

Washington State Guidelines for Appointed Counsel in Indigent Appeals

Preface

These guidelines apply to appointed counsel handling appeals for indigent clients. These guidelines are intended to be used as a guide to professional conduct and performance. Because appellate practice is a specialized area of practice requiring distinct expertise, particularized standards apply. These guidelines are to be read in conjunction with the Revised Code of Washington (RCW), the Washington Rules of Appellate Procedure (RAP), the Washington Rules of Professional Conduct (RPC), the Washington Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), the Washington Supreme Court Standards for Indigent Defense, and the Washington State Bar Association Standards for Indigent Defense Services.

The object of these guidelines is to alert the attorney to the courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best possible representation.

All of the steps covered in these guidelines are not meant to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. The guidelines recognize that representation in indigent appellate cases is a difficult and complex responsibility. Attorneys must have the flexibility to choose a strategy and course of action that ethically “fits” the case, the client, and the court proceeding.

These guidelines may or may not be relevant in judicial evaluation about alleged misconduct of defense counsel to determine the validity of a conviction. They may be considered with other evidence concerning the effective assistance of counsel.

1. Role of Appointed Counsel

- a. **Client Representation** - The paramount obligation of appointed counsel is to provide conscientious, zealous, and quality representation to their clients at all stages of the legal process. Attorneys also have an obligation to abide by ethical requirements and act in accordance with the rules of the court, including having a system in place to check for conflicts of interest.
 - i. The basic duty appointed counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.

- ii. Counsel has no duty to execute any directive of the accused that does not comport with law or such standards.
- b. **Holistic Representation** - Appellate counsel should provide comprehensive representation that also includes determining whether the client needs assistance with areas such as parole advocacy, re-entry, or unacceptable prison conditions and making appropriate referrals. Special consideration should be given to the client's immigration status, and if the client is not a U.S. citizen, counsel should determine if any immigration proceedings have occurred and the potential impact that an appeal may have on the client's immigration status.
- c. **Role & Standards** - It is the duty of counsel to know and be guided by the standards of professional conduct as defined in the codes of the legal profession applicable in Washington. Once representation has been undertaken, the functions and duties of counsel are the same whether counsel is assigned, privately retained, or serving in a legal aid or defender program.

2. Education, Training and Experience of Appellate Counsel

- a. **Familiarity with Law** - To provide quality representation, counsel must be familiar with substantive law and procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should also be informed of the practices of the court before which a case is pending.
- b. **Experience** - Prior to handling an appointed appeal, counsel should have sufficient experience or training to provide quality representation. Less experienced counsel should only represent clients in less complex cases and only with adequate supervision and review. More complex cases should only be assigned to more experienced counsel and with adequate resources and time afforded to provide quality representation.
- c. **Training** - Appointed appellate counsel must engage in regular training focused on appellate advocacy, both written and oral, as well as on substantive issues and other pertinent areas.

3. Appellate Counsel Caseload - Appointed appellate counsel's caseload must not exceed the standards adopted by the Washington Supreme Court and must permit counsel to provide representation consistent with the representation afforded by counsel in non-

appointed cases. Counsel's caseload should be such as to permit the filing of an opening brief in the majority of cases without numerous extensions.

4. Duties of Appointed Counsel

- a. **Standard of Representation** - Counsel in an appointed appeal must be expected to provide representation consistent with that afforded to clients who retain counsel. Appellate procedure, as outlined below, includes responsibilities unique to appellate counsel, including the submission of an appellate brief, presentation of oral argument, and the possibility of pursuing further avenues for relief where appropriate.
- b. **Withdrawal Exception** - Appointed counsel should not withdraw as counsel until the appeal is final except with the consent of the client, upon motion establishing good cause, or pursuant to *State v. Theobald*¹ and *Anders v. California*.² Counsel should file a motion to withdraw pursuant to *Anders* only after a thorough review of the record and review of the facts and relevant law with other defenders, and after meaningful attempts to consult with the client.
- c. **Substitution of Counsel** - Counsel shall request that substitute counsel be appointed to represent the client when counsel's continued representation might violate the codes of professional responsibility or when counsel in good faith believes counsel cannot provide the client with zealous representation.
- d. **Refusal of Appointment** - Counsel shall refuse an appointment to represent a client when the appointment will violate the Washington Supreme Court Standards for Indigent Defense.
- e. **Other Proceedings** - Appointed counsel should assist trial counsel where appropriate in seeking any relief in an assigned matter short of relief on appeal.

5. Relationship with Client

- a. **Establishment of the Relationship** - Defense counsel should seek to establish a relationship of trust and confidence with the client.
- b. **Barriers to Communication** - Counsel should ensure that communication with the client accounts for differences in language, literacy or other barriers to communication. Counsel should use the means of communication best suited to meet the client's needs and best suited to an attorney's obligations to consult, counsel, and advise the client. Such means include written communication, personal visits,

¹ *State v. Theobald*, 78 Wn.2d 184 (1970).

² *Anders v. California*, 386 U.S. 738 (1967).

- telephone, and electronic communication. Counsel should use interpreter, translation, or other services necessary to overcome any language barriers.
- c. **Consultation with the Client** - Counsel must make reasonable efforts to consult with the client to determine potential issues and identify the client's objectives on appeal. An initial consultation should occur prior to preparation of the initial substantive pleading in any review.
 - d. **Client Notification** - Counsel shall keep the client apprised of the status of the appeal. Counsel shall promptly notify the client of all substantive filings and rulings in the course of the appeal.

6. Appellate Procedure – Preparation of the Record

- a. **Duty of Appellate Counsel** - Counsel should promptly review the record to determine which portions are necessary for review. Counsel should make reasonable efforts to consult with the client and trial attorney to determine which portions of the record are necessary for review. All missing documents should be obtained as expeditiously as possible, filed with the trial court, and designated as clerk's papers if relevant.
- b. **Record Documents** - The record may consist of more than the documents that are regularly provided, such as jury questionnaires, power point presentations, or transcripts of exhibits presented to the jury.

7. Appellate Procedure – Issue Selection

- a. **Issue Selection – Communication with Client** - The client, not the attorney decides whether to proceed with the appeal. Strategic decisions regarding the issues to be pursued on appeal should be made only after reasonable efforts to consult with the client. Counsel should raise those issues which diligent counsel would raise based upon current research. Counsel should seek and consider the advice of the client on those issues which should be presented. Counsel should advise the client of issues that are proper for review in collateral review proceedings and pursue those avenues where appropriate.
- b. **Issue Selection – Communication with Trial Counsel** - Counsel should make reasonable efforts to consult with trial counsel to determine the issues to be presented.
- c. **Issue Selection – Additional Considerations**
 - i. To promote the goal of finality in judgments, counsel is encouraged to raise those claims that have arguable potential for success on the direct appeal.

- ii. The determination of which issues will be presented on appeal should be made only after reasonable efforts to engage in consultation with other defenders aware of the facts of the case and potential legal claims. Counsel should also be aware of issues already pending in State and Federal Court.
- iii. Prior to filing, all substantive pleadings should be peer-reviewed by a defender equally qualified to represent the client and familiar with the relevant law.
- iv. It is very important that counsel understand federal habeas corpus law and procedure in order to anticipate the possibility that the client may need to pursue federal court remedies to obtain relief for a serious constitutional error.

8. Appellate Procedure – Drafting of Brief & Other Pleadings

- a. **Drafting of Document** - All pleadings and other materials submitted to the court should be clear, concise, and well organized in order to provide the court with the facts and law necessary to make a well-reasoned decision. They should be professional in appearance, free of errors, consistent with court rules and citation requirements and accurate in citation to appellate record and legal authority. The brief should also be well reasoned and persuasive.
- b. **Reply Brief** - Unless it is unnecessary to advance the goals of representation, appellate counsel should file a reply brief that responds to arguments in the respondent's brief by pointing out misstatements, weaknesses, and new issues raised.
- c. **Other Pleadings** - Counsel should file any additional motions or pleadings if it is in the interest of the client or furthers the interest of litigation. This can include additional motions, objections or supplemental briefs.

9. Appellate Procedure – Oral Argument

- a. **Obligation** - Where counsel is afforded oral argument by the court it should not be waived except upon reasonable efforts to secure consultation with client and with colleagues made familiar with the facts and claims of the case. After efforts to consult, waiver should only occur upon the conclusion that the client's rights will be adequately protected by submission of the appeal on the briefs alone. Where a matter is set without argument, argument should be requested where counsel believes it is likely to advance the client's interest and the goals of representation.

- b. **Preparation** - Oral argument can be a critical opportunity to advocate for the client and thorough preparation is essential. This should include development of an outline or notes that set forth key points, cites to key record pages and appellate decisions, and answers to anticipated questions. Counsel should prepare with and consult with other attorneys.
- c. **Knowledge of Rules** - Counsel should be familiar with the relevant appellate court's rules regarding cases in which argument is permitted, how to make requests for argument, how notification of argument is provided, and whether rebuttal and post-argument submissions are permitted.

10. Appellate Procedure – Actions Upon Decision of the Court

- a. **Communication with Client** - Counsel should timely inform the client of the decision of the court and shall advise the client of any further proceedings in which the client may seek further relief.
- b. **Remand** - If the client's case has been remanded to a lower court where counsel will no longer represent the client, counsel should ensure new counsel is appointed to the matter.
- c. **Further Proceedings** - Counsel shall seek further review, including motions to modify, motion for reconsideration, or discretionary review of any decision where appropriate and necessary. In determining whether further review is appropriate and necessary, counsel must consider: whether the client, having been timely advised, so requests; whether doing so will advance the client's interests; whether further review is necessary to preserve issues for collateral attack; and whether issues then pending in state or federal court may affect the client's case. Counsel should seek additional review in state or federal court where appropriate.
- d. **Case File Maintenance** - Although the case file is maintained by counsel, it belongs to the client. Counsel should retain the file in reasonably secure conditions for a period of time consistent with appropriate professional guidelines. Counsel should advise the client of counsel's retention policy and should inform the client that the client is entitled to receive the file on request after conclusion of the representation. Counsel should promptly furnish a client's file to successor counsel if requested. However, counsel may not disclose confidential information to successor counsel unless the client gives permission.