

# **RULES AND REGULATIONS OF THE SAN DIEGO COUNTY OFFICE OF ASSIGNED COUNSEL (OAC)**

**(Appendix A to OAC Panel Attorney Contract)**

## **1. MISSION**

San Diego County's Office of Assigned Counsel ("OAC") arranges for the legal representation of indigent defendants who are entitled by law to court appointed attorney services but who cannot be represented by the internal legal staff of the various other divisions of San Diego County's Department of the Public Defender, including the Primary Public Defender, the Alternate Public Defender, and the Multiple Conflicts Office, due to conflict of interest issues. OAC provides indigent legal representation services by establishing and maintaining an Assigned Counsel Program using a panel of well-qualified San Diego attorneys who are engaged in private law practice, who perform this appointed work as independent contractors to the County of San Diego, and who have been approved by OAC to participate in the County's indigent defense panel attorney program after meeting the requirements for their participation. Additional indigent defense legal services may be provided for and/or paid for by the OAC on behalf of the County where authorized and required by court order.

## **2. ADMINISTRATION AND GENERAL OPERATION OF OAC**

The OAC shall generally function and administer San Diego County's Assigned Counsel Program as follows:

### **2.1 Ethical Separation.**

The OAC functions as an ethically separate division of San Diego County's Department of the Public Defender. The OAC shall be organized and administered in such fashion to conform with the prevailing legal standards for ethical separation of government legal services offices.

### **2.2 Director of Office of Assigned Counsel**

The Chief Deputy Public Defender or Deputy Public Defender assigned to serve as the Director of OAC ("OAC Director") by the Public Defender shall be responsible for administration of the OAC and its Assigned Counsel Program. The OAC Director shall administer the OAC

and the Assigned Counsel Program under the general administrative supervision of the Public Defender consistent with prevailing legal standards for ethical separation of government legal services offices. The OAC Director shall be responsible for the referrals and case assignment procedures, for keeping the program records, for continuing development of policies, procedures, rules and regulations, and for the development of statistical information and reports relating to the program. The OAC Director shall perform whatever other administrative functions may be assigned by the Public Defender consistent with the spirit and purpose of this independent, ethically separate, indigent defense assigned counsel program. The OAC Director is authorized to make the day-to-day administrative decisions regarding the operation of the OAC and the Assigned Counsel Program.

## **2.3 Assigned Counsel Program**

**2.3.1 Method of Delivery.** The OAC shall deliver legal counsel services to indigent criminal case defendants through attorneys contracted by the County of San Diego through the OAC (“Assigned Counsel Program”). The OAC Director is authorized by the County of San Diego Board of Supervisors to execute such contracts on behalf of the County of San Diego. The contracts shall conform to the general guidelines and minimum requirements set forth in these OAC Rules and Regulations.

**2.3.2 Qualifications and Applications.** The OAC Director shall establish qualification criteria for contracting attorneys. The OAC Director may modify the Assigned Counsel Program attorney qualification criteria as he or she deems necessary and appropriate. The OAC Director shall develop an application to be completed by private practice attorneys who want to participate in the Program. The application shall conform to the general guidelines set forth in these Rules & Regulations.

**2.3.3 Contracts.** The OAC Director, in consultation with County Counsel, shall develop a form of contract to be executed by attorneys who have completed the application to join the program and who have been deemed qualified by the OAC Director. The contract shall conform to the general guidelines set forth in these Rules & Regulations.

**2.3.4 Assigned Panels.** Upon executing the contract, an attorney shall be assigned to a list of attorneys qualified to work on a particular category of cases (“Assigned Counsel Program Attorney Panel” or “Assigned Panel”). The OAC Director may assign cases to Assigned Panel attorneys on a rotating basis taking into account geographic considerations relating to court locations when possible.

**2.3.5 Training.** OAC shall develop a training program in cooperation with the Public Defender and Alternate Public Defender offices. The training program will be made available to panel attorneys for the purpose of annual recertification in the OAC program and for general MCLE purposes.

### **3. APPLICATION TO BECOME A PANEL ATTORNEY**

#### **3.1 Application Form.**

To become assigned to an Assigned Panel, an attorney shall complete an Application form developed by the OAC Director. The Application form shall be **Attachment C** to these Rules and Regulations. The Application shall at a minimum require the applicant to attest under penalty of perjury to the following:

- 3.1.1 General current practice information and background
- 3.1.2 Education and Admissions to Practice
- 3.1.3 Jurisdiction and Case Classification Preferences
- 3.1.4 Employment history
- 3.1.5 Continuing legal education
- 3.1.6 Case classification qualification criteria chart
- 3.1.7 Criminal experience (cases, trials, motions, sentencing, etc.)

The Application will also contain a statement reflecting the applicant's understanding that in order to participate in the Assigned Counsel Program they will be required to execute a contract with the County of San Diego that contains non-negotiable terms and conditions. The application will list the major provisions of the contract they will be required to sign, as reflected in the paragraphs below.

#### **3.2 Assignment to Panels.**

Applicants must meet the minimum experience and educational requirements for specific class panels set forth in **Attachment A** "Criteria for Admittance to OAC Class Panels" and the related **Attachment B** "Classification of Crimes" both of which documents are incorporated herein by reference as part of these rules and regulations and, therefore, part of the attorney contract with the County of San Diego.

These criteria and classifications of crimes are subject to change by the OAC Director, with appropriate notice to panel members.

**3.3 Application Fee.**

There shall be no application fee for joining or participating in the program.

**3.4 Application Amendments.**

Panel members who desire a higher case classification category and Assigned Panel may submit an amendment to their application at any time using forms approved by the OAC for this purpose.

**3.5 Application Evaluation.**

All applications for participation in the Assigned Counsel Program, and all applications of participants seeking elevation to a higher class or category Assigned Panel, will be evaluated by the OAC Director in consultation with the OAC Assistant Director and any Advisory Screening Committee that may be established pursuant to these Rules & Regulations.

**3.6 Waiver of Qualification Criteria.**

The OAC Director may exercise his or her discretion to waive established Assigned Panel qualification criteria.

**3.7 Supplemental Application Information.**

The OAC Director may require any applicant to furnish additional information relevant to the applicant's qualifications for a particular panel and may also seek independent verification of any information provided by the applicant during the application process.

**3.8 Denial of Application.**

Any new applicant or Assigned Panel member who has been denied participation in the Assigned Counsel Program or certification in any class or category may ask the OAC Director for reconsideration. The decision of the OAC Director in such matters shall be final.

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### **3.9 Advisory Screening Committees.**

The OAC Director may appoint one or more advisory screening committees to assist in evaluating panel members and panel applicants as directed by the OAC on a case by case basis. Appointment to, and dismissal from, an advisory screening committee is at the sole discretion of the OAC Director. Screening committees exist at the sole discretion of the OAC Director and may be disbanded at any time. The recommendations of any screening committee or other committee established by OAC shall be advisory only. All communications, deliberations, results, and records of the Screening Committees' activities shall be confidential to the extent allowable by law.

## **4. CONTRACT BETWEEN COUNTY AND ATTORNEYS**

### **4.1. Contract Required.**

Upon acceptance of the application, the applicant attorney must sign a contract between the attorney and the County of San Diego in order to complete assignment to an Assigned Panel. The OAC contract form used for this agreement shall be developed by the OAC Director in consultation with County Counsel and revised from time to time as necessary. The current OAC panel attorney contract shall be **Attachment E** to these Rules and Regulations.

### **4.2 Contract Provisions.**

The contract shall include, but not be limited to, the following provisions:

4.2.1. Attorney identification and contact information

4.2.2 Recitals relating the need for and purpose of the contract, including statutory authority such as Penal Code section 987.2

4.2.3 Agreement to accept the compensation provided for in the official OAC fee schedule referred to as **Exhibit G**, which fee schedule is incorporated by reference in these Rules and Regulations, and agreement that the OAC Director shall have the sole authority to approve, deny, or modify any ancillary defense costs request in any amount.

4.2.4 Agreement to abide by the case level classifications and the Rules and Regulations of OAC, including agreement that the Rules and Regulations may be changed from time to time with reasonable notice by the OAC Director.

4.2.5 Agreement by the attorney to defend and indemnify the County and its employees, to include claims by third parties of legal malpractice.

4.2.6 Agreement to maintain and provide proof of professional liability insurance in amounts to be determined.

4.2.7 Agreement to take certain steps to avoid conflicts of interest.

4.2.8 Agreement to audits of case files and records, excluding that which is attorney-client privileged.

4.2.9 Agreement to independent contractor status.

4.2.10 Agreement that the contract may be terminated for convenience by the County upon 30 days notice, without cause, to the extent allowed by law.

4.2.11 Agreement that the attorney has appropriate geographic proximity to the location of the courts in which the attorney will handle assigned cases.

4.2.12 Agreement to maintain active status and good standing with the California State Bar and to notify the OAC of any disciplinary measures imposed.

4.2.13 Agreement to participate, and provide proof of participation, in continuing legal education as determined by the OAC Director.

4.2.14 Agreement that the contract is not a guarantee of case assignment.

4.2.15 Agreement to hold the County of San Diego harmless with respect to administration of the OAC and the Assigned Counsel Program, including but not limited to case, level, and panel assignments.

4.2.16 Agreement that participation in the Assigned Counsel Program is voluntary and a participant may withdraw from the Assigned Counsel Program at any time upon written notice to the OAC Director. A Program participant will be expected, whenever possible, to complete the cases to which the participant has been appointed.

4.2.17 Agreement to report the filing of any “Marsden Motion” and the results of any hearing thereon.

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## **5. ASSIGNED PANELS AND ASSIGNMENT OF CASES**

### **5.1 Composition of Assigned Panels.**

The case class panels shall be comprised of contracted attorneys who meet the requisite experience and educational requirements, and shall be organized according to judicial districts. Referrals for appointment shall be made from each panel on a rotating basis and based on the panel attorneys' availability to accept appointments.

**5.1.1 Geographical Considerations.** The geographical basis for appointment shall, whenever feasible, be the judicial district of the occurrence of the offense. Eligible attorneys who maintain their principal office in a given judicial district shall be eligible for appointment in cases arising from offenses committed in that judicial district.

**5.1.2 Continuity of Representation.** Notwithstanding any provision relating to geographical eligibility, if an attorney has been appointed to represent a defendant in this county, the attorney may be appointed to represent that defendant in any case which may arise in any court in the county while the original charge is pending and judgment has not been imposed, provided the attorney meets the necessary experience standards. If the attorney does not meet the experience standards, the case will be assigned to a panel attorney qualified to handle the case.

### **5.2 Coordination With The Court.**

Upon receipt of a request from a judge or clerk of the court, or upon receipt of notice from the Public Defender that a conflict exists or that for some other reason the Primary Public Defender, Alternate Public Defender and Multiple Conflicts Office cannot represent the accused in a particular case, OAC shall provide the name of the next eligible attorney to the court for assignment. Referrals for appointment shall be made from each panel on a rotating basis and based on the panel attorneys' availability to accept appointments.

### **5.3 Appointment Refusal.**

If a panel attorney refuses an appointment, he or she shall maintain his or her position on the panel list, but if the panel attorney refuses three (3) consecutive appointments, he or she shall be placed at the end of the panel list for that case category.

### **5.4 Case Handling Responsibility; Limited Delegation**

The attorney appointed by OAC shall be responsible for the case and shall not delegate its handling to another attorney. The attorney may occasionally allow

another attorney to make some appearances or do other acts regarding the case, provided that the substitute attorney is an Assigned Counsel Program participant and is assigned to the appropriate case class or category Assigned Panel. Under no circumstances shall any such delegation cause OAC and the County to incur any additional costs. An attorney appointed on a particular case who uses another attorney to make appearances on a regular basis is subject to review by the OAC Director and subject to suspension from the Assigned Panel. This rule is designed to prevent attorneys from accepting cases and then having substitute attorneys make their appearances. OAC will only authorize payment to the attorney who has been appointed on the case. See also the subcontractor limitations.

### **5.5 Direct Court Appointments; Notice.**

To avoid disparity in appointments resulting from judges appointing individual attorneys, any panel attorney receiving a direct appointment to an OAC case from the court shall notify the OAC Director of the appointment and his or her name shall be rotated to the bottom of the list. If the appointment does not conform with these Rules and Regulations, including but not limited to cases in which an attorney is appointed on a case which is a higher level case or a case which is elevated to a higher level than the attorney is qualified to handle, the appointment shall be transferred, following consultation with the Court, to a qualified attorney. An OAC attorney must notify the OAC Director immediately if an appointment has been made outside or above his or her approved class level (i.e., Class I through VI) so that appropriate action can be taken. This rule shall not apply if the direct appointment is for a minor appearance such as a probation violation. This rule shall also not apply in juvenile proceedings.

## **6. STANDARD OF CARE EXPECTATIONS FOR PANEL ATTORNEYS**

All members are expected to perform in an ethical and professional manner, complying with the Rules of Professional Conduct, the Rules of Court, and all applicable regulations, rules, and standards of conduct.

### **6.1 Specific expectations.**

The following is a non-exclusive list of expectations of counsel on Assigned Panels:

- 6.1.2 Submit all required reports and invoices promptly.
- 6.1.3 Provide accurate information to clients and OAC.
- 6.1.4 Meet clients at the appointed time.
- 6.1.5 Appear at scheduled hearings for client.
- 6.1.6 Comply with the procedures for receiving OAC cases.

- 6.1.7 Maintain a courteous and professional manner toward clients, the court and OAC staff ;
- 6.1.8 Promptly return telephone calls and answer letters from clients and OAC staff
- 6.1.9 Keep client informed of progress of case
- 6.1.10 Explain final disposition of case to client
- 6.1.11 Accept case assignments from OAC
- 6.1.12 Cooperate in the resolution of client's complaint and client's case
- 6.1.13 Maintain a principal office in the judicial district for which cases are accepted during period of panel participation
- 6.1.14 Meet experience and educational criteria or obtain peer review approval
- 6.1.15 Report to OAC the commencement of any disciplinary proceedings against the member by any disciplinary agency in any state, and any filing of an accusatory criminal pleading against the member;
- 6.1.16 Abide by the rules and regulations of the OAC Program;
- 6.1.17 Pay ancillary fees to ancillary service providers within 15 days of receipt by attorney of such fees from OAC;
- 6.1.18 Report sanctions imposed by any Court against the member;
- 6.1.19 Not seek or use ancillary fees paid by OAC to employ a relative of the client to work on client's case
- 6.1.20 Not seek or use any ancillary fees paid by OAC to the attorney to offset ordinary office or staff overhead.
- 6.1.21 Report any action taken by any disciplinary agency in any state that renders the attorney ineligible to practice, including but not limited to suspension or disbarment.
- 6.1.22 Provide OAC with the address of an active e-mail account for the attorney that OAC may use for all communications with the attorney regarding panel matters, including confidential communications and notices regarding case assignments, approvals and denials of requests, and legal notices about changes in the OAC program such as changes to OAC's Rules & Regulations, fee schedules, and case classifications.

## **6.2 Failure To Follow Rules; Suspension**

Failure to abide by these guidelines, which are an integral part of the panel attorney's contract, may result in suspension, termination, or reclassification.

## **7. COMPLAINTS, SUSPENSIONS AND TERMINATION**

### **7.1 OAC Director's Sole Discretion; Delegation**

Complaints relating to the conduct or performance of an Assigned Counsel Program contracting attorney will be investigated by the OAC Director, who will have

sole discretion to determine whether the complaint has merit or not, and what action will be taken with respect to the attorney's panel status and contract. The OAC Director may delegate any of his or her duties under this section to the OAC Assistant Director.

## **7.2 Review Committees; Discretionary Appointment; Advisory Only**

At any point in the procedures described in this section 7, the OAC Director may, in his or her sole discretion except as noted herein, appoint a Review Committee to assist with the evaluation of a complaint against a panel attorney. A Review Committee may only be appointed upon the approval or request of the panel attorney who is the subject of the investigation and evaluation. The OAC Director may deny a request for a Review Committee. Recommendations of a Review Committee are advisory only.

## **7.3 Suspension And Termination**

Upon receipt of a complaint or negative information relating to the professional conduct of an Assigned Counsel Program participant, the OAC Director, or Assistant Director in the Director's absence or as delegated by the OAC Director, shall evaluate the complaint or information to determine whether, in his sole discretion, an immediate suspension is warranted or whether the attorney should be allowed to continue to accept and work on assigned cases pending further investigation. The OAC Director shall also have sole discretion to determine whether the attorney's contract with the County should be terminated.

**7.3.1 Immediate Emergency Suspension; Court Notice.** The OAC Director may, without prior notice, immediately suspend a contracted attorney from the Assigned Counsel Program and Assigned Panel(s) if, in the sole discretion of the OAC Director, exigent circumstances warrant such emergency suspension. Exigent circumstances may include, but are not limited to, situations in which the integrity of the defense of an indigent client is in immediate jeopardy. Under such circumstances, the Court shall be informed immediately of the nature of the complaint or information, and the OAC Director's procedures, in order that the Court may consider what its options are with respect to the active cases being handled by the assigned attorney.

**7.3.1.1 Notice And Response.** Upon immediate suspension from an Assigned Panel, the suspended Assigned Panel participant will be notified in writing of the suspension and the reasons for it. Such notice of suspension shall be mailed return receipt requested. Any response from the suspended attorney must be returned to the OAC Director no more than 10 business days after receipt of the notice of suspension in order to be considered by the OAC Director in his or her review of the complaint.

**7.3.1.2 OAC Director Review.** The OAC Director or Assistant Director shall review the suspended attorney's submissions, if any, investigate as might

be appropriate, and determine whether (1) the suspension should be lifted, (2) the suspension should be lifted pending further review, (3) the suspension should remain in place pending further review, or (4) the attorney's contract should be terminated. The OAC Director shall coordinate with the Court as appropriate.

### **7.3.2 Non-Emergency Procedures.**

**7.3.2.1 OAC Director Review.** If it does not appear that a complaint warrants immediate emergency suspension or continuation of an already-imposed immediate emergency suspension, the OAC Director or Assistant Director shall investigate the complaint while the attorney remains on the Assigned Counsel Panel(s). The OAC Director, in his or her sole discretion, may determine whether suspension from the Program is appropriate, whether the Contract with the attorney should be terminated, whether the attorney should be given an opportunity to respond to the complaint, or whether a Review Committee would be appropriate.

**7.3.2.2 Attorney Response.** If the OAC Director determines that the Assigned Panel attorney should be given an opportunity to respond, the OAC Director will notify the Assigned Panel attorney in writing of the facts of the complaint, and obtain a written response to the complaint from the panel member, unless asked not to do so by a governmental or regulatory agency. The OAC Director will consider the attorney's response in determining whether the complaint should be dismissed, the attorney should be suspended, a Review Committee would be appropriate, or the contract between the attorney and the County should be terminated.

### **7.3.3 Notice; Coordination With Court**

Assigned Counsel Program attorneys shall be provided notice of any complaints, investigations and actions taken with respect to their participation in the Program. The Court will be advised of suspensions or contract terminations when there are pending active cases being handled by the suspended or terminated attorney. The attorney will be apprised of any notices sent to the Court relating to suspensions or contract terminations. The Court may require an assigned attorney to continue to handle pending active cases.

## **8. RECLASSIFICATION**

The OAC Director may at any time reevaluate and reclassify an assigned panel attorney to a higher or lower class. Written notice of the reclassification will be provided to the affected panel attorney within ten (10) days of the decision. The attorney may seek reconsideration or ask for a Review Committee. Reconsideration or appointment of a Review Committee is at the sole discretion of the OAC Director.

## **9. CLASS VII (CAPITAL) CASES - ATTORNEY'S FEES AND EXPENSES**

### **9.1 Appointment**

**9.1.1. Court Notice To OAC.** The Director of OAC shall coordinate with the Court on a means for the Court to notify the OAC when there arises a reasonable possibility that there may be a conflict with the public defender organizations as to a Class VI (special circumstances case with LWOP exposure) or Class VII (death penalty) murder case.

**9.1.2 Prosecution Announcement.** When the prosecution announces its intent to seek the penalty of death in a case, the OAC Director shall contact an attorney on the Class VII list currently maintained by OAC to discuss that attorney's possible representation of the accused going forward. If an attorney on the current OAC Class VII list was already the assigned attorney prior to the prosecution's announcement of its intent to seek the penalty of death, that attorney will be contacted by OAC and given the first opportunity to continue to represent the client in conformity with these rules and regulations and the OAC program's then current fee schedule.

**9.1.3 Acceptance And Appointment.** All appointments for either lead or associate counsel on cases in which the District Attorney has announced a decision to seek the death penalty must come from and have the approval of the OAC Director.

### **9.2 *In Propria Persona* Advisory Counsel.**

In the event the defendant in a capital case seeks and obtains *Pro Per* status, and the Court decides to authorize the appointment of Advisory Counsel or Standby Counsel, the assigned panel attorneys are required by these Rules & Regulations to remain on the case and serve in the role of advisory or standby counsel and will be compensated in the same manner provided for in the OAC attorney fee schedule.

### **9.3 Second Counsel**

**9.3.1 Application.** Following the District Attorney's announcement of an intention to seek the death penalty, the OAC panel attorney assigned to the case may make application to the OAC Director for the services of second or associate counsel ("second chair"). The application for second or associate counsel shall state in detail why second or associate counsel is needed. The request may be limited in scope and will be granted on a showing of good cause in conformity with California law. The lead attorney may submit a recommendation to the OAC Director regarding the selection of second or associate counsel from the "Second Chair" or the Class V and/or Class VI or Class VII lists maintained by the OAC, but such recommendations are advisory only. Second

counsel must meet the education and experience requirements for Class V and/or Class VI panel attorneys and the requirements of California Rule of Court 4.117.

**9.3.2 OAC “Second Chair List.”** OAC will maintain a Second Chair or Associate Counsel list. If an attorney is appointed to serve as second or associate counsel on a capital case, he or she shall be moved to the bottom of the “Second Chair” rotational assignment list for consideration for future capital cases. If a Class VI attorney is ultimately selected to serve as second or associate counsel on the case, that attorney shall be placed at the bottom of the Class VI rotational assignment list.

#### **9.4 Reduction of Status of Case to Non-Death Penalty Status.**

In the event that prior to the termination of the case, the prosecution changes its position on the case and elects to no longer seek the penalty of death, the OAC will have discretion to adjust the capital case fees to reflect the modified status of the case and to terminate the appointment of the Second or Associate Counsel attorney.

#### **9.5 Fee Disputes.**

Determination of appropriate fees in capital cases that are subsequently reduced to non-death penalty status shall be made on a case-by-case basis by the OAC. In the event of any dispute concerning fees in capital cases and in capital cases that are subsequently reduced to non-death penalty status, the burden shall be on the attorney to verify the amount of time spent on the case by submitting to the OAC detailed time logs. The decision of the OAC Director in resolving such disputes shall be final.

#### **9.6 Ancillary Expenses & Operation of Penal Code 987.9.**

All applications for funding approval for expenses for ancillary services on capital cases shall initially be submitted to the OAC using the same standard OAC procedures used for submitting Ancillary Services Requests on all other cases assigned through the OAC. Applications for approval of ancillary services expenses made directly to the Court pursuant to Penal Code Section 987.9 are no longer necessary or approved. The Penal Code Section 987.9 procedure has long been irrelevant in large counties such as San Diego in that use of this procedure has not resulted in any state reimbursement to San Diego County of expenses in capital cases for many years. Direct requests to the Court for approval of case expenses may only be used as a means to appeal from the denial of ancillary services requests submitted earlier to the OAC. Furthermore, an OAC panel attorney seeking Court approval for County payment of expenses on any OAC assigned indigent defense case is required by these rules and regulations to provide the OAC with reasonable prior notice of such a request and an opportunity for representatives of the OAC to appear before the Court and inform the Court of any

objections the OAC may have to the request before any action is taken on the request by the Court.

#### **10. Modification of Fees on OAC Assigned Cases of All Types**

It is presumed that attorney fees will be paid by OAC to the panel program attorneys on all OAC assigned cases in accordance with the terms set forth in the OAC fee schedule in effect at the time of assignment on the case or cases. However, in circumstances in which there has been a change in the complexity of the case that could not reasonably have been foreseen by the attorney at the time the case was accepted, the attorney may petition the OAC Director in writing to request an elevation or modification of the attorney fees. The attorney should provide detailed information in support of the fee adjustment request. Requests for such fee adjustments will be considered on a case by case basis by the OAC Director. The decision of the OAC Director with regard to such requests shall be final.