing of justification should be commensurate with the extent to which he or she seeks to exceed the benchmarks.

**H. Submission of payment requests** Counsel may submit a request for payment of compensation and expenses every 90 days.

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***I.* Special rules for capital cases** The following rules apply to capital cases only:

1. *Delay in certification of record or filing of brief* If delay in the certification of the record on appeal or in the filing of the appellant's opening brief (AOB) is due to a lack of diligence on the part of appointed counsel, payment of compensation will be deferred until the record is certified or the AOB is filed.

2. *Forms and reports* Counsel must submit a cumulative hours compensation form and the most recent status report with every request for payment. The cumulative hours compensation form will be provided by the court or may be obtained from CAP. Counsel should retain a copy of each cumulative hours compensation form submitted. These forms will facilitate completion of the data form for automatic

appeals, which must accompany the request for final payment for services rendered in this court. Note that although a request for payment may be submitted every 90 days, a current status report must be submitted every 60 days.

3. *"Allowable hours" benchmarks* The court, after consultation with representatives of a cross-section of the criminal justice bar, has established the following benchmarks for the various stages of capital representation: *[As amended effective Jan. 22, 1998, Feb. 4, 1998, Aug. 25, 2004, and Nov. 30, 2005.]*

(i) APPEAL

*Reading the record and producing detailed, understandable and computerized transcript notes*: 40 pp./hr.
*Record correction*: 20-120 hrs.
*Client communication*: 15-30 hrs.
*Appellant's opening brief (AOB)*: 260-600 hrs.
*Appellant's reply brief (ARB)*: 55-160 hrs.
*Oral argument*: 40-80 hrs.
*Supplemental briefs*: 20-80 hrs.
*Rehearing petition*: 25-75 hrs.
*Certiorari petition*: 40-75 hrs.
*Briefing and argument in the United States Supreme Court after grant of certiorari*: Counsel shall seek compensation for such services from the United States Supreme Court. Should that court deny compensation for such services, this court will authorize reasonable compensation for such services up to a maximum of $6,000. *[As Amended Aug. 25, 2004.]*

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(ii) HABEAS CORPUS

a. Investigation and Presentation of Petition

*(For cases in which appellate counsel also handles habeas corpus responsibilities):*

*Client communication related to*
*habeas corpus investigation*: Up to 60 hours, as follows: Up to 30 hrs. in the first year after appointment; and up to 15 hrs. per year thereafter.
*Investigate and present habeas* corpus *petition*: 140-400 hrs.

*(For cases in which separate appointed counsel handles habeas corpus responsibilities)*:

*Client communication related to*
*habeas corpus investigation*: Up to 70 hours, as follows: Up to 40 hrs. in the first year after appointment; and up to 15 hrs. per year thereafter.
*Record review*: 50 pp./hr. *[As amended Nov. 30, 2005.]*
*Investigate and present habeas corpus petition*: 180-500 hrs.

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*For all cases:*
*Informal reply*: 50-120 hrs.
*Traverse*: 50-120 hrs.

b. Habeas Corpus Evidentiary Hearing

*Preparation*: 150-300 hrs.
*Evidentiary hearing*: 72-144 hrs. (i.e., 3-6 days)
*Post-hearing litigation before the referee*: 75-125 hrs.

c. Post-Hearing Briefs in the Supreme Court

*Brief on the merits, response brief,*
*and supplemental brief*: 50-150 hrs.

(iii) EXECUTIVE CLEMENCY

*Representation in executive clemency proceedings before the Governor of California: 40-80 hrs.*

These benchmarks are guidelines for the expected hours in "typical" cases, and are neither ceilings nor floors for fees in any given case. The court will continue to monitor its fee payment data to determine whether adjustment of the benchmarks is warranted in the future. Counsel is advised to review the benchmarks carefully, and to bear the following in mind throughout the course of representation (i.e., at each "stage" of the litigation):

a. *The "lower range" of the benchmarks* A case that has a relatively short record (i.e., 3,000-6,000 pages), and that raises standard (albeit fact-specific) issues already resolved in prior cases, should generally produce hours near or below the "lower range" of the benchmarks. Based on experience, the court expects a substantial percentage of cases to be completed under the lower range of the benchmarks.

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Counsel should determine at an early stage of representation whether the case meets the description of a "lower range" case. If counsel has such a case, and submits a fee request substantially exceeding the lower range of the benchmarks for any particular stage of the litigation, he or she must include in each request a detailed explanation of why fees exceeding the lower range of the benchmarks should be awarded. The court will award fees substantially exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

b. *The "upper range" of the benchmarks* Based on experience, the court anticipates a number of cases will produce fee hours at or near the upper range of the benchmarks, and occasionally, over that range. The following important caveats apply in such cases:

The upper range of the benchmarks is generally reserved for those cases with relatively long records (i.e., 10,000 or more pages), *and* that raise novel or difficult issues. The mere fact that the record may be long does *not* indicate that "upper range" or "over-benchmark" hours will be appropriate in any or each stage of the litigation.

If a case does not meet the above description of an "upper range" or "over-benchmark" case, counsel should not expect to receive "upper range" or "over-benchmark" fees. In order to secure such fees in a case not otherwise meeting the above description, counsel must include in the request a detailed explanation of why the fees requested should be awarded. The court will award fees near or exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

4. *Second counsel "override"* In cases in which appointed counsel deems it necessary to associate with second counsel, and the court approves the association, the court may in its discretion, and on a showing of good cause, approve compensation to appointed counsel for hours incurred exceeding the "appeal" through "habeas corpus briefing" benchmarks by 5-15 percent. As a general rule the court will allow the full 15 percent override in cases in which counsel divides the hours fairly evenly for the stage for which fees are sought. If counsel divides the work less evenly, the override will be diminished accordingly. The court will continue to monitor the cases to determine whether the 15 percent ceiling should be increased.

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## III. NECESSARY EXPENSES

**A. Items not qualifying as expenses** The hourly fee should cover all overhead related to a case, *including secretarial services, word processing, and the like*. Expenses listed below will be reimbursed to the extent they are itemized, reasonable, and necessarily incurred during the course of the appeal, and otherwise comply with the court's procedures (see below, part III.B). Note that these guidelines apply not only to appointed

counsel, but to those persons, including experts and investigators, who assist appointed counsel with the appeal.

**B. Prior approval** Prior approval is required for extraordinary expenses, such as for out-of-state travel, expert witnesses and investigators. *In capital cases*, expense requests are governed by the court's "Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions," published in the Official Reports advance sheets, pamphlet No. __ (_____, 2008), rules pages __-__. (See *id.*, std. 2-1 et seq.)

**C. Reimbursable expenses** In general, when making a request for reimbursement, counsel must itemize *all* expenses, and must provide in the request the original receipts for the following: (i) travel expenses (airfare, car rental, hotel bills, etc.) over $47 per day; (ii) telephone and copying expenses over $50 and $100 per month, respectively (see below); and (iii) all other single transactions that exceed $100. Counsel should keep all receipts in the event documentation is later required.

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1. *Photocopying* The cost of photocopying will be reimbursed, at not more than 10 cents per page, whether the copying is done inside or outside counsel's office. If counsel represents that photocopying was billed at 10 cents per page or less, receipts will not be required unless the expenses are in excess of $100 per month.

   In addition to investigative expenses as set forth in the "Supreme Court Policies Regarding Cases Arising From Judgments of Death," Policy 3, standard 2-2.1, counsel appointed to handle habeas corpus/executive clemency representation will be reimbursed the reasonable cost of photocopying defense counsel's trial files, at the rate of not more than 10 cents per page, after filing of the certified record on appeal. Counsel must provide a receipt or invoice showing the number of pages copied, and the cost per page. Reimbursement will not be paid for photocopying of items already contained in the record on appeal, such as daily transcripts or exhibits. *[As amended effective Jan. 16, 2002.]*

2. *Postage and delivery costs* Expenses for express mail/messenger service will be reimbursed only on a showing that use of express mail/messenger service was necessary and reasonable.

3. *Telephone charges* Receipts will not be required unless the expenses are in excess of $50 per month.

4. *Travel expenses* *[As amended effective July 1, 2006.]*

   a. The court will determine the reasonableness and necessity of travel expenses on a case-by-case basis. Counsel are cautioned that travel expenses are not considered necessary when the purpose of a trip may reasonably be accomplished in another way, such as by telephone or correspondence. Further, counsel should use the least expensive alternative means of travel. For motor vehicles, the mileage rate is the prevailing amount established by the Administrative Office of the Courts. *[As amended effective July 1, 2006.]*

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   b. When travel is required by appointed counsel or a person authorized to assist appointed counsel, reasonable and necessary meals and lodging may be claimed, to the extent allowed under State Board of Control rules. Counsel should contact CAP for further information.

   c. Some of the lesser known provisions of the Board of Control rules are as follows:

      (1) The per diem allowance does not apply for trips of 25 miles or less.

      (2) Lunch is not covered unless the travel period is 24 hours or more.

      (3) The cost of collision coverage in a contract for a rental car is not covered.

5. *Computerized legal research* The reasonable cost of computerized legal research (as opposed to the costs of installation and monthly access fees), when the use is specifically attributable to the case, will be reimbursed to the extent reasonably and necessarily incurred. Counsel must explain in writing the specific nature of the computer expenses (e.g., Shepard's, Autocite, issue searches, etc.), and must explain why computerized research was more efficient than the same research performed "manually."

6. *Services of law clerks, paralegals, and State Bar members [As amended effective Jan. 22, 1998.]*

   a. Counsel shall be reimbursed for the compensation of the following individuals at a rate not to exceed the following:

      (1) Law clerks who are not members of the State Bar of California at $40 per allowable hour.

      (2) Paralegals at $40 per allowable hour.

      (3) Members of the State Bar of California, who are not appointed to the case, at the rate of $98 per allowable hour.

   b. Reimbursement of the compensation for all persons performing legal services, other than appointed counsel, shall be subject to the following conditions:

      (1) In submitting a claim for reimbursement, counsel shall describe with specificity the legal services and number of hours of work performed by each other person so the court can evaluate the reasonableness of the services and expenses as part of appointed counsel's overall claim. *It is expected that the hours devoted to legal services by nonappointed counsel, and any "exceptionally high" hours attributed to law clerks and paralegals* (i.e., hours

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exceeding 30 percent of the benchmark hours for appointed counsel for any given stage), *will reduce the hours that appointed counsel will devote to those services*.

(2) Appointed counsel shall not delegate to others those functions that require the ability and experience for which counsel was appointed.

(3) Appointed counsel shall supervise and have full responsibility for the services performed by others.

7. *Services of investigators and experts [As amended effective Jan. 22, 1998, and July 23, 2008.]*

a. An investigator or expert shall be compensated at a rate not to exceed the maximum rates listed below. Counsel must establish that use of an expert's services is reasonably necessary under the facts of the case. Counsel seeking to use the services of multiple experts relating to a single or common issue must demonstrate a compelling necessity for such use of multiple experts. In addition, counsel must include in the request for reimbursement a representation that the rate requested

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(1) does not exceed the investigator's or expert's customary rates for the services performed, and

(2) does not exceed local prevailing rates for the services performed.

b. The maximum rates are as follows

(1) Investigators, $55-~~75~~90 per hour.

(2) Penalty phase consultants, $60-~~75~~125 per hour.

(3) Psychiatrists and other medically licensed mental health experts, $200-~~275~~350 per hour.

(4) Other forensic experts, $125-~~200~~225 per hour.

(5) Psychologists (Ph.D.'s), $150-~~200~~275 per hour.

(6) Attorneys serving as experts, $125-145 per hour. (*Note:* Until an order to show cause is issued, *or* the People submit an expert declaration in their informal opposition to a habeas corpus petition, the court will not approve payment for attorney "expert opinion" in the form of declarations, etc.)

(7) Any expert listed above testifying at a court proceeding, eight times the hourly rate per day or four times the hourly rate per half day.

c. In exceptional circumstances, when the need for services at a greater rate of compensation is documented and prior authorization is obtained from the Supreme Court, compensation beyond the maximum may be paid.

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8. *Proceedings returnable in superior court following order to show cause on alleged mental retardation of condemned inmate [As adopted Aug. 27, 2008.]*

In proceedings pending in superior court pursuant to an order to show cause issued by the California Supreme Court, and returnable before the superior court, regarding a condemned inmate's alleged mental retardation and resulting ineligibility for the death penalty within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304 (see also *In re Hawthorne* (2005) 35 Cal.4th 40), the following practices apply to requests by counsel appointed in the California Supreme Court for the reimbursement of investigation services and expenses incurred in superior court for experts, investigators and law clerks/paralegals:

a. The decision whether to authorize funding for any experts, investigators or law clerks/paralegals is to be made by, and is within the discretion of, the superior court in which the proceedings are pending.

b. Appointed counsel may engage experts, investigators and law clerks/paralegals either in the locality where counsel's offices are situated or in the locality where the superior court proceedings are being held, at counsel's option.

c. The California Supreme Court will pay for investigation services and expenses at the rate prevailing where the services are engaged, if otherwise permissible within the maximum hourly rates and other applicable provisions set forth within these payment guidelines.

## IV. FEE AND EXPENSE DISALLOWANCES

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The court will provide reasons in writing for fee disallowances of $1,000 or more, and expense disallowances of $500 or more.

## V. COURT ACTION UPON NONPERFORMANCE OF WORK, AND REIMBURSEMENT OF FEES UPON AUTHORIZED WITHDRAWAL OF APPOINTED COUNSEL

*[Guideline adopted effective July 30, 1997.]*

**A. Nonperformance of counsel** In the rare circumstance in which appointed counsel ceases work on a case and refuses to complete the work with reasonable diligence, the court has had, and will continue to exercise as appropriate, the following nonexclusive options: The court may enforce its legal rights; the court may refer the matter to the State Bar; and finally, the court may institute contempt proceedings to enforce its orders.

**B. Authorized withdrawal of counsel** In the event that the court permits appointed counsel to withdraw before completion of counsel's

duties in a case, the court will, as appropriate under the circumstances, authorize payment to counsel for legal work completed. Alternatively, the court may, as appropriate under the circumstances, order counsel to reimburse the court for fees paid, less a credit for work performed that is determined by the court to be of value to the court.

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**GUIDELINES FOR FIXED FEE APPOINTMENTS, ON OPTIONAL BASIS, TO AUTOMATIC APPEALS AND RELATED HABEAS CORPUS PROCEEDINGS IN THE CALIFORNIA SUPREME COURT**

**Adopted by the Supreme Court December 14, 1993, effective January 1, 1994**

**Amended effective September 1, 1995, January 1, 1997, January 22, 1997, July 30, 1997, January 22, 1998, February 4, 1998, July 18, 2001, January 16, 2002, March 21, 2002, October 1, 2005, November 30, 2005, July 1, 2006, October 1, 2007, and January 1, 2008**

## Introduction

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Presently, appointed counsel in automatic appeals are compensated on a "time and costs" basis, under the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court (as revised [Off. Reps. Adv. Pamp. No. _ (_____, 2008) Rules pp. __-__]) (hereafter Payment Guidelines). Under the Payment Guidelines, appointed counsel must submit a detailed and lengthy cumulative hours compensation form with every request for payment of fees and reimbursement of expenses. Moreover, "allowable hours" benchmarks limit the fees available for each stage of the capital representation; other provisions limit or exclude reimbursement for expenses. Requests for prior approval of extraordinary expenses are governed by the Supreme Court Policies Regarding Cases Arising From Judgments of Death (as revised [Off. Reps. Adv. Pamp. No. __, *supra*, Rules pp. __-__]).

In an effort to provide appointed counsel in capital cases greater predictability, consistency and control over compensation and expenses, and to reduce administrative burdens on both counsel and the Court, the Court has adopted an optional fixed fee and expenses payment system.

The categories of fixed fees set out below in Guidelines 1, 1.1, and 1.2 establish the compensation and responsibilities of appointed counsel for all services and "incidental expenses" (habeas corpus investigation expenses are separately provided for in Guideline 2):

(1) In cases in which counsel is appointed to represent the defendant both on appeal and in related habeas corpus/executive clemency proceedings, fixed fee compensation is for: (a) the direct appeal, through the filing of a certiorari petition to the United States Supreme Court, or an answer thereto (but not including any briefs or appearances in the United States Supreme Court after grant of certiorari or any briefs or appearances on remand to the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines); (b) state habeas corpus investigation, and preparation and filing (if warranted) of a state habeas corpus petition and informal reply, and any subsequent habeas corpus petition, including any petition to exhaust state remedies, in the California Supreme Court (but not including any traverse, habeas corpus evidentiary hearing or post-hearing briefs in the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines); (c) any trial court proceedings under Penal Code sections 1193 and 1227 to set an execution date; and (d) representation in executive clemency proceedings before the Governor of California. (See Cal. Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, *supra*, Compensation Stds., std. 2-1.)

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(2) In cases in which counsel is appointed to represent the defendant on appeal only, fixed fee compensation is for: (a) the direct appeal, through the filing of a certiorari petition to the United States Supreme Court, or an answer thereto (but not including any briefs or appearances in the United States Supreme Court after grant of certiorari or any briefs or appearances on remand to the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines); and (b) any trial court proceedings under Penal Code section 1193 to set an execution date. (See Cal. Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, *supra*, Compensation Stds., std. 2-1.)

(3) In cases in which counsel is appointed to represent the defendant in habeas corpus/executive clemency proceedings only, fixed fee

compensation is for: (a) state habeas corpus investigation, and preparation and filing (if warranted) of a state habeas corpus petition and informal reply, and any subsequent habeas corpus petition, including any petition to exhaust state remedies, in the California Supreme Court (but not including any traverse, habeas corpus evidentiary hearing or post-hearing briefs in the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines); (b) any trial court proceedings under Penal Code section 1227 to set an execution date; and (c) representation in executive clemency proceedings before the Governor of California. (See Cal. Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, *supra*, Compensation Stds., std. 2-1.) *[Adopted effective Jan. 1, 1994; as amended effective Sept. 1, 1995, Jan. 22, 1998, and Feb. 4, 1998.]*

**1. Fixed Fee Categories**
**for Cases in Which Counsel Is Appointed**
**to Handle the Appeal and Related**
**Habeas Corpus/Executive Clemency Proceedings**

*[As amended effective Sept. 1, 1995, Jan. 1, 1997, Jan. 22, 1998, Oct. 1, 2005, July 1, 2006, and Oct. 1, 2007.]*

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Category I: $160,000

A. An appeal from a judgment based on a guilty plea and penalty phase; or

B. An appeal from a judgment on remand following a reversal limited to penalty.

C. 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)) likely will be valued well below $160,000. (See also Guideline 4 [Case Evaluation], *post*.)

Category II: $231,000

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) or I(B) 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 4,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were 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 under 6,000 pages.

Category III: $283,000

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 12,000 pages; or

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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 5,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category IV: $322,000

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 12,000 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 numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category V: $368,000 base fee

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.

### 1.1. Fixed Fee Categories for Cases in Which Counsel Is Appointed to Handle the Appeal Only

*[Guideline added effective Jan. 22, 1998; as amended Oct. 1, 2005, July 1, 2006, and Oct. 1, 2007.]*

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Category I: $65,000

A. An appeal from a judgment based on a guilty plea and penalty phase; or

B. An appeal from a judgment on remand following a reversal limited to penalty.

C. 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)) likely will be valued well below $65,000. (See also Guideline 4 [Case Evaluation], *post*.)

Category II: $136,000

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) or I(B) 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 4,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were 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 under 6,000 pages.

Category III: $178,000

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 12,000 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 5,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

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Category IV: $219,000

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 12,000 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 numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category V: $263,000 base fee

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.

### 1.2. Fixed Fee Categories for Cases in Which Counsel Is Appointed to Handle Habeas Corpus/Executive Clemency Proceedings Only

*[Guideline added effective Jan. 22, 1998; as amended Oct. 1, 2005, Nov. 30, 2005, July 1, 2006, and Oct. 1, 2007.]*

Category I: $85,000, plus an additional fixed fee calculated at the rate of $145 for every 50 pages of transcript in the combined record on appeal.

A. Habeas corpus representation related to a case that would fall within Fixed Fee Guideline 1.1, Categories I or II.

B. Habeas corpus representation related to a case that would fall within Fixed Fee Guideline 1.1, Categories III, IV, or V, but that, for case-specific reasons, is of below-average complexity.

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Category II: $110,000, plus an additional fixed fee calculated at the rate of $145 for every 50 pages of transcript in the combined record on appeal.

A. Habeas corpus representation related to a case that would fall within Fixed Fee Guideline 1.1, Categories III , IV, or V.

B. Habeas corpus representation related to a case that would fall within Fixed Fee Guideline 1.1, Categories I or II, but that, for case-specific reasons, nevertheless is of average complexity.

Category III: $127,000, plus an additional fixed fee calculated at the rate of $145 for every 50 pages of transcript in the combined record on appeal, for cases of above-average complexity.

*For cases of exceptional complexity, appointed counsel may present a justification at the outset for a fixed fee higher than the $127,000 base fee.*

### 1.3. Factors Affecting Fee Categories

*[Guideline added effective Nov. 30, 2005.]*

The California Supreme Court considers four factors in determining the fee in fixed fee appointments in capital proceedings: *complexity*, *difficulty*, *extraordinary costs*, and *time-intensiveness*. The case-specific issues that influence the applicability of these factors often overlap, but examples of such issues include the following:

- Multiple defendants
- Motion for change of venue
- Joint or separate trials with co-defendants
- Multiple homicides or multiple incidents (including multiple victims in separate incidents)
- Mistrials and re-trial(s)
- Substitution of trial counsel; additional trial proceedings or phases (e.g., grand jury, competency phase, sanity phase)
- Multiple special circumstances
- Prior convictions or unadjudicated criminal conduct admitted at penalty phase
- Prosecution's use of informants
- Extensive litigation of the admissibility of evidence
- Forensic testing, analysis, and evidence (e.g., DNA, hair, fingerprint, blood, ballistics) introduced at trial or necessary for habeas investigation
- Mentally ill, mentally impaired, or mentally retarded capital defendants
- Non-English-speaking or foreign national capital defendant
- Non-English-speaking witnesses
- Minimal guilt and/or penalty phase investigation done for trial

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- Investigation requirements in multiple locations and/or out of the state or country
- Extended elapsed time since offenses/trial
- Necessity of expert witnesses
- Necessity of using some fees to cover investigative and incidental expenses
- Length of record
- Number of trial witnesses

### 1.4. Suggested Format and Contents of Fixed Fee Requests

*[Guideline added effective Nov. 30, 2005.]*

Counsel may submit requests for consideration of a case for a particular fixed fee category. Lengthy letters are not necessary or encouraged. Letters for the most complex cases should not exceed seven pages. A suggested format that will assist the Court in making a fixed fee determination includes the following elements:

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Fixed fee request: An opening paragraph stating the fee category and base fee requested, plus additional amounts sought for transcript length and cases of exceptional complexity.

Short summary of the case: This paragraph should not extensively reiterate the facts of the case or the procedural history.

Discussion of the applicability of the four factors to this particular case: An explanation of why the appointed case is particularly complex, difficult, costly, and/or time-intensive.

## 2. Incidental and Investigative Expenses

*[As amended effective Sept. 1, 1995, Jan. 22, 1998, and Jan. 1, 2008.]*

All incidental expenses for the direct appeal and habeas corpus/executive clemency representation are included in the fixed fee. Incidental expenses include photocopying, postage, telephone charges, computerized legal research, travel (other than for habeas corpus investigation) and services of law clerks and paralegals (other than for habeas corpus investigation). In addition to the agreed-upon fixed fee, counsel may also incur up to $25,000 in habeas corpus investigative expenses, without prior Court authorization, subject to the Court's Payment Guidelines, *supra*, part III, subpart C, paragraphs 1-7, inclusive ("Reimbursable expenses"). Investigative expenses include travel associated with habeas corpus investigation, and services of law clerks, paralegals, and others serving as habeas corpus investigators. Counsel will be reimbursed for all such habeas corpus investigative expenses that were reasonably incurred, up to $25,000. The Court will not authorize or reimburse habeas corpus investigative expenses exceeding $25,000 prior to the issuance of an order to show cause.

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As to those cases in which, by January 1, 2008 (the effective date of Assem. Bill No. 1248), the defendant has not filed a capital-related habeas corpus petition in this court and the date by which to file a presumptively timely petition has not yet passed, counsel may be reimbursed up to $50,000 for those investigative services and expenses incurred on or after that date. Such investigative funding for expenses incurred after January 1, 2008, also is available in those cases in which a presumptively timely petition has been filed by January 1, 2008, but petitioner's reply to the informal response has not been filed and the time to do so (with any extensions of time) has not passed as of that date. (See also Cal. Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, *supra*, Timeliness Stds., std. 1-1, & Compensation Stds., std. 2-2.1.)

### 3. Requests for Additional Fees

In extraordinary and unique situations, the Court will entertain requests for additional fees based on exceptional circumstances (e.g., circumstances that were unforeseeable at the time of the appointment of counsel on a fixed fee basis). In such situations, counsel shall have the burden of proof to justify any additional fees.

### 4. Case Evaluation

*[As amended effective Jan. 22, 1998.]*

There will be agreement on the fixed fee prior to the appointment of counsel. (See also, Guideline 6 [Conversion From Time and Costs Appointment to Fixed Fee], *post*.) Initially, applicant counsel selected to consider an appointment to a specific automatic appeal and/or habeas corpus/executive clemency proceedings will have the option of investigating that case for purposes of proposing a fixed fee pursuant to these alternative guidelines, rather than the traditional time and costs method. At any given time, there will be only one set of applicant counsel investigating a specific automatic appeal and/or habeas corpus/executive clemency proceedings for purposes of a possible appointment. Applicant counsel are encouraged to consult with trial counsel, examine any available transcript "dailies" prepared during the trial or other proceedings, and examine any available materials normally found in the clerk's transcript. Counsel are also encouraged to examine additional materials and information that may be available from the California Appellate Project in San Francisco.

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Using these alternative guidelines, applicant counsel opting to be appointed on a fixed fee basis will propose a category and hence a fee for all services and expenses in the case. The Court's concurrence is required for any such appointment.

Discussions with applicant counsel regarding proposals for fixed fee appointments shall be conducted through the Automatic Appeals Monitor.

The fixed fee encompasses counsel's investigative costs in reviewing the case for purposes of considering an appointment. If counsel's proposal for a fixed fee is not accepted by the Court, counsel will not be reimbursed for those investigative costs; however, counsel may request an appointment to that case pursuant to the traditional time and costs method of the Payment Guidelines.

### 5. Progress Payments

*[As amended effective Jan. 22, 1998, Feb. 4, 1998, and Mar. 21, 2002.]*

Until appointed appellate counsel files the appellant's opening brief or appointed habeas corpus counsel files a petition, a current status report must be filed every 60 days. Other than reimbursement for habeas corpus investigative expenses, documentation and itemization of hours and expenses by appointed counsel are not required under these alternative fixed fee guidelines.

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Counsel appointed for both the direct appeal *and* habeas corpus/executive clemency proceedings will receive progress payments after specified stages of representation as follows: (i) one-sixth of the fixed amount shortly after counsel is appointed; (ii) one-sixth after counsel (a) submits to the assisting entity or counsel (e.g., the Habeas Corpus Resource Center, the California Appellate Project, or other assisting counsel) detailed, understandable and computerized transcript notes, a list of potentially meritorious habeas corpus issues, and a draft first request for correction of the record (and, if appropriate, any motion for augmentation and/or settled statement), and (b) files this first request; (iii) one-sixth after certification of the record and filing of the record in this court (one-half of this progress payment will be advanced upon request after the trial court's order disposing of the consolidated motion to augment, correct, and settle the record on appeal); (iv) one-sixth after counsel (a) files a confidential declaration that he or she has made reasonable efforts to consult with defendant and trial counsel about potential habeas corpus issues, (b) submits to the assisting entity or counsel a detailed outline of potential habeas corpus issues to be investigated, and (c) files the appellant's opening brief (one-quarter of this progress payment will be advanced upon request after counsel's submission to the assisting entity or counsel of a complete

draft of the statement of the case and statement of the facts portion of the appellant's opening brief; one-quarter after submission of a complete draft of the guilt phase and special circumstance issues portion of the appellant's opening brief; and one-quarter after submission of a complete draft of the penalty phase issues portion of the appellant's opening brief [counsel may request these advances before progress payment (iii) has been paid in full]); (v) one-sixth after counsel (a) submits to the assisting entity or counsel a draft reply brief, (b) files a reply brief, and (c) files a confidential declaration that counsel has substantially completed the habeas corpus investigation (to the extent possible given funding provided therefor), and has submitted for review to the assisting entity or counsel a draft habeas corpus petition with necessary exhibits and declarations (or, in the alternative, that counsel has submitted for review to the assisting entity or counsel a draft declaration indicating that all potential leads have been substantially pursued to the extent possible given funding provided therefor, and that it appears that no habeas corpus petition will be filed) (one-half of this progress payment will be advanced upon request after the following: (a) the Attorney General files the respondent's brief and (b) counsel files a confidential declaration that counsel has completed approximately one-half of the anticipated habeas corpus investigation, and has submitted to the assisting entity or counsel a detailed outline of the remainder of the planned investigation); (vi) one-sixth, less $10,000, after counsel files a habeas corpus petition in this court on behalf of counsel's client, and after oral argument and submission of the matter on the direct appeal (except that if counsel files no petition, counsel must instead file a confidential declaration indicating that all potential leads have been pursued to the extent possible given funding provided therefor, and that no habeas corpus petition will be filed, after which counsel will receive no sixth progress payment, except upon a showing that in view of work performed, full or partial payment is warranted); and finally (vii) the sum of $10,000 after completion of representation in executive clemency proceedings before the Governor of California. With each request for payment except for those set forth above in (i), (vi), and (vii), counsel shall provide to the court a statement from the assisting entity or counsel that counsel's submission to the entity or counsel substantially complies with the conditions set forth for payment.

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Counsel appointed for the direct appeal only will receive progress payments after specified stages of representation as follows: (i) one-sixth of the fixed amount shortly after counsel is appointed; (ii) one-sixth after counsel (a) submits to the assisting entity or counsel (e.g., the Habeas Corpus Resource Center, the California Appellate Project, or other assisting counsel) detailed, understandable and computerized transcript notes, and a draft first request for correction of the record (and, if appropriate, any motion for augmentation and/or settled statement), and (b) files this first request; (iii) one-sixth after certification of the record and filing of the record in this court (one-half of this progress payment will be advanced upon request after the trial court's order disposing of the consolidated motion to augment, correct, and settle the record on appeal); (iv) one-sixth after counsel files the appellant's opening brief (one-quarter of this progress payment will be advanced upon request after counsel's submission to the assisting entity or counsel of a complete draft of the statement of the case and statement of the facts portion of the appellant's opening brief; one-quarter after submission of a complete draft of the guilt phase and special circumstance issues portion of the appellant's opening brief; and one-quarter after submission of a complete draft of the penalty phase issues portion of the appellant's opening brief [counsel may request these advances before progress payment (iii) has been paid in full]); (v) one-sixth after counsel (a) submits to the assisting entity or counsel a draft of the appellant's reply brief, and (b) files the reply brief; and (vi) one-sixth after oral argument and submission of the matter on the direct appeal. With each request for payment except for those set forth above in (i) and (vi), counsel shall provide to the court a statement from the assisting entity or counsel that counsel's submission to the entity or counsel substantially complies with the conditions set forth for payment.

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Counsel whose appointment is limited to habeas corpus/executive clemency proceedings will receive progress payments after specified stages of representation as follows: (i) one-fifth of the fixed amount shortly after counsel is appointed; (ii) one-fifth after counsel files a confidential declaration that counsel has reviewed the record on appeal and the detailed transcript notes and list of potentially meritorious habeas corpus issues provided by appointed counsel on the direct appeal, has made reasonable efforts to consult with defendant, appellate counsel and trial counsel, and has submitted to the assisting entity or counsel (e.g., the Habeas Corpus

Resource Center, the California Appellate Project, or other assisting counsel) a detailed outline of potential habeas corpus issues to be investigated; (iii) one-fifth after counsel files a confidential declaration that counsel has completed approximately one-half of the anticipated habeas corpus investigation, and has submitted to the assisting entity or counsel a detailed outline of the remainder of the planned investigation; (iv) one-fifth after counsel files a confidential declaration that counsel has submitted for review to the assisting entity or counsel a draft habeas corpus petition with necessary exhibits and declarations (or, in the alternative, that counsel has submitted for review to the assisting entity or counsel a draft declaration indicating that all potential leads have been pursued to the extent possible given funding provided therefor, and that no habeas corpus petition will be filed) (one-half of this progress payment will be advanced upon request after counsel files a confidential declaration that counsel has completed the habeas corpus investigation to the extent possible given the funding provided therefor); (v) one-fifth, less $10,000, after counsel files a habeas corpus petition in this court on behalf of his or her client (except that if counsel files no petition, counsel must instead file a confidential declaration indicating that all potential leads have been pursued to the extent possible given funding provided therefor, and that no habeas corpus petition will be filed, after which counsel will receive no fifth progress payment, except upon a showing that in view of work performed, full or partial payment is warranted); and finally (vi) $10,000 after completion of representation in executive clemency proceedings before the Governor of California. With each request for payment except for those set forth above in (i), (v), and (vi), counsel shall provide to the court a statement from the assisting entity or counsel that counsel's submission to the entity or counsel substantially complies with the conditions set forth for payment.

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Under limited circumstances (e.g., a delay in the certification of the record not due to a lack of diligence on the part of appointed counsel), the court will authorize partial payments before completion of the relevant stage(s) of representation.

In the event the proceedings terminate prior to the completion of all of the stages set forth in the progress payment schedule (as a result, for example, of the death of the defendant), appointed counsel shall memorialize all work completed and the court shall determine and pay an

appropriate sum to compensate counsel for work performed prior to the termination of the proceedings.

### 6. Conversion From Time and Costs Appointment to Fixed Fee

*[As amended effective Jan. 22, 1998.]*

Counsel appointed to an automatic appeal and/or habeas corpus/executive clemency proceedings under the traditional time and costs basis of the Payment Guidelines are encouraged to consider converting their method of compensation pursuant to this optional, fixed fee payment system. Any such conversion must take into account any payments previously made to counsel, and must be approved by the Court. Ordinarily, conversion will not be approved after the filing of the appellant's opening brief, or, in the case of habeas corpus/executive clemency counsel, after six months following counsel's appointment, whichever is later.

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Counsel approved by the Court for an appointment to his/her first automatic appeal and/or habeas corpus/executive clemency proceedings should carefully consider an initial appointment under the time and costs basis of the Payment Guidelines. A conversion to a fixed fee appointment pursuant to these alternative guidelines may be more appropriate after such counsel has become familiar with the case.

### 7. Second Counsel

The Court encourages association with second counsel. Unlike the procedure under the traditional time and costs appointment scheme of the Payment Guidelines, the fixed fees provided by this optional payment system are intended to adequately compensate appointed counsel and any associate counsel. Hence, the Court will not recognize a "second counsel override" in fixed fee cases.

## 8. Valuation and Length of Record on Appeal

*[As amended July 18, 2001.]*

In determining the length of the combined record on appeal as part of the process whereby a case may be valued within a fixed fee category, the Court will take into consideration whether an unusual proportion of the record is comprised of jury voir dire and/or preliminary hearing transcript. When appropriate, the Court may treat the combined record as having a reduced length. Moreover, consistent with this court's historical practice, when determining the appropriate fixed fee category, the Court will not include, in determining the size of the combined record on appeal, the juror questionnaires completed by actual or prospective jurors.

## 9. Applicability of Supreme Court Policies Regarding Cases Arising From Judgments of Death

*[As amended effective Jan. 23, 1998.]*

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The Supreme Court Policies Regarding Cases Arising From Judgments of Death, as amended, apply to all automatic appeals and habeas corpus/executive clemency proceedings in which counsel has opted for a fixed fee pursuant to these alternative guidelines. However, standard 2-2.2 of the Compensation Standards, through standard 2-4.4 of the Compensation Standards (governing authorization to incur, and reimbursement of, habeas corpus investigation expenses), shall not apply to fixed fee cases.

## 10. Fixed Legal Fees and Expenses For Evidentiary Hearings

*[Guideline adopted Jan. 22, 1997; as amended effective Jan. 22, 1998, Oct. 1, 2005, July 1, 2006, and Oct. 1, 2007.]*

In a case in which the Court orders an evidentiary hearing, counsel may elect to enter a fixed legal fee and expenses agreement covering (i) preparation for the evidentiary hearing, (ii) presentation of the evidentiary hearing, (iii) post-hearing litigation before the referee, and (iv) post-hearing briefs and proceedings in this Court.

**(1) FIXED LEGAL FEE AND EXPENSE CATEGORIES.** The Court and counsel for petitioner will agree to fix legal fees and expenses within one of the following categories.

Each agreement shall specify one fixed dollar sum covering *all* legal fees and *all* expenses — "incidental" and investigative — (e.g., photocopying, postage, telephone charges, travel, computerized legal research, services of law clerks and paralegals, services of and witness fees for investigators and experts, and any other witness expenses).

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The fixed sum agreement shall also specify separately a dollar amount for the "legal fee component" and the "expenses component" of the fixed sum.

**Category A: $52,500 ($49,000 legal fees; $3,500 expenses).**

A matter presenting a single issue or limited issues expected to require minimal additional investigation, minimal or no services of experts, and to consume 1-2 hearing days.

**Category A(1): $57,500 ($49,000 legal fees; $8,500 expenses)**

A matter otherwise within category A, but which is expected to require significant additional investigation and use of experts.

**Category B: $80,500 ($72,000 legal fees; $8,500 expenses)**

A matter expected to require significant additional investigation and/or significant use of experts, and to consume 3-4 hearing days.

**Category B(1): $86,000 ($72,000 legal fees; $14,000 expenses)**

A matter otherwise within category B, but which is expected to require substantial additional investigation and use of experts.

**Category C: $116,000 ($102,000 legal fees; $14,000 expenses)**

A matter expected to require substantial additional investigation and/or services of experts, and to consume 5-6 hearing days.

**Category C(1): $123,000 ($102,000 legal fees; $21,000 expenses)**

A matter otherwise within category C, but which is expected to require substantial additional investigation and use of experts.

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**Category D: $148,000 *base sum* ($124,000 base amount for legal fees; $24,000 base amount for expenses)**

A matter that is expected to require substantial additional investigation and services of experts, and to consume 7 or more hearing days. In this category, counsel may present justification at the outset for a fixed sum higher than the base amount.

**(2) REQUESTS FOR ADDITIONAL LEGAL FEES.** In extraordinary and unique situations, the Court will entertain requests for additional fees based on exceptional circumstances, as set out *ante*, Fixed Fee Appointment Guideline 3.

**(3) CASE EVALUATION.** A fixed fee and expenses agreement shall be reached within 60 days after the Court issues its order appointing a referee. Discussions with applicant counsel regarding proposals for such an agreement shall be conducted through the Automatic Appeals Monitor.

**(4) FIXED LEGAL FEE AND EXPENSE PAYMENTS.**

**Fixed legal fee payments.** Counsel shall be entitled to be paid one-fourth of the *legal fee component* of the amount set out in the fixed legal fee and expenses agreement upon the filing of the Court's order making the fixed legal fee and expenses appointment. Thereafter, counsel will receive, on written request (but without the necessity of providing an itemization of hours), a one-fourth progress payment of the legal fee component after (i) the evidentiary hearing commences, (ii) the post-hearing litigation before the referee is completed, and (iii) the post-hearing briefing in this Court is completed. Under limited circumstances (e.g., substantial delay not due to lack of diligence on the part of counsel), the Court will authorize partial payments before completion of the aforementioned stages.

**Expense payments.** Every 30 days, counsel may request reimbursement from this Court for all necessary and reasonable expenses, up to the amount set out in the fixed legal fee and expenses agreement. Reimbursement shall be governed by and calculated in accordance with the Court's Payment Guidelines, *supra*, par. III ("Necessary Expenses").

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**11. Court Action Upon Nonperformance of Work, and Reimbursement of Fees Upon Authorized Withdrawal of Appointed Counsel**

*[Guideline adopted effective July 30, 1997.]*

The provisions of "Guideline V" of the "Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court" apply as well to counsel appointed on a "fixed fee" basis.

## 12. Reimbursement for Photocopying Defense Counsel's Trial Files

*[Guideline adopted effective Jan. 16, 2002.]*

In addition to investigative expenses as set forth in the "Supreme Court Policies Regarding Cases Arising From Judgments of Death," Policy 3, standard 2-2.1, counsel appointed to handle habeas corpus/executive clemency representation will be reimbursed the reasonable cost of photocopying defense counsel's trial files, at the rate of not more than 10 cents per page, after filing of the certified record on appeal. Counsel must provide a receipt or invoice showing the number of pages copied, and the cost per page. Reimbursement will not be paid for photocopying of items already contained in the record on appeal, such as daily transcripts or exhibits.

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