

HIRING ME FOR HABEAS CORPUS

[EXCERPTED FROM CALIFORNIA HABEAS HANDBOOK (5TH ED. WINTER 2007-08)]

HIRING A LAWYER

There are two principal obstacles to hiring a private lawyer for habeas corpus:

Competence:

Habeas corpus law is so technical and fraught with the possibility of making potentially fatal procedural errors that it is dangerous to rely on any lawyer who is not a specialist in both state and federal habeas corpus. At the same time, finding lawyers who specialize in habeas corpus is difficult, because very few private lawyers have a sufficiently large stable of post-conviction cases to support a financially viable practice. Furthermore, as is unfortunately all too true in hiring a professional, there are pretenders and incompetents out there who are all too willing to take your family's hard-earned money while doing little or nothing in exchange.

Cost:

Competent lawyers who do specialize in habeas corpus are likely to quote you fees that will knock your socks off. In fairness, this is not necessarily because habeas lawyers are greedy: Rather, most experienced post-conviction lawyers are understandably worried about being "stuck" in a case in which the proceedings can take years to conclude, and during which time the prisoner's family may run out of money. For an attorney to get out of a case in which the attorney has already entered an appearance it is necessary to go through a motion procedure than can be time-consuming and cumbersome; and even if the lawyer goes through all the required hoops, there is no assurance that a judge will relieve an attorney from pending deadlines merely because of non-payment of fees. In order to avoid being left up the financial creek, so to speak, many post-conviction lawyers feel that it is necessary to charge in advance for every possible contingency that could possibly occur in a case, regardless of how unlikely it may be for all of those contingencies to actually take place. For example, many lawyers asked to quote a fee for the "whole case" will charge in advance for an evidentiary hearing, even though the vast majority of cases are decided without an evidentiary hearing ever being granted. Others will insist on a fund for experts or investigators before even knowing whether expert witnesses or private investigation is going to be necessary or productive in a particular case. Still others will charge for an entire appeal that may never take place because a habeas case can't be appealed without a COA being granted, and there's no assurance in advance that a COA will be obtained in any given case.

All this creates a serious dilemma in hiring a private lawyer for habeas corpus. On the one hand, clients often demand to know in advance what it is going to cost them to have a lawyer fight a habeas corpus case "from beginning to end"; on the other hand, an experienced post-conviction lawyer who is asked that question is likely to quote a fee to cover every possible contingency, and that kind of "blind" fee quote is likely to be astronomical. Meanwhile, a fair number of habeas corpus cases can be seen to be hopeless or nearly so after an initial evaluation; and many of those that have potential merit are, given the very small number of habeas corpus petitions that are actually granted in practice, likely to be dismissed earlier rather than later in the game.

Finally, even the best-looking habeas corpus case is virtually certain to require *losing* battles on the way to winning the war - a prime example being the exhaustion doctrine, which *requires* losing several times in state court before the Petitioner can even get in the door to the federal courthouse. Thus, whereas many clients demand to know in advance what it will cost to "go all the way", a much more practical question to ask is whether it will make financial sense to press on after a loss at one level of the court system in order to continue the fight at the next level. Yet, it's impossible to answer this question before the case has even started, because deciding whether it will be cost-effective to continue to fight the war depends on what the next battle will cost and what the likely odds are of winning that next battle. In sum, because every habeas corpus case is different and is constantly evolving from one court to the next, the only realistic and fair way to quote fees in a habeas corpus case is to start with a fee estimate following an initial evaluation of the case, and then to continue to revise that estimate as the case moves along through the many courts

which will hear it along the way.

Taking all of the above into account, the following basic principles should be understood by any client wanting to know what a habeas case is going to cost in terms of attorneys' fees and costs:

- ❖ Asking a lawyer to quote a "flat fee" in a habeas corpus case that will cover every possible contingency in advance is inevitably going to result in a fee that the average person can't afford.
- ❖ The only alternative to a flat fee is hourly representation. By definition, however, hourly representation means that the more success the lawyer has in pursuing the case, the more time it is going to take, and the more the client is going to have to pay. Conversely, the less chance a case has of winning, the less the client is going to have to pay before it is resolved.
- ❖ Because every habeas corpus case is different, every case will have its own unique requirements for pursuing it, not only with regard to attorneys' fees but also as to investigators and experts. It is impossible to even ballpark these kinds of costs in a case before doing a sufficient preliminary review of it so that reasonable estimates can be made as to what the entire case is going to cost in terms of lawyers' fees, expert witnesses, and investigation.
- ❖ Most habeas corpus cases routinely proceed through several courts in the state and federal system, and this takes time. Therefore, it is common for a habeas case to take as much as 2-3 years from beginning to end. And, because the typical case takes so long to complete, there is an opportunity to spread out payments over the life of the case rather than paying for it all at once.
- ❖ Deciding whether to push a case to the next level following a loss in a previous court is not a cookie-cutter-type decision, but rather depends on what the odds are of winning in that next forum compared with the likely cost of going forward. For example, while it may make good financial sense to pursue a case to circuit court of appeals, where there is at least a reasonable chance of success, it might not be wise to take that same case to the U.S. Supreme Court, where the statistical chance of even getting heard is minuscule.
- ❖ No matter how much you pay in a particular case, there is no guarantee of winning. At the same time, because you get only one linear shot at the court system on habeas, once you start a case, as you suffer each loss, you will have to decide whether to press on (i.e., spend more money in the hope of eventually winning), or abandon the fight once and for all (i.e., cut your financial losses and give up permanently on the court system as a means of getting a conviction or sentence overturned).

With the above principles as a guide, I have developed a fee structure that is (a) hourly-based; (b) includes (time permitting) an in-depth Preliminary Evaluation of the case following which my involvement in the case can be terminated if my assessment of the chances is too bleak; (c) if the case proceeds past the Preliminary Evaluation stage, permits the client to pay for the case over time as it proceeds through the various levels of the state and federal system; and (d) gives the client, at each major stage of the case, the opportunity to either continue paying me or, after consulting with me about the realistic chances vs. the cost of going on, to decide to terminate my involvement rather than continue to pursue the case to the bitter end.

SAMPLE FEE AGREEMENT TO RETAIN ME AS YOUR HABEAS LAWYER
(Effective September, 2007 until further notice.)

Minimum Retainer Requirement

The minimum retainer for new cases is **\$20,000**. This amount must be paid *before* I will review any case files.

I receive correspondence daily from prisoners, and I try my best to quickly look over legible letters that come in from prisoners. However, my office accepts no responsibility for the return of any correspondence sent to my office before the minimum retainer is paid.

Hourly Rate

The fee arrangement requires the client to pay an hourly rate for my services (currently \$300 per hour), plus costs (e.g., copying, delivery, postage, filing fees, expert witness fees, and investigation costs). After the initial retainer is exhausted, the client will have to replenish it further increments of \$5,000 or more in order for me to continue working on the case.

No Maximum Fee

There is no maximum fee for any case, the total amount of fees and costs being driven by the number of hours I have to put in and the amount of costs expended. However, I will give you an estimate of the overall cost of the case when I provide you with the Preliminary Evaluation (see below), and I will regularly provide all clients with itemized billing statements calculated to the tenth of every hour I spend and every dollar in costs that I have to pay to third parties.

Preliminary Evaluation

I will conduct a "Preliminary Evaluation" of all new cases, provided that I am retained at least 120 days before the expiration of a pending statute of limitations or court-imposed deadline. The Preliminary Evaluation is actually a thorough written evaluation of the case averaging between 20-25 pages in length, and is based on my targeted review of the briefs, court opinions, final arguments, correspondence from the prisoner, and any other portions of the transcript or file which I deem essential to a solid understanding of the case. The current cost of the Preliminary Evaluation is **\$10,000**, which is non-refundable. In the Preliminary Evaluation I will summarize the history of the case through the trial and direct appeal, the potential habeas claims which have been brought or can be brought, and the chances for ultimate success on any of the claims. Also, I will provide a ball-park estimate of what it will cost to pursue the case in the short run and over the long haul.

After the Preliminary Evaluation, if I determine that the case is hopeless, I will say so, give my reasons for that determination, and I will decline to be involved any further in the case. Alternatively, even if I believe that the case may have some merit, if the client thinks that the chances of winning are too remote in light of the projected cost, the client may choose to terminate me after receiving the Preliminary Evaluation. In either event, if my involvement in the case ends after the Preliminary Evaluation stage, I will refund **\$10,000** of the \$20,000 retainer, less any out-of-pocket costs that I have incurred up until that point.

Personal Attention

I will personally handle all legal work on your case. The only services that are contracted out to others are for third-party consultants such as expert witnesses, private investigators, and other sources of information outside the legal profession.

Free Copy of the *California Habeas Handbook*

All new clients receive a free, complementary copy of the *California Habeas Handbook*, which will be provided to the prisoner (or, if the prisoner already has the latest edition, to the prisoner's designated family member).

RETAINER PROCEDURE

Keep in mind that I need at least 90-120 days to complete a Preliminary Evaluation or otherwise meet an applicable deadline, and that this time period does not start until I have all the file materials necessary to do my review. Therefore, and because I may not be continuing with the case after the Preliminary Evaluation is done, it's wise to retain me as much in advance of a pending statute of limitations or other deadline as possible.

To retain me for a particular case, please use the following procedure.

1.

Have your family member call my office to make sure of my availability.

From time to time my schedule may become so full that I may have to decline to take any new cases for awhile until I can catch up with my existing obligations. Therefore, before your family sends the retainer, they should call my office or send me an e-mail to make sure that I will be able to take on the case within the existing time constraints. This initial contact will also allow your family member to ask me questions they may have about my services.

2.

Send the required minimum retainer of \$20,000.

If payment is made by mail, checks or money orders must be used. (Sorry, but we don't accept credit cards at this time.) Always use Fed-Ex or some other track-able method when sending money and files. (Please do *not* use the post office's certified mail service, because if I am not in when the post office attempts a certified mail delivery they will return the item to the post office instead of re-delivering it.)

Within a day or two of my receipt of the retainer, I will send your family member or representative a written engagement letter which specifies the terms of my representation. At that time, I will also provide the prisoner with a special phone number he or she can use to call me collect. Once I have been retained, copies of all correspondence and documents that I generate will be sent both to the prisoner and to the family member who is paying my fees.

3.

Send the file to me for review.

At a minimum, I will need the following items, most of which are contained in the record of the appeal, which is usually returned by the appellate lawyer to the prisoner after the direct appeal is concluded.

- ❖ All appellate briefs (Appellant's Opening Brief, Respondent's Brief, Appellant's Reply Brief).
- ❖ The Reporter's (trial) Transcript.
- ❖ The Clerk's Transcript (copy of documents filed in the trial court.)
- ❖ The appellate court's written opinion.
- ❖ The Petition for Review filed in the California Supreme Court.
- ❖ Any previous habeas corpus petitions filed by the prisoner at any time.
- ❖ Any medical, forensic, or expert witness reports that you may have concerning the case.
- ❖ If you are already in federal court, I'll need the entire federal court file.

I don't necessarily need trial counsel's file to do a Preliminary Evaluation, but if it is available you should send that, too.

4.

The prisoner should send me a letter about the potential issues in the case.

Although it's not absolutely required, it's always useful for the prisoner to send me a letter explaining in his or her own words what issues the prisoner wants me to focus on and why.