



# Judicial Council of California

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## REPORT TO THE JUDICIAL COUNCIL

*Item No.: 23-125*

For business meeting on September 19, 2023

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**Title**

Criminal Procedure: Appointment of Trial  
Counsel in Capital Cases

**Agenda Item Type**

Action Required

**Effective Date**

January 1, 2024

**Rules, Forms, Standards, or Statutes Affected**

Amend Cal. Rules of Court, rule 4.117

**Date of Report**

July 10, 2023

**Recommended by**

Criminal Law Advisory Committee  
Hon. Brian M. Hoffstadt, Chair

**Contact**

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### Executive Summary

The Criminal Law Advisory Committee recommends amending the rule governing qualifications for appointed trial counsel in capital cases. This amendment would clarify that the requirement for appointment of qualified counsel applies in all capital cases unless the district attorney affirmatively states on the record that the death penalty will not be sought.

### Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2024, amend rule 4.117 of the California Rules of Court to clarify that requirement for appointment of qualified counsel applies in all capital cases unless the district attorney affirmatively states on the record that the death penalty will not be sought.

The proposed amended rule is attached at page 5.

### Relevant Previous Council Action

The Judicial Council adopted rule 4.117 with an effective date of January 1, 2003. The council adopted the rule to implement statewide minimum standards for appointment of trial counsel in capital cases. The rule was designed to help ensure adequate representation in death penalty trials

and to avoid unnecessary delay and expense in appointing counsel. The rule was most recently amended with minor non-substantive changes, effective January 1, 2007.

## **Analysis/Rationale**

The Judicial Council report recommending adoption of rule 4.117 noted:

[I]t is not always clear at arraignment, when counsel would normally be appointed, whether the District Attorney will be seeking the death penalty. Thus, as a practical matter, the rule would apply to all special-circumstances cases, unless there has been an explicit statement by the District Attorney that the death penalty will not be sought. This procedure is consistent with the current practice in counties with local standards. In those counties attorneys who are qualified to be assigned to death penalty cases are appointed to all cases involving special circumstances.

(Judicial Council of Cal., Advisory Com. Rep., *Minimum Standards for Appointed Trial Counsel in Capital Cases* (Aug. 19, 2002), pp. 3–4.)

The language in subsection (b) of the current rule begins, “In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant.” The Criminal Law Advisory Committee is recommending amendment of the rule because it is concerned that the phrase “in which the death penalty is sought” could be misinterpreted as applying only when the district attorney has made an affirmative statement indicating that the district attorney is seeking the death penalty, regardless of whether the complaint alleges special circumstances.

Penal Code section 987.9 lends support to the committee’s position that qualified trial counsel should be appointed at the outset. This statute allows an indigent defendant charged in a capital case or under Penal Code section 190.05(a)<sup>1</sup> to seek funds for investigators, experts, and others whose assistance is needed to prepare or present a defense. The state regulations on reimbursement to counties for the cost of homicide trials under section 987.9 allow for reimbursement in a special circumstances case unless it “no longer involves the death penalty.” (Cal. Code Regs., tit. 2, § 1026.2.) This phrase applies if “either the allegations of special circumstances have been dismissed or the prosecution has formally elected not to seek the death penalty.” (*Ibid.*; see also *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1014 [“a murder case in which special circumstances are alleged is a ‘capital case’ within the meaning of section 987.9, unless and until the prosecution expressly indicates that the death penalty will not be sought”].)

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<sup>1</sup> “The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.” (Pen. Code, § 190.05(a).)

The rationale for when a defendant is eligible for indigent capital defense funds under section 987.9 applies equally to the rule of when qualified counsel should be appointed in a special circumstances case. Because the current phrase “in which the death penalty is sought” may not be sufficiently precise, the committee recommends amending rule 4.117(b) to clarify that qualified counsel should be appointed in all capital cases “unless the district attorney has made an affirmative statement on the record that the prosecution will not be seeking the death penalty.”

### **Policy implications**

This proposal has no major policy implications because the recommendation is to clarify the applicability of an existing rule.

### **Comments**

This proposal circulated for comment from March 30 to May 12, 2023. The committee sought specific comments on whether the rule should specify that the statement from the district attorney be made on the record or whether it was preferred that the rule remain silent on this point. As noted, regulations and cases interpreting section 987.9 do not require the statement to be on the record.

Eight comments were received. The Superior Courts of Orange, San Bernardino, and San Diego Counties; the Orange County Bar Association and Riverside County Criminal Defense Bar Association; one public defender; and one member of the public agreed with the proposal. One criminal defense attorney agreed with the proposal if modified to add that death penalty–related ancillary service funding mechanisms be available unless the prosecution makes a statement on the record that the death penalty will not be sought. Because this modification would be a substantive change, the committee will consider this suggestion at a future proposal cycle meeting.

Several commenters agreed with the proposal as circulated, and two commenters expressly agreed (in response to the request for specific comments on this point) with specifying that the statement be made on the record, while one preferred that the rule remain silent on whether the statement had to be on the record. The committee recommends requiring that the statement be made on the record, noting that doing so appears to be the standard practice.

### **Alternatives considered**

The committee did not consider taking no action, determining that it was important to amend the rule for clarity.

### **Fiscal and Operational Impacts**

The committee received comments from two courts that the rule amendment will require training of judicial officers and courtroom clerks, whereas another court did not anticipate any changes to its appointment procedures.

## **Attachments and Links**

1. Cal. Rules of Court, rule 4.117, at page 5
2. Chart of comments, at pages 6–10

Rule 4.117 of the California Rules of Court is amended, effective January 1, 2024, to read:

**Rule 4.117. Qualifications for appointed trial counsel in capital cases**

**(a) \* \* \***

**(b) General qualifications**

In cases in which ~~the death penalty is sought~~ a person is charged with a capital offense, the court must assign qualified trial counsel to represent the defendant unless the district attorney has made an affirmative statement on the record that the prosecution will not be seeking the death penalty. The attorney may be appointed only if the court, after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.

**(c)–(i) \* \* \***

## SPR23-12

### Criminal Procedure: Appointment of Trial Counsel in Capital Cases

All comments are verbatim unless indicated by an asterisk (\*).

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Michael A. Gregg President	A	*The proposal appropriately addresses the stated purpose.	Thank you for reviewing and submitting a comment for this proposal.
2.	John Phillipsborn Law Office of John T. Phillipsborn San Francisco, California	AM	<p>This comment is submitted by a defense lawyer who has defended capital cases for 40 years in more than 10 different California counties; is one of the authors of the California Death Penalty Defense Manual (and has been for close to 30 years); a lawyer for the Mexican Capital Legal Assistance Program; and is one of CACJ's amicus committee chairs (30 years) who is often consulted by defense counsel in capital cases on appointment of counsel and ancillary funding issues.</p> <p>Rule 4.117 should be amended to require a statement on the record that the death penalty will not be sought in the case before the host court determines that (a) death qualified counsel is not required and (b) that death penalty related ancillary service funding mechanisms need not be employed in the case. There is no standard procedure for the appointment of death qualified counsel in use--meaning in actual use--throughout California. Depending on the local practice and expressed preferences of the Judge who has the case, both the DA and institutional defender office may take the position that regardless of any clearly stated prosecution position, the case is 'probably not' going to be a death penalty case, and therefore strict regard for defense counsels' qualifications can be dispensed with. In a few instances brought to</p>	Further amending the rule to state that death penalty-related ancillary service funding mechanisms need not be employed if a statement is made on the record that the death penalty will not be sought would be a substantive change to the proposal that was circulated. For this reason, the committee believes public comment should be sought before any such recommendation is made. The committee will consider this suggestion during a future proposal cycle as time and resources allow.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

## SPR23-12

### Criminal Procedure: Appointment of Trial Counsel in Capital Cases

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	Commenter	Position	Comment	Committee Response
			<p>my attention both as an MCLAP lawyer and as a CACJ amicus chair, particularly in co-defendant special circumstance murder cases it has happened that the trial court appointed counsel without inquiry into capital case qualifications, and ended up appointing counsel whose experience in defending murder cases was extremely limited. The same has happened when an institutional defender office assigned a special circumstance murder case to a lawyer with both limited experience and little (if any) documented capital case defense training.</p> <p>The Rule should be amended as proposed.</p>	
3.	Angelica A. Rivera Senior Defense Attorney, Fresno County Public Defender's Office	A	No specific comment.	Thank you for reviewing and submitting a comment for this proposal.
4.	Riverside County Criminal Defense Bar Association by Graham Donath, President	A	<p>The Riverside County Criminal Defense Bar Association strongly supports the proposed amendment.</p> <p>* Riverside County is an outlier not only within California but known nationwide for our District Attorney's excessive pursuit of the death penalty. Poor or no access to funding for counsel is a significant issue within Riverside in particular, compared to other jurisdictions. This problem is exacerbated by the fact that frequently attorneys who do not meet the minimum standards for capital defense representation are initially appointed and work on these capital punishment eligible cases as if they were not a capital case for extended periods of time, as the DA frequently does not</p>	Thank you for reviewing and submitting a comment for this proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Committee Response
			<p>make their election to seek death until years into a case.</p> <p>This of course creates a real disadvantage to defendants and even the new defense counsel who are later appointed once the declaration is made and appropriate counsel is sought. These cases are not currently treated by the courts or county as capital cases for funding purposes until such a declaration is made. This is contrary to what we believe would be the appropriate and ethical manner of treating such cases, and the proposed amendment helps to rectify that. Regarding the direct question, we agree that the phrasing about whether the DA has elected to not seek the death penalty should be on the record, either in a formal notice filed with the court or by way of statement in open court on the record.</p> <p>We appreciate the Judicial Council's attention to this critical issue, and strongly support the adoption of the proposed rule change.</p>	<p>The committee agrees with requiring the statement to be on the record.</p>
5.	Kaitlin Schneider Fresno, CA	A	These changes are necessary to allow defendants to be appropriately represented and to have the seriousness of the case addressed.	Thank you for reviewing and submitting a comment for this proposal.
6.	Superior Court of Orange County by Iyana Doherty Courtroom Operations Supervisor	A	Agree with the proposed language changes to clarify that appointment of counsel applies to all capital cases unless the district attorney affirmatively states on the record that the death penalty will not be sought.	Thank you for reviewing and submitting a comment for this proposal.

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	Commenter	Position	Comment	Committee Response
			<ul style="list-style-type: none"><li>• Proposal does appropriately address the stated purpose</li><li>• Modified phrase is preferred</li></ul> Implementation requirements- No training needed. <ul style="list-style-type: none"><li>• Judicial info would be attorneys are now appointed for all capital cases unless the District Attorney states they are not pursuing the death penalty.</li><li>• Recommend for Alternate Defense Services to review regarding potential costs associated to the impact of appointments of the qualified attorneys</li></ul>	<p>The committee agrees with other commenters and prefers the language in the proposal requiring the statement to be on the record for clarity, rather than the modified phrase which eliminates that requirement.</p> <p>It is the committee's understanding that Alternate Defense Services administers the court's conflict panel, including the appointment of qualified counsel in capital cases.</p>
7.	Superior Court of San Bernardino County by Denise McGovern Management Analyst II	A	I don't anticipate this will impact our court's Indigent Defense Program, which oversees appointment of attorneys in Capital and Life without Parole cases where the Public Defender has conflicted off. Our requirements for attorneys in Capital eligible cases will not change. This will also not affect our PC 987.9 procedures. I cannot comment on courtroom procedures.	Thank you for reviewing and submitting a comment for this proposal.
8.	Superior Court of San Diego County by Mike Roddy, Executive Officer	A	<ul style="list-style-type: none"><li>• Does the proposal appropriately address the stated purpose? <b>Yes.</b></li><li>• Would the alternate phrasing be preferable to explicitly requiring that the statement be on the record? <b>San Diego would prefer that the DA's intention to not seek the death</b></li></ul>	<p>Thank you for reviewing and submitting a comment for this proposal.</p> <p>The committee agrees with requiring the statement to be on the record.</p>

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	Commenter	Position	Comment	Committee Response
			<p><b>penalty be stated on the record. This makes the record crystal clear, and hopefully triggers the DA to let the court know at the earliest opportunity.</b></p> <ul style="list-style-type: none"><li>• Would the proposal provide cost savings? If so, please quantify. <b>No.</b></li><li>• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? <b>Training judicial officers and courtroom clerks to make sure the proper processes are followed at the first court appearance (rather than waiting for the DA to affirmatively announce they are seeking the death penalty).</b></li><li>• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? <b>Yes.</b></li><li>• How well would this proposal work in courts of different sizes? <b>This proposal would work fine in the San Diego Superior Court (a large court).</b></li></ul> <p>Additional Comments: <b>None.</b></p>	

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