



**RECOMMENDED BEST PRACTICES
OF THE
ALAMEDA COUNTY BAR ASSOCIATION
CRIMINAL COURT APPOINTED ATTORNEY PROGRAM**

(effective 8/13/2021)

ACBA MISSION STATEMENT

Our mission is to promote excellence in the legal profession and to facilitate equal access to justice.

CAAP MISSION STATEMENT

The purpose of the Court Appointed Attorney Program (“CAAP”) is to:

- (1) Establish and maintain a service to assist the Superior Court of California, County of Alameda (“the County”) in appointing qualified private counsel to represent eligible indigents accused of crime, and others who may be entitled to court appointed counsel, pursuant to the Constitution of the United States or the laws of the State of California;
- (2) Assist the County in providing eligible indigents with court appointed counsel in an effective and efficient manner;
- (3) Further the general purpose of the Alameda County Bar Association (“ACBA”), which is to promote excellence in the legal profession and facilitate equal access to justice;
- (4) Provide indigent criminal defendants access to qualified, committed and professional private counsel;
- (5) Promote high standards of professionalism, competence, diligence and integrity among members of the County’s criminal defense bar;
- (6) Provide effective, competent, diligent and conscientious advocacy by attorneys who make rational and informed decisions founded on adequate investigation and preparation;
- (7) Provide legal representation based on the client’s expressed interests and maintain a confidential relationship with the client.

With these objectives as our goal, we share the following best practices for representing clients.

1. Relationship with the Client: It is essential that attorneys build and maintain a trusting relationship with their clients in order to effectively represent and advise them through the legal process. This requires that you have sufficient contact with your client to establish and maintain a meaningful and professional attorney-client relationship.

a. When possible, interview your client before making a general appearance on their case. If this is not possible, arrange to have a meaningful interview with your client in a confidential setting before the next court date.

b. Develop personal background information on your client (including but not limited to, their prior record, pending probation/parole status, other pending cases, housing, job, professional licensing status, school, mental/physical health issues, family/friend contacts, educational background, military background, substance abuse issues, ties to community, and bail/property bond possibilities.)

c. Explain the charges and the prosecution's evidence to your client, including explanation of the potential maximum/minimum punishments and defenses. Summarize the police reports to your client. Elicit potential witnesses' names, alibi information and seek mitigation leads.

d. Prior to each court date, confer with your client to explain the purpose of the court date and to set expectations.

e. When appropriate, and after obtaining your client's consent, reach out to identified family members/support persons to fill them in and seek their support. It is important to build and maintain a positive, professional relationship with key family members or support persons, as these individuals may be helpful throughout the case, especially for sentencing.

f. Clients are not entitled to copies of their discovery. (Rules of Professional Conduct 1.4(a)(3).) You should only provide your client with discovery after careful and circumspect consideration. In those instances, the discovery must be redacted pursuant to Penal Code section 1054.2. Important considerations are whether the client will testify, whether the reports will be disclosed to other potential witnesses, or whether others will gain access to the reports while the client is in custody. You should advise your client how to maintain the confidentiality of their discovery and attorney client communications.

g. Report to your client results of investigation and legal research.

h. Meet/communicate with your client on a regular basis throughout pendency of case.

i. Assiduously maintain the privilege, confidentiality and confidences of your client.

j. Be vigilant about conflicts. This is an ongoing responsibility throughout the representation and continues through the time of the client's death.

k. CAAP staff are covered by the attorney-client privilege under the “Common Interest” doctrine, which states that when parties share a common interest with a client, attorneys are not violating their client’s privilege by disclosing otherwise confidential matters with CAAP staff.

2. Work Up the Case: It is the best practice to review and handle the case from the outset as if preparing the case for trial. By doing so, you will be better able to determine the strength and weaknesses of your client’s case and are, therefore, better able to both navigate the process and advise your client.

a. Review the complaint immediately at the first court appearance for statute of limitations, demurrer and notice issues, as well as other pleading errors. Additionally, determine the maximum potential sentence both to advise your client but also to confirm that CAAP has properly classified this case. If you find that CAAP has not properly classified the case, contact them immediately. (See CAAP’s Fee Schedule section I, subsection 1 and 2.)

b. Review the police report post-arraignment and make a written request for discovery to the District Attorney. Discovery should include all police reports, digital recordings and your client’s criminal history record. It is important to memorialize your timely requests for discovery to make a record of your diligence and to defend the right to a continuance when discovery has not been provided.

c. Evaluate immediately if there is potential for loss of evidence. Preserve and request dispatch recordings. Are there possible videos of the scene of the crime in the possession of private businesses? Subpoena these before they are destroyed. Are there witnesses who need to be immediately interviewed to preserve their recollections? Is there a need to collect DNA-type evidence, such as hair samples from client, to demonstrate presence or lack of presence of intoxicants.

d. After conferring with your client about the facts of the case, consider retaining the services of an investigator to interview witnesses, surveil the scene and/or conduct any other activity helpful to the defense of the case.

e. After conferring with your client about the facts of the case, consider retaining the services of social workers, mental health professionals, educators and other experts reasonably necessary for the preparation of the client’s defense. Obtain reports from experts after consultation with the expert about the proposed contents of the report and only when the report will be favorable.

f. Order and obtain important biographical records regarding the client, including but not limited to, school, medical, mental health, prior convictions, prior police reports, and prior probation reports involving client. The latter is helpful in anticipation of the prosecution relying on prior cases reflected in your client’s criminal history report. Be sure to confirm with client every jurisdiction where they have been arrested, suffered a conviction, or have a pending matter.

g. Maintain a well-organized file that includes all attorney notes, motions, communications with prosecutors, communications with others, reports, collected documents, and communications with your client. The best practice is to scan and retain the file electronically for long term storage, as dictated by the Rules of Professional Conduct.

3. Work Up Legal Issues on the Case: Understanding and anticipating the legal issues in your client's case is as important as understanding the factual basis underlying the charges. This work should also start at the inception of your representation of your client. You should seek at every possible juncture to diminish/dismiss the case by litigating:

- a. Statute of limitations issue(s)
- b. Specific Over General motion
- c. Severance motion
- d. Motion to suppress evidence and to quash warrant
- e. Formal motion for discovery
- f. Motion for discriminatory prosecution (*Murgia*)
- g. Motion for discovery of witness background (*Engstrom*)
- h. Motion for information regarding officer misconduct (e.g. *Pitchess* and PC 832.7.)
- i. Motion to disclose identity of the informant
- j. Motion to obtain reports from expert witnesses
- k. Motion to evaluate client's competency
- l. Litigate, seek dismissal of counts, and make a thorough record of objections of law and sufficiency of the evidence at the Preliminary Hearing
- m. Seek reduction to misdemeanor at Preliminary Hearing
- n. PC 995/motion to dismiss

4. Plea Negotiations:

a. Gather information and documentation regarding mitigating facts about your client to present to prosecutor. Send same to the prosecutor and discuss with them before the court appearance.

b. Discuss and reach a consensus with the client about possible resolutions, prior to negotiating with the prosecution. After the prosecution has communicated an offer, you must convey that offer to your client. The best practice is to communicate important matters such as offers at a time and place where both parties feel comfortable enough to discuss openly the matter for an extended period of time. Jointly evaluate the offer with the client, explaining the pros and cons of any possible resolution of case. Attorneys must fulfill their ethical obligations to investigate and communicate any potential or likely collateral consequences of any conviction, including but not limited to current or future immigration status, future increased criminal liability and collateral licensing consequences of a conviction.

c. Develop specific alternative sentencing alternatives, including but not limited to, residential treatment programs, job training and mental health counseling that can be presented to the Court and District Attorney.

5. Preparing For and Conducting a Trial: Since you have been preparing your case for trial since your representation began, this work will focus largely on matters specific to trial after your client has rejected the prosecution's offer of early resolution. Generally speaking, the best practice is for clients to have a trial by jury.

- a. Prepare jury questionnaire.
- b. Prepare, in advance of trial commencement, tailored jury instructions.
- c. Prepare and litigate motions *in limine*.
- d. Subpoena witnesses.
- e. Retain and coordinate expert witnesses to testify.
- f. Prepare demonstrative aids such as PowerPoint.
- g. Consider having family and friends of your clients attend court proceedings throughout the trial as a show of support of your client.
- h. Prepare press relations.
- i. Make a record throughout the trial of all at bench and in chambers conversations.
- j. Object when appropriate and make a record throughout, being mindful to preserve the record for both state and Federal appellate challenges.
- k. Prepare client's wardrobe to be worn at trial.

6. Sentencing Considerations.

- a. Immediately after a finding of guilt after plea or trial, contact the probation officer assigned to preparing a sentencing report in your client's case.
- b. Prepare your client for the probation officer's interview and be present for the actual interview. Consider whether to advise your client to make an expression of acceptance of responsibility and remorse that you, as counsel, have fully vetted. However, you should carefully weigh the benefits of doing so against the potential of that statement being used against your client in future proceedings.
- c. Provide mitigation information and/or documentation to the probation officer.
- d. Prepare a sentencing brief, letter or memorandum for the Court's consideration and file it in advance of the sentencing hearing.

e. Review the probation officer's report in advance of sentencing in order to correct errors, omissions and, in particular, errors in the factors in aggravation and mitigation.

f. Consider a motion for new trial.

g. Preserve appellate issues.

h. Advise your client in detail, including providing assistance in filing an appeal.

7. Juvenile Delinquency Cases.

a. CAAP adopts the statutory guidelines and requirements set forth in Welfare and Institutions Code section 634.3 as guidance for best practices. The matters addressed above have equal application to juvenile matters.

b. Transfer Hearings: most cases require and benefit from the assistance of retained defense experts (i.e. mental health experts and social workers) to address the child's brain development, amenability to being rehabilitated by the juvenile justice system, and the child's relevant personal history. Incorporating experts early on in the case will allow sufficient time to prepare the child, the family and the expert to maximum benefit.

c. CAAP maintains a staff of forensic social workers with extensive experience with juveniles and in handling juvenile delinquency cases. County funding for these experts requires CAAP panel members to use CAAP social workers when fulfilling their obligations to explore the minor's history and possible alternatives to incarceration, pursuant to Welfare and Institutions Code section 643.3.

d. Develop and maintain professional relationships with your client's family and support system in crafting plans for the child going forward.

e. Develop placement, education and treatment options for the client.

f. Work with the client's family regarding alternative settings for residence of the child.

g. Prepare for the disposition hearing:

i. Speak to and/or write to the probation officer immediately following your client's admission to an allegation or when an allegation is found true.

ii. Prepare your client and their family for the probation interview.

iii. Be present when the probation officer interviews your client.

iv. Prepare a disposition letter or memorandum for the Court's consideration.

v. Read probation officer's report in advance of the hearing to be prepared to correct and address errors in the report and/or negative inferences that require attention.

8. Other Considerations.

a. Continuing Legal Education: It is paramount that attorneys maintain and continue their professional development. CAAP requires attorneys to complete six (6) hours of Continuing Legal Education (CLE) compliant hours in criminal law every year as a condition of membership. (See CAAP Rules and Regulations section D, 1, (e).) In addition to the CLE hours, please consider:

1. Being a member of a listserv with professional organizations such as CPDA and CACJ in order to be exposed to daily postings regarding goings-on in courts and changes in the law.

2. Read advance sheets daily.

3. Consult with experienced criminal defense practitioners on issues and challenges in your cases, including but not limited to, reaching out to members of CAAP's Advisory Committee. You can find contact information for Advisory Committee members here:

Committee members are covered by the attorney/client privilege under the "Common Interest" doctrine. Assuming possible conflicts are vetted in advance, your conversation with an Advisory Committee member does not violate the attorney-client privilege.

b. Billing: CAAP's billing fee guidelines and the online billing program are used to promote uniformity in billing, to aid staff review and payment of billings, and to assist and educate panel attorneys in good billing practices. Attorneys are expected to bill in accordance with our Rules and Fee Guidelines. The basic principles of billing are to bill for actual time spent, work efficiently, and provide staff with detailed explanations and description of work performed.

c. Professional liability insurance is provided to all CAAP attorneys for cases they receive through CAAP. You must immediately notify CAAP of any potential legal action threatened against you so that CAAP can tender the claim to the carrier promptly.



Acknowledgment

I acknowledge that I have received and had an opportunity to read the *Recommended Best Practices for CAAP Attorneys*. I understand that this document conveys best practices in criminal defense in general. The needs in a particular case will differ. A lack of adherence to these best practices may be considered when the CAAP Advisory Committee makes determinations regarding panel status.

Signature

Name

Date