COMMENTS – 100TH ANNIVERSARY CELEBRATION OF THE COURT OF APPEAL

Chief Justice George. Each of the Administrative Presiding Justices. May it please all of the Courts. On this 100th anniversary of the California Court of Appeal, I want to recount briefly the history of the system by which the Court of Appeal appoints appellate counsel for indigents when required by our Constitutions or statutes. It is a story of which we all can be proud.

After the United States Supreme Court's 1963 decision in Douglas v. California (1963) 372 US 353, which established the right to counsel on a first appeal in a criminal case, California's court-appointed counsel system began as a "hit or miss" process with little quality control. In its 1970 Annual Report, the Judicial Council confronted the reality that a lawyer who had just passed the Bar could get appointed to represent someone convicted of murder by simply showing up at the Clerk's office. No attempt was made to check qualifications or to match counsel's experience to a case's complexity. Compensation was $20.00 per hour, and there were no statewide guidelines to govern fee awards or the timeliness of payments to counsel.

Under our adversary system, a Court of Appeal cannot decide cases justly without defense lawyers to present what can be said on behalf of an appellant. This is the defense function, and it is critical to our system of justice. Yet, in 1970, the Judicial Council Report noted that there had been testimony before a legislative committee that 30-40% of the criminal appeals filed "fell 'below an acceptable level of quality.'"

Also in 1970, the California Supreme Court decided In re Smith (1970) 3 Cal.3d 192. Smith had been convicted of kidnaping and rape. The case was, in the Supreme Court's words, "bristling with arguable [appellate] issues." Appointed counsel in the Court of Appeal filed a 21 page Opening Brief, of which the first 20 pages were a recitation of the facts. Counsel's legal argument consisted of one page urging the "ludicrous proposition" (court's words, again) that a reversal was required because the prosecution failed to expressly prove that he was not married to the woman he had raped. The Supreme Court held, in this case of first impression, that counsel's representation was ineffective, and until 1985, the Courts of Appeal frequently relied on Smith to address piecemeal this systemic problem.

The State Public Defender's Office opened in 1976 and was thought to be the solution to this critical gap in the Court of Appeal. But, for various reasons, the State PD never handled more than 1/3 of the indigent caseload in the Court of Appeal (leaving the remaining 2/3 outside the system noted above) and, by the early to mid 1980s, was handling predominantly, and now only, death penalty cases in the Supreme Court. I personally spent 9 years in that office.

In 1983, at the request of the Chief Justice, the State Bar convened an Ad Hoc Committee of which I was a member, chaired by State Bar President Anthony Murray, to deal with these critical issues. This group created the California Appellate Project to

assist the Supreme Court in the capital case arena, and the graduating class of the State Bar's Board of Governors that year became the new organization's Board of Directors. Most of them have continued to serve, including Murray, Lee Selna, Geoff van Loucks and General Thomas Eres, recently appointed Commander of the California National Guard by Governor Schwarznegger. The three other current members of the CAP Board are Herbert Rosenthal, Nanci Clinch and Michael Lightfoot.

At the same time, this State Bar Committee was instrumental in breathing new life into Appellate Defenders, Inc., in San Diego, the original model for the "appellate projects" as a public-private partnership in which a small office serves as a resource and quality control center for private counsel taking appointments from the Court of Appeal. A 1984 Judicial Council Report to the Legislature further laid the groundwork for establishing appellate projects for each district when it noted that California still had an unacceptable "non-system" and that the most substantial improvements since 1970 had been brought about due to the efforts of CAP and ADI.

During the mid 1980s, the First District Appellate Project, the Central California Appellate Program (which covers both the 3rd and 5th Districts) and the Sixth District Appellate Program were established, each with its own boards of directors. CAP/LA opened in 1986, thanks to the efforts of APJ Arleigh Woods who approached Anthony Murray about setting up an office in the Second Appellate District.

As Executive Director of CAP/LA, I have had the good fortune to work with four APJs, the late Hon. Mildred Lillie, the Hon. Campbell Lucas, the Hon. Charles Vogel and, the current APJ, the Hon. Roger Boren). I say to these jurists and all of the justices of the Second Appellate District that this office appreciates the respect and cooperation they have shown from our earliest days to the present and that I have personally enjoyed working with them.

Since the mid-1980s, the appellate projects, pursuant to Rule of Court 76.5, have administered the panels in each district. We have admitted and removed panel members based on the quality of their work, matched their skills to the case needs, worked with them in assisted and independent cases, presented training sessions and developed materials for their use, and recommended compensation on a case-by-case basis pursuant to Guidelines adopted by the Chief and the APJs. These peer evaluations are a critical part of the projects' mandate; when we review counsel's compensation claims (once after the filing of the AOB and again after a final claim in each case), we also examine in detail the quality of counsel's work. This evaluation process provides key information for matching the attorney to the next case.

From Day One, each project has been analyzed, evaluated and audited by judicial council committees, the justices of its own and other districts, efficiency experts and cost accountants provided by the State, as appropriate for a new program. The Judicial Council committee with the current overall responsibility for this system is entitled the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC). It was created by Chief Justice Lucas in 1994 and continued by Chief Justice George; it

has 10 members (six justices, one from each district; and four attorneys), all appointed by the Chief Justice.

I am happy to have been a member of this committee since its inception and to have worked with four chairs: the Hon. Gary Strankman, the Hon. Clint Peterson, the Hon. Rodney Davis and, the current chair, the Hon. Herbert Levy. Its main function is to audit carefully the court appointed counsel system and make sure it is running properly, but it has also come to serve as a "sounding board" for general issues related to appellate defense as they are referred to us by the Chief and the APJs.

Many justices, both from the Second and other Districts, have volunteered to me how well they think the current appointed counsel system is working and how much better the briefs now filed by appointed counsel are than in the past. One justice who remembers that time well said recently that, in his view, the biggest change in the Court of Appeal over the last 25 years has been the quality of representation provided by appointed appellate counsel for the indigent.

I want to thank all of the attorneys who take appointments through the projects. They are the heart of this system. And I would be remiss if I did not note that the panel attorneys are in serious need of a raise from the $65, $75 or $85 per hour rate they have been getting for many years. The Chief, the APJs and AIDOAC all support a reasonable increase, and one must hope that the state's fiscal situation will soon improve sufficiently so the panel can receive this long overdue raise. Good attorneys must be able to afford to continue to do this important work.

AIDOAC and CAP/LA are also anticipating and addressing a future problem: many of the top panel attorneys who today handle the most difficult cases are "greying" – nearing retirement age. Specific steps need to be taken to ensure that an adequate supply of experienced and skilled lawyers will continue to be available to do this work. With AIDOAC's approval, CAP/LA has begun an intensive mentoring program which we refer to as the "greening" of the panel which we hope will accomplish this end. This effort will soon be under way in other districts.

I want to express my appreciation to Michael Millman, Executive Director of CAP/SF, and Jay Kohorn, CAP/LA's Assistant Director, with whom I work closely. I want to recognize the efforts of the directors of the other projects -- Mat Zwerling, First District Appellate Project; George Bond, Central California Appellate Program; Elaine Alexander, Appellate Defenders, Inc.; and Michael Kresser, Sixth District Appellate Program. And I want to thank the staff attorneys at CAP/LA and all the projects; they are dedicated, experienced lawyers whose ability to assist efficiently and economically the panel attorneys who need it make this system go.

I want to acknowledge Joseph Lane, Clerk of the Second Appellate District; Danny Potter and Paul McGill, his chief assistants; their deputies; and their counterparts in other Clerk's offices. Every good lawyer knows the importance a positive relationship with those in the Clerks is. Thanks, too, to Marcia Taylor, AOC, Division Director, and

her colleagues, Deborah Collier-Tucker and Donna Drummond. We greatly value these relationships.

And finally, my thanks to the Chief and the APJs for establishing and maintaining an appellate court system that has made the appellate projects an essential part of the professionali- zation of the court-appointed counsel process. This is difficult work, without a lot of victories to spur us on. But we can take pride in what has been accomplished since 1963. The defense function is alive and well in the Court of Appeal.

Thank you.

Jonathan B. Steiner