

# FREQUENTLY ASKED QUESTIONS

## Qualifications

- Q. What are the requirements for participation in the Assigned Appellate Counsel Plan (the plan) administered by the Third Department?*
- A.** You must be an attorney admitted to practice in the State of New York, in good standing, and in compliance with Rule 821.1(b), which requires that there exist no legal or ethical conflict of interest. You must reside in or maintain an office for the practice of law within the Third Department (exceptions are made to this requirement under circumstances deemed appropriate by the Court, such as referrals by county administrators of their respective assigned counsel plans).
- Q. How do I get added to the list of attorneys eligible for assignment?*
- A.** You must submit a completed application, together with your resume and writing sample, to the Assigned Appellate Counsel Program at the Court's address.
- Q. What if I'm new to the practice of law or have no experience in appellate practice?*
- A.** We recognize that such is sometimes a factor and attempt to make assignments in keeping with one's experience and skill level. In addition, we have a professional staff that is more than willing to assist in the "nuts and bolts" of record and brief organization and submission. Finally, there is an unofficial Administrative Handbook that is provided to each new participant in the plan and which is also available to all participants upon request.

## Performance

- Q. What are the court's expectations regarding prompt perfection of an appeal?*
- A.** It is expected that all assigned matters will be completed promptly. The assignment order specifies a time frame within which a motion seeking an extension of time to perfect the appeal must be made. Special attention must be paid to the court rules, however, particularly as such pertain to civil appeals since they are, by court rule, deemed abandoned if not perfected within nine (9) months from the date of the notice of appeal unless a motion showing reasonable cause for the delay and merit to the appeal is made and granted.
- Q. Are there different rules for criminal cases and family court cases?*
- A.** Yes and assigned counsel is urged to familiarize himself or herself with those rules before proceeding. For instance, as noted in the answer to the previous question, there is a presumption of abandonment if a civil appeal is not perfected within a specified nine (9) month period. Another example is rule 800.10, which provides that an appeal dealing exclusively with sentencing may not be argued orally except as otherwise permitted by the court.
- Q. Is assigned counsel authorized to seek a stay as part of his or her duties?*
- A.** Not in criminal appeals. An indigent client will often insist that counsel perform this task but such is not considered to be within the scope of a criminal appellate assignment. In some family court matters, however, such applications are allowed as a duty of assigned appellate counsel.

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## **Performance** (Cont'd.)

- Q. *Is assigned counsel in a criminal case authorized to commence a motion pursuant to CPL Article 440?*
- A. No. As is true with a stay, an indigent client will often insist that counsel perform this task but such is not considered to be within the scope of an appellate assignment. In the event such a motion is made on a pro se basis and a hearing is granted, the trial court will often assign the appellate counsel to handle that hearing, but such assignment is as trial court counsel, not as appellate counsel.
- Q. *Is appellate counsel required to seek input from the client regarding the appeal and to otherwise communicate regarding same?*
- A. Yes. In fact, the most significant source of client complaints is the failure of counsel to communicate and counsel is therefore strongly advised to do so. As noted below however, this does not require a face to face meeting with the client.
- Q. *Is assigned counsel in a criminal case authorized to visit an inmate at his or her place of confinement.?*
- A. No. Since an appeal must be based on the record there is little reason to personally meet with the client to discuss the facts involved in an appeal. Telephone conferences are allowed however, and this office will assist in arranging same in the unlikely event the inmate's institution of confinement requires prior approval. That said, if assigned counsel deems a personal visit absolutely necessary he or she may seek permission from plan administrators to do so.
- Q. *Is it possible for assigned counsel to contact court personnel with questions regarding their assignment?*
- A. Yes. Both lawyer and non-lawyer staff members are available to assist with questions regarding rules and procedures including "how to" questions. Court staff cannot, however, provide specific legal advice or opinions about an appeal.

## **Compensation**

- Q. *How are assigned appellate counsel paid?*
- A. Upon completion of the assignment, counsel submits a voucher (available on the court's website) to which he or she attaches the necessary backup information including an itemization of hours expended as well as receipts for expenses. The court sets the fee and issues an order which is then submitted by counsel to the appropriate county for payment.
- Q. *What is the hourly rate of compensation for assigned counsel?*
- A. \$75.00

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### Compensation (cont'd.)

Q. *Is there a limit to the amount that can be paid?*

A. Yes. The law imposes a statutory cap of \$4,400, but also provides that it may be exceeded if the court determines such is appropriate based upon an affidavit of extraordinary circumstances submitted by counsel.

Q. *What about expenses relating to such things as copying; travel; postage; long distance phone costs, etc.?*

A. Expenses are reimbursed upon production of receipts, although there are restrictions as to amounts which cannot be exceeded unless prior approval is obtained. For instance, reimbursement of expenses exceeding \$350 require prior approval, and copying costs are limited to a maximum of \$.15 per page whether outsourced or done in-house (except if the actual cost is less than the above per page cost then only the actual amount can be claimed). Travel expenses are reimbursed in accordance with current IRS allowances, although expenses for overnight lodging must be preapproved and are rarely deemed necessary.

Q. *Is the cost of research tools such as Westlaw or Lexis reimbursable?*

A. No. Such costs are considered part of office overhead in the same sense maintenance of a library would be.

Q. *Does the court allow interim payments?*

A. Not of fees. However, if authorization is given, the court will approve interim reimbursement of all appropriate disbursements made to date. If authorization is given an appellant to obtain a copy of the transcripts contained in the record on appeal pursuant to an order granting permission to file a pro se supplemental brief, the court will approve interim reimbursement.

Q. *Can I charge for time associated with the receipt of the order of assignment and "opening a new file?"*

A. Generally the answer is no. However, you can charge for your time in connection with your initial correspondence with the parties, such as the representation letter and statement of client's rights (if required), letters to the court, court clerk and involved attorneys. It should be noted that it is presumed that these letters will be rather uniform from one assignment to the next, and an inordinate or unreasonable amount of time should not be allocated.

Q. *Can I charge for time associated with "closing a file?"*

A. Generally the answer is no. However, you can charge for your time in connection with your final closeout correspondence with the parties. It should be noted, that it is presumed that these letters will be rather uniform from one assignment to the next, and an inordinate or unreasonable amount of time should not be allocated.

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**Q.** *Can I charge for time associated with "travel to the copy center," "photocopying," or "binding?"*

**A.** Generally the answer is no. Time spent in this regard is considered ministerial in nature or office overhead, and is thus not compensable as "legal" work.

**Q.** *To what extent should my bill be itemized?*

**A.** Bills should list the date, the task (i.e., record review, legal research, brief preparation), and the time allocated for each task. Time spent on tasks that are performed on the same day or are otherwise grouped together may appear excessive when not broken down.

### **Obligations to Clients**

**Q.** *Are there rules specific to assigned appellate representation that must be followed?*

**A.** There are specific rules regarding acts assigned appellate counsel must complete. For example, court rule 800.14(b) requires counsel to provide his client with a copy of the brief prepared on the client's behalf (together with proof of service of having done so) as well a copy of respondent's brief as soon as it is received. And while there is no specific provision regarding proof of service in the latter case, the court requires counsel to provide such in any event.

Rule 821.2(b) requires assigned counsel in criminal cases, upon entry of an order affirming the judgment or order being appealed, to advise his or her client of the right to appeal, or seek permission to appeal, and to timely file the appropriate notice or leave application if his or her client indicates a desire to proceed.

Finally, counsel is reminded that the New York Rules of Professional Conduct always apply and counsel's particular attention is directed to Rule 1.3 (Diligence) and Rule 1.4 (Communication). Counsel should always be mindful of the importance the court places on these professional obligations.

### **Obligations to Clients** *(cont'd.)*

**Q.** *Is assigned counsel authorized to participate in the Civil Appeals Settlement Program?*

**A.** Yes. In most civil appeals, court rules require that an appellant file a pre-calendar statement along with the notice of appeal, and consequently may be required to participate in a settlement conference. Participation in such a conference is considered incident to appellate representation and will be compensated. It should be noted that no pre-calendar statement is to be filed on appeals from Family Court proceedings involving child abuse or neglect, juvenile delinquency or persons in need of supervision.

## FREQUENTLY ASKED QUESTIONS

- Q.** *Is assigned counsel required to include every issue a client wants included?*
- A.** No. While counsel is required to carefully review issues raised by the client, the ultimate responsibility for determining which issues should or should not be part of the brief is that of the attorney. In this regard there are sometimes instances when a careful review of the record discloses no non-frivolous issues that could be raised on appeal. Counsel's attention is directed to People v. Cruwys , 113 AD2d 979 (3<sup>rd</sup> Dept. 1985) and Anders v. California, 386 US 738.
- Q.** *Is assigned counsel required to file a notice of appeal or apply for leave to appeal to the Court of Appeals?*
- A.** Yes: Section 821.2(b) of the Rules of the Court states that assigned counsel in criminal appeals shall advise the client of the right to appeal or to seek permission to appeal and, if the client wishes to do so, timely file the necessary notice or application for leave. Correspondingly, Family Court Act § 1120(a) states that an appointment of counsel shall continue for the purpose of filing a notice of appeal or motion for leave to appeal to the Court of Appeals.