JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 30, 2018

Title
Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 8.601 and 8.652; amend rule 8.605; amend and renumber rule 8.600 as 8.603; renumber rules 8.603, 8.495, 8.496, 8.498, and 8.499

Recommended by
Proposition 66 Rules Working Group
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

Effective Date
April 25, 2019

Date of Report
November 9, 2018

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Executive Summary

To achieve competent representation without unduly restricting the pool of attorneys willing and able to accept appointment in death penalty appeals and habeas corpus proceedings, the Proposition 66 Rules Working Group recommends the adoption of two new rules and amendments to two existing rules relating to qualifications of counsel. These proposed rule changes are intended to partially fulfill the Judicial Council's obligation under Proposition 66 to reevaluate the competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. This proposal is submitted concurrently with a separate report to the Judicial Council containing the working group's proposal for related rules regarding the vetting and appointment of counsel for death penalty–related habeas corpus proceedings in the superior courts.

Recommendation

The Proposition 66 Rules Working Group recommends that the Judicial Council, effective April 25, 2019:

1. Adopt Cal. Rules of Court, rule 8.601, to provide definitions for terms used in the rules addressing qualifications of counsel for death penalty appeals and habeas corpus proceedings, and specifically to:
    a. Include the terms and definitions currently set forth in existing rules 8.600(e) and 8.605(c)(1)–(5);
    b. Amend the definition of "associate counsel" and the advisory committee comment thereto, to delete, as unnecessary, language regarding specific duties of counsel;
    c. Amend the definition of "assisting counsel or entity" to add "a Court of Appeal district appellate project" to the list of possible assisting entities;
    d. Further amend the definition of "assisting counsel" to clarify that an assisting counsel:
        - Must be an experienced capital appellate counsel or habeas corpus practitioner;
        - In an automatic appeal must meet the qualifications for appointed appellate counsel, including the nonalternative case experience requirements; and
        - In a habeas corpus proceeding must have filed a death penalty–related habeas corpus petition in a California state court.
    e. Newly define the terms "panel" and "committee," two entities that are proposed and discussed in greater detail in the separate but related council report regarding the appointment of counsel for death penalty–related habeas corpus proceedings in the superior courts; and
    f. Make minor changes to existing definitions, including to reflect changes to death penalty–related habeas corpus proceedings (e.g., statutory right to appeal) enacted by Proposition 66;
2. Amend rule 8.600 as follows and renumber as rule 8.603:
    a. Add the Habeas Corpus Resource Center to the list of individuals and entities who receive a certified copy of the judgment of death;
    b. Delete the definition for trial counsel in subdivision (e), which would be moved to proposed new rule 8.601(6); and
    c. Make a minor conforming change;
3. Amend rule 8.605 to:
    a. Limit its application to counsel appointed in automatic appeals, including by moving the qualifications standards for counsel in death penalty–related habeas corpus proceedings to a new rule;

b. Amend the statement of "purpose" to clarify that the qualifications are designed to promote competence and assist the court in appointing counsel;

c. Delete the definitions, which have been moved to proposed rule 8.601;

d. Modify the experience requirement to provide that the appeals may be on behalf of either party, but a subset of the appeals must be as counsel of record on behalf of the defendant;

e. Modify the training requirement to add that counsel may receive training credit for instruction if approved by the Supreme Court;

f. Clarify that the recent automatic appeals experience may satisfy "some or all" of the training requirement; and

g. Make other minor clarifying and conforming changes;

4. Adopt rule 8.652 to contain the qualifications standards for counsel to be included on a panel, appointed by the Supreme Court, or appointed by a superior court for a death penalty–related habeas corpus proceeding, including those standards currently set forth in existing rule 8.605, and specifically to:

a. Parallel the overall structure of the qualifications standards for automatic appeals in proposed rule 8.605 by describing required years of practice, case experience, knowledge, training, skills, and alternative experience;

b. Increase the current required length of time counsel has been in the active practice of law from four years to five;

c. Modify and streamline the existing case experience requirement by:

- Providing that it may be satisfied by past service as counsel of record for a person in a death penalty–related habeas corpus proceeding;
- Providing that it may be satisfied by any combination of completed appeals, jury trials, or habeas corpus proceedings (as opposed to the current requirement of a certain number of appeals or writs, and a certain number of jury trials or habeas corpus proceedings), on behalf of any party, but in at least two cases counsel must have filed habeas corpus petitions involving serious felonies;
- Deleting the reference to "writ proceedings" so that writ proceedings other than habeas corpus proceedings no longer satisfy the case experience requirement; and
- Deleting the requirement that at least one appeal or writ proceeding must involve a murder conviction;

d. Modify the existing training requirement by:

- Increasing from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, of which at least 10 (increased from 6) hours must address death penalty–related habeas corpus proceedings;

- Providing that the State Bar of California—not the Supreme Court—must approve the training courses; and
- Mirroring the training requirement in proposed amended rule 8.605 to clarify that past capital case experience may satisfy "some or all" of the training requirement, and to provide that an instructor may receive credit for teaching a course upon approval of the entity vetting counsel's qualifications;

e. Modify the existing skills requirement by retaining the requirement that recommendations, evaluations, and writing samples must be considered in an assessment of counsel's qualifications, but clarifying that it is counsel's responsibility to submit the necessary recommendations and writing samples, and the responsibility of the entity vetting counsel—which may be a committee or a superior court, as proposed in the separate council report regarding the appointment of death penalty–related habeas corpus counsel, or the Supreme Court—to obtain and review any applicable evaluations;

f. Further modify the existing skills requirement to specify that the writing samples must include:

- At least two filed habeas petitions involving serious felonies; or
- At least one filed death penalty–related habeas corpus petition; or
- Habeas corpus petitions filed, if any, if counsel is qualifying for appointment under the alternative experience standard;

5. Renumber and reorganize several rules, chapters, and divisions in title 8 that do not relate to capital proceedings so as to permit the rules regarding posttrial capital proceedings in the Supreme Court and Courts of Appeal to be located together, for the most part, in division 2 (new rules adopted by the Judicial Council on September 21, 2018), specifically:

   a. Renumber chapters 11 and 12, in division 1, as chapters 1 and 2, respectively, and move these chapters to new division 3;

   b. Renumber rule 8.495 as 8.720, rule 8.496 as 8.724, rule 8.498 as 8.728, and rule 8.499 as 8.730, and move these renumbered rules to new chapter 3 in new division 3;

   c. Reserve for future use chapter 8 in division 1, which will have no rules under it once rules 8.495, 8.496, 8.498 and 8.499 are renumbered and moved; and

   d. Renumber existing divisions 2–5 as divisions 4–7; and

6. Refer to the appropriate Judicial Council advisory body or bodies, for their consideration, commenters' suggestions for additional substantive changes to the rules that the working group was not able to consider at this time.

The text of the amended and new rules is attached at pages 29–44.

Relevant Previous Council Action

In 1997, the California Legislature passed former section 68655 of the Government Code (now section 68665), requiring that "[t]he Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings."[1] A committee consisting of Supreme Court and Judicial Council staff was formed to develop a proposed rule. Former rule 76.6 was adopted, effective February 27, 1998, by both the Supreme Court and the Judicial Council. The rule was amended soon thereafter, effective April 15, 1998, to provide that an attorney's recent active representation in an automatic appeal or death penalty–related habeas corpus proceeding could be found to constitute compliance with the training requirement. Effective January 1, 2007, the rule was amended with nonsubstantive technical changes and renumbered as rule 8.605.

Before Proposition 66, the Supreme Court generally was responsible for the appointment of counsel for both the direct appeal and habeas corpus proceedings in capital cases. As a result, rule 8.605 establishes the minimum qualifications for attorneys appointed by the Supreme Court, and no other courts, in these proceedings.

In January 2018, after Proposition 66 went into effect, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition.[2] The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions. Since its formation, the working group has recommended, and the Judicial Council, at its meeting on September 21, 2018, has adopted and amended rules and adopted forms governing the preparation of the record on appeal in capital cases.[3] In addition, this recommendation is being submitted to the council concurrently with the working group's separate council report and recommendation[4] addressing the amendment and adoption of related rules and forms for the appointment of counsel by the superior courts in death penalty–related habeas corpus proceedings.

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[1] California's adoption of this statute appears to have been at least partly in response to federal court decisions concluding that the mechanism that California previously had in place for qualifying counsel—section 20 of the Standards of Judicial Administration—failed to meet the requirements for California to qualify for "fast-track" procedures for federal habeas corpus proceedings under chapter 154 (part of the Antiterrorism and Effective Death Penalty Act of 1996), because this Standard of Judicial Administration was not a statute or a rule of court and did not impose binding or mandatory competency standards. (*Ashmus v. Calderon* (N.D.Cal. 1996) 935 F.Supp. 1048; *Ashmus v. Calderon* (9th Cir. 1997) 123 F.3d 1199, 1207–1208, revd. (1998) 523 U.S. 740, and vacated on jurisdictional grounds (9th Cir. 1998) 148 F.3d 1179.)

[2] A copy of the working group's charge and a roster of its membership are attached at pages 26–28.

[3] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases* (Sept. 7, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938*.

[4] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Nov. 2018).

Analysis/Rationale

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty cases in the California courts, many of which were focused on reducing the time spent on this review. Among other things, Proposition 66 modified Government Code section 68665, which addresses mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. Section 68665 now directs the Judicial Council and the Supreme Court to "reevaluate the standards as needed to ensure that they meet the [following] criteria":

- The qualifications needed to achieve competent representation;
- The need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment;
- The standards needed to qualify for chapter 154 of title 28 of the United States Code (hereafter chapter 154); and
- Experience requirements must not be limited to defense experience.

Proposition 66 also provides that the superior courts must offer and, unless the offer is rejected, appoint counsel for indigent persons in death penalty–related habeas corpus proceedings. (Gov. Code, § 68662.) Proposition 66 calls for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

The act did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown et al.* (S238309) (*Briggs*). On October 25, 2017, the Supreme Court's opinion in *Briggs* (3 Cal.5th 808) became final and the act took effect. Shortly afterward the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the act.

Existing qualifications standards and procedures

Government Code section 68665 required the Judicial Council and the Supreme Court to adopt binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. The Judicial Council and the Supreme Court fulfilled that obligation by adopting what is now rule 8.605, which establishes the minimum qualifications for attorneys appointed by the Supreme Court in these proceedings.

Rule 8.605 requires both appellate counsel and habeas corpus counsel to have completed at least four years of practice, to have the specified criminal defense experience and the specified knowledge and training, and to have demonstrated proficiency at certain skills and the

commitment necessary to represent a capital appellant or petitioner. Rule 8.605 also includes an "alternative qualifications" provision, which permits the Supreme Court to appoint attorneys who do not have the requisite criminal defense experience, such as prosecutors, academics, or civil practitioners, providing they complete additional training and meet other requirements.

The adoption of what is now rule 8.605 predates the criteria newly articulated in Government Code section 68665, as amended by Proposition 66. Nevertheless, all four criteria were considered in developing the rule. In addition to considering how to assure competent representation, the committee also expressly considered the effect that the standards would have on the pool of available attorneys and rejected a number of suggested qualifications as unduly restrictive.[5] The committee also sought "to set the standards high enough to have a reasonable chance of avoiding" a determination by the federal courts "that the minimum appointment standards . . . are too low to qualify for federal 'fast-track' treatment [under chapter 154]."[6] The committee recommended providing an alternative qualification provision to permit the appointment of attorneys who do not have criminal defense experience "because (1) such attorneys have competently represented defendants in capital cases in the past, and (2) deleting it would unnecessarily reduce the number of attorneys available to handle death penalty cases."[7]

The Supreme Court has applied these minimum qualifications standards for over two decades, since their adoption. (Even prior to their adoption by rule of court, the Supreme Court applied a version of the standards in place as section 20 of the Standards of Judicial Administration.) Going forward, the Supreme Court will continue to be the sole appointing entity in automatic appeals. However, in death penalty–related habeas corpus proceedings, primary responsibility for appointment will reside with the superior courts, which will be applying the death penalty–related habeas corpus qualifications standards for the first time.

Working group process and considerations

The Judicial Council charged the Proposition 66 Rules Working Group with reevaluating the mandatory competency standards and considering whether changes to the qualifications of counsel appointed in death penalty direct appeals and habeas corpus proceedings are needed to address the act's provisions.

A subgroup of working group members was formed to consider this topic and make recommendations to the full working group. In undertaking this task, the working group was guided by the criteria articulated in Government Code section 68665. In considering these criteria, the working group made two general observations:

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[5] See Judicial Council of Cal., staff rep., *Rule on Qualifications of Counsel in Death Penalty Appeals and Habeas Corpus Proceedings (Cal. Rules of Court, new rule 76.6)* (Feb. 20, 1998) at pp. 6–7 (declining to require eligibility for appointment to a murder case by a district appellate panel because the pool of attorneys was too limited; also declining to require prior capital experience as "unduly restrictive").

[6] *Id*. at p. 4.

[7] *Id*. at p. 6.

- Some of these criteria may point in opposite directions in terms of qualifications requirements. For example, meeting the standards needed to assure competent representation and qualify for chapter 154 may point toward increasing some qualifications requirements while the need to avoid unduly restricting the available pool of attorneys may point toward reducing some qualifications requirements.
- Chapter 154 addresses only the appointment and qualifications of counsel for death penalty–related habeas corpus proceedings, not for the appeals in capital cases.[8]

As part of its consideration, the working group examined, among other things, the qualifications standards recommended by the American Bar Association, the qualifications standards adopted by other jurisdictions, and the final rule issued by the U.S. Department of Justice regarding how to qualify under chapter 154.[9] This examination indicated that the existing requirements in rule 8.605 are generally similar to those in other jurisdictions—sometimes slightly lower and sometimes slightly higher, but never far from the minimum qualifications required in other jurisdictions.

The working group also considered the actual qualifications of attorneys who have sought appointment by the Supreme Court in capital cases. Working group members reported that attorneys applying for appointment typically have training and experience that far exceed the existing minimum qualifications standards set out in rule 8.605. Members indicated that it is rare that an attorney who has just met the requirements in rule 8.605 would seek appointment in a capital case. Many do not apply until they have decades of criminal law experience. As a result, it was not apparent to working group members that the existing qualifications standards are restricting otherwise interested and competent counsel from seeking appointment in capital cases. Instead, members pointed to other oft-cited reasons for avoiding appointment in capital

[8] As noted above, chapter 154 establishes "fast-track" procedures for federal habeas corpus proceedings. State procedures for the appointment of counsel in death penalty–related habeas corpus proceedings must meet certain standards in order to qualify for these "fast-track" procedures. To certify a state is in compliance, the Attorney General must determine

> (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; [and]
> . . .
> (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(28 U.S.C. § 2265(a)(1); see *id*., § 2261(b).) If a state's standards of competency meet or exceed the benchmarks set by the federal government's implementing regulations, those state standards are presumptively adequate under chapter 154. However, the implementing regulations are also intended to be flexible and require only that a state reasonably assure the availability and appointment of competent counsel; there is no requirement that the benchmark criteria be met in order to be certified by the Attorney General under chapter 154.

[9] Certification Process for State Capital Counsel System, final rule (78 Fed.Reg. 58,160 et seq. (Sept. 23, 2013)) (final rule); see 28 C.F.R. § 26.20 et seq.

cases, including the level of compensation for this work,[10] the lengthy time commitment required, and the nature of the cases.

Additionally, the working group considered how capital appointments work in practice in California. Generally, only one attorney is actually appointed to a case, whether it is an automatic appeal or a death penalty–related habeas corpus proceeding. However, once appointed, every private counsel is provided with assistance and consultation by an assisting counsel or entity designated by the Supreme Court.[11]

The Proposal

This proposal is intended to help fulfill the Judicial Council's obligation under Proposition 66 to reevaluate the competency standards for the appointment of counsel in death penalty direct appeals and related habeas corpus proceedings. This proposal also is intended to help fulfill, in part, the Judicial Council's obligation under Proposition 66 to adopt, within 18 months of the act's effective date, initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.

Currently, the qualifications standards for counsel in both death penalty appeals and habeas corpus proceedings are set forth in rule 8.605. This proposal would divide the provisions in existing rule 8.605 between three rules: new rule 8.601, which would define terms used in the qualifications rules; amended rule 8.605, which would address the qualifications for counsel in appeals; and new rule 8.652, which addresses the qualifications for counsel in habeas corpus proceedings.

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[10] The Consolidated Appropriations Act of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the California Supreme Court is $145, a rate that has not increased since at least 2008. The California Commission on the Fair Administration of Justice (Commission), tasked with conducting a review of California's justice system, including its administration of the death penalty, observed in its Final Report that "the low level of income is certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals." (Commission's Final Report (2008), p. 132; see Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 So.Cal. L.Rev. 697, 734 (2007) ("Private practitioners who can bear the financial sacrifice of accepting court-appointment at the present hourly rates are scarce").

Several commenters to the proposal (see attached comment chart, pages 114–117) also suggested that it will be difficult to expand the pool of attorneys willing to accept appointments in capital review proceedings without additional compensation.

[11] This practice is not set out in any rule of court or statute. However, it is described in materials available from the Supreme Court's website. (See, e.g., Supreme Court brochure, *Appointments in Capital Cases in the California Supreme Court* (Apr. 2009), *www.courts.ca.gov/documents/supremebroch.pdf* ("Assistance is available to you for the duration of the appeal and related habeas corpus/executive clemency proceedings. Shortly after your appointment, you are partnered with a "buddy" attorney at CAP who will be available for consultation on legal and procedural matters"); Supreme Court memorandum, Appendix of Appointed Counsel's Duties (2011), p. 3, *www.courts.ca.gov/documents/applica9.pdf* (appointed counsel "have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the Supreme Court"; "[a]ppointed counsel's cooperation and close working relationship with his or her assisting entity or counsel are important to achieving the common goal of maintaining a high level of legal representation in all capital appeals and related habeas corpus/executive clemency proceedings").)

Proposition 66 did not change the procedure for hearing death penalty appeals. Death penalty appeals continue to be within the exclusive jurisdiction of the Supreme Court, which will continue to appoint counsel for such cases. The experience of the Supreme Court has been that the existing qualifications standards strike the appropriate balance between articulating qualifications that are high enough to achieve competent representation, but not so high as to unduly restrict the eligible pool of counsel. The Supreme Court also has many decades of experience applying the qualification criteria in rule 8.605. As a result, only a few changes are being proposed to the existing standards for counsel in death penalty appeals in rule 8.605.

By contrast, Proposition 66 did effect procedural changes to death penalty–related habeas corpus proceedings. One statutory change is that counsel in habeas corpus proceedings will have much less time to investigate and file an initial petition: the time has been shortened, generally, from three years to one year from the order appointing counsel.

Another change is that, going forward, the superior courts generally will hear the initial petitions and appoint counsel for those proceedings. Previously, virtually all death penalty–related habeas corpus petitions were filed in, and heard by, the Supreme Court. Thus, the Supreme Court vetted and appointed counsel for those proceedings.[12] Though not required by statute or rule of court, the Supreme Court also designated an "assisting entity" or, where the entity had a conflict, experienced "assisting counsel" to provide private habeas corpus counsel with assistance.

Accordingly, the proposed rules on qualifications of counsel in death penalty–related habeas corpus proceedings refer not only to the Supreme Court—which will continue to vet counsel for its own appointments—but also to the committees and superior courts that, as proposed in the separate council report addressing the appointment of counsel, would apply the qualification criteria when a superior court makes the appointment.

Additionally, the separate council report recommends that courts be required to designate an assisting counsel or entity for private habeas corpus counsel. Accordingly, this qualifications proposal presumes that habeas corpus counsel appointed by a superior court will continue to be assisted by an experienced entity or attorney designated for that purpose. Different minimum qualifications standards likely would be appropriate for habeas corpus counsel if they were no longer assisted.

Below is a discussion of the specific proposed changes.

[12] Due to a scarcity of applicants and other factors, the Supreme Court does not maintain a list of qualified counsel awaiting appointments in death penalty–related habeas corpus proceedings that would be suitable for statewide use by the superior courts in making appointments. In light of Proposition 66 making superior courts generally responsible for appointment of death penalty–related counsel, it is not anticipated that the Supreme Court will be developing such a list.

Definitions

Proposed rule 8.601 would retain the terms and definitions set forth in existing rules 8.600(e)(2) and 8.605(c)(1)–(5), generally with little or no changes, with the exception of the definition of "assisting counsel or entity."

Based on the comments received, and recognizing that the proposal regarding the appointment of death penalty–related habeas corpus counsel (submitted to the council in a separate report) would newly require superior courts to designate an "assisting counsel or entity," the working group recommends clarifying the definition. Subdivision (5) of proposed new rule 8.601 would clarify that an assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate.[13] The proposed rule would further clarify that an assisting counsel in an automatic appeal must meet the nonalternative qualifications for appointed appellate counsel, and an assisting counsel in a habeas corpus proceeding must have served as appointed counsel of record in a filed death penalty–related habeas corpus petition and meet the other minimum qualifications for appointed habeas corpus counsel.

The proposed rule would also amend the definition of "assisting counsel or entity" to add "a Court of Appeal district appellate project" to the list of possible assisting entities. The working group recommends adding these projects to the list because Proposition 66 created a statutory right to appeal a superior court's denial of a death penalty–related habeas corpus petition. While lacking capital case experience, the projects have experience assisting counsel appointed to noncapital cases in the Courts of Appeal.

Proposed rule 8.601 would also newly define "panel" and "committee," two entities proposed and discussed in greater detail in the separate report to the council addressing the appointment of death penalty–related habeas corpus counsel in the superior courts. "Panel" would refer to the panel of attorneys eligible for appointment by a superior court in death penalty–related habeas corpus proceedings, and "committee" would refer to the entity charged with vetting attorneys for inclusion in the panel.

Qualifications of counsel for death penalty appeals

As discussed above, the proposal would make only a few changes to the qualifications standards for counsel on appeal, which are set forth in existing rule 8.605(d) and (f). Following are the two main substantive changes proposed.

Criminal appellate experience. The existing rule already permits the appointment of counsel who does not have the standard criminal defense experience. Nevertheless, in reevaluating the qualifications, the working group concluded that, consistent with Proposition 66's direction that the experience requirements for counsel not be limited to defense experience, the existing requirements should be amended to more clearly convey that experience for either party counts

[13] This language is taken from page 3 of the Supreme Court memorandum, Appendix of Appointed Counsel's Duties (2011), which provides that an assisting counsel may be "an experienced private capital appellate and/or habeas corpus practitioner, as appropriate."

toward meeting the case experience requirements. Subdivision (d)(2) of existing rule 8.605 requires past experience serving as counsel of record for a defendant. The working group recommends amending this provision to provide that service as counsel of record for *either* party be permitted to satisfy part of the requirement, but a subset of that case experience (e.g., four of seven completed felony appeals) must still be as counsel of record for a defendant. (See proposed new rule 8.605(c)(2).) The working group concluded that some defense experience was generally necessary to become reasonably proficient in issue-spotting and other defense skills on appeal. Under the proposal, counsel without such experience could continue to qualify under the "alternative qualifications" provision, which the working group recommends be retained.

Training. Recognizing that instruction should be valued, the working group recommends amending the training provision (current rule 8.605(d)(4)) to permit a qualifying course instructor to request and receive training credit for teaching a course, subject to the Supreme Court's approval. (See proposed new rule 8.605(c)(4).) Additionally, the existing provision that recent capital case experience may satisfy the training requirement (rule 8.605(d)(4), (f)(3)) would be modified simply to clarify that the experience may satisfy "some or all" of the training requirement.

Qualifications of counsel for death penalty–related habeas corpus proceedings

As discussed above, this proposal creates a new rule to state the existing provisions regarding qualifications of counsel for death penalty–related habeas corpus proceedings. Specifically, subdivisions (e) through (k) in existing rule 8.605 are either moved to or repeated in proposed new rule 8.652. Throughout, references to the Supreme Court are supplemented or replaced with references to the "committee" or the "court appointing counsel under a local rule as provided in rule 4.562," and in one instance to "the California courts."[14] The overall structure of the qualifications standards would remain the same as that in current rule 8.605, and would articulate required years of practice, case experience, knowledge, training, skills, and alternative experience. However, this proposal refines or increases several of the requirements, as described in further detail below.

General legal experience. The proposal would increase from four to five years the required length of time counsel has been in the active practice of law. (See existing rule 8.605(e)(1), (f)(1) (four years).) This recommended change is consistent with Proposition 66's direction that the Judicial Council and the Supreme Court consider the standards needed to qualify under chapter 154. Since the existing qualifications standards were first adopted, the federal government has provided new guidance on the standards needed to qualify for chapter 154. Now, standards of competence are presumptively adequate for purposes of chapter 154 if they provide for the "[a]ppointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience." (28 C.F.R. § 26.22(b)(1)(i).)

[14] For example, the existing rule requires, in part, that counsel have familiarity with the practices and procedures of the Supreme Court. The proposal would replace the reference to the Supreme Court with the California courts to reflect that counsel may be practicing in the superior courts, the Courts of Appeal, or the Supreme Court.

Case experience. The working group recommends several changes to the current requirements relating to prior case experience:

- *Combination of cases*: Current rule 8.605 requires counsel to have past case experience consisting of a set number of appeals or writ proceedings and a set number of jury trials or habeas corpus proceedings. Proposed new rule 8.652(c)(2) would streamline the case experience requirement by providing that it may be satisfied by: (1) past service as counsel of record for a person in a death penalty–related habeas corpus proceeding in a California state court in which the petition has been filed; *or* (2) any combination of completed appeals, jury trials, or habeas corpus proceedings (either eight or five, total, depending on whether counsel has previously served as a "supervised attorney" in a death penalty–related habeas corpus proceeding), for either party, as long as at least two cases include filed habeas corpus petitions in serious felony cases. The working group concluded that prior habeas corpus experience was necessary now that counsel will have only a one-year period in which to file an initial petition. Additionally, recent federal regulations and guidance on the standards needed to qualify for chapter 154 now emphasize the importance of prior postconviction litigation experience.[15] In streamlining the case experience requirement, service as counsel of record in a murder case would no longer be required. Also, writ proceedings other than habeas corpus proceedings would no longer satisfy the past case experience requirement. The working group reasoned that the broad category of "writ proceedings" (as opposed to the more specific "habeas corpus proceedings") may include very simple writ petitions that are not particularly indicative of the level of skill and experience necessary in a death penalty–related habeas corpus proceeding.
- *Service as counsel of record for* either *party*: The proposal would permit case experience requirements to be satisfied by prosecution experience. The working group recommends that, consistent with Proposition 66's direction that the experience requirements for counsel not be limited to defense experience and avoid unduly restricting the available pool of attorneys, the existing case experience requirement be amended to provide that service as counsel of record for *either* party satisfies part of the requirement. (See proposed new rule 8.652(c)(2)(B), (C).)

Training. The proposal would increase from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, and would specify that at least 10 (increased from 6) of these hours must address death penalty–related habeas corpus proceedings. (Compare current rule 8.605(e)(4) with proposed new rule 8.652(c)(4).) The working group recommends the increased hours in light of the fact that counsel will have less time to learn on the job because the time to investigate and file an initial petition has been shortened to one year from the date of

[15] See final rule, 78 Fed.Reg. 58,169 (Sept. 23, 2013) ("Prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings"); 28 C.F.R. § 26.22(b)(1)(i) (articulating benchmark for the appointment of counsel "who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience").

the order appointing counsel. This recommended change likely would not affect the pool of eligible counsel available for appointment because, in the experience of working group members, counsel who are interested in doing this type of work generally want to attend relevant trainings and, in the view of working group members, an additional 6 hours is not overly burdensome.

Going forward, superior courts generally will have primary responsibility for appointing death penalty–related habeas counsel and, therefore, will be involved, either individually or working with a regional committee, in determining whether counsel are qualified. Accordingly, the working group recommends deleting references to the Supreme Court approving training courses. The proposal includes language borrowed from existing rule 4.117, addressing qualifications for capital trial counsel, which would require that qualifying training be approved for Minimum Continuing Legal Education credit by the State Bar of California.

The existing rule provides that the training requirements must be satisfied "within three years before appointment." The working group recommends that the training provision be modified to require completion within three years before inclusion on a panel or, where applicable, appointed by a court, to accommodate the proposal (in the separate report to the council) recommending the creation of committees that will vet counsel for inclusion on a statewide panel. (This proposed provision in the separate report is a departure from current practice in which the Supreme Court vets counsel on a case-by-case basis prior to each appointment.) As provided in the separate report, counsel would have to reapply for inclusion on a panel after a maximum six-year term.

As with the proposed new rule for counsel for automatic appeals, the working group also recommends that proposed new rule 8.652 clarify that past capital case experience may satisfy "some or all" of the training requirement, and that an instructor may request and receive credit for teaching a course, subject to the approval of the entity vetting counsel's qualifications.

Skills. In keeping with the conclusion that having prior experience filing habeas corpus petitions is critical, the working group recommends modifying the existing writing sample requirement to require submission of one or more filed habeas corpus petitions. The existing requirement in rule 8.605(e)(5)(A) is more permissive and states that the writing samples are "ordinarily two appellate briefs and one habeas corpus petition." As proposed, new rule 8.652(c)(5)(A) would require that counsel must submit at least two habeas corpus petitions involving serious felonies or one petition filed as lead counsel in a death penalty–related habeas corpus proceeding, as well as any portions of habeas corpus petitions prepared as associate or supervised counsel in a capital case.

The working group also recommends clarifying that counsel is responsible for submitting the necessary recommendations and writing samples, but that the entity vetting counsel—which may be a committee or a superior court (as proposed in separate rules regarding the appointment of habeas corpus counsel) or the Supreme Court—is responsible for obtaining and reviewing any applicable evaluations.

Alternative experience. The working group recommends retaining the substance of the current provision, which permits counsel who have extensive alternative experience to qualify for appointment even if they do not meet the standard case experience requirement, with some minor modifications. Subdivision (d) of proposed new rule 8.652 would require at least five years of experience as an attorney (instead of four), to match the proposed increase for all death penalty–related habeas corpus counsel set forth in proposed subdivision (c)(1). Proposed subdivision (d) also would require that at least 10 (increased from 9) of the required training hours address death penalty–related habeas corpus proceedings, to match the proposed increase to 10 hours that would be required of all appointed death penalty–related habeas corpus counsel. Aside from these quantitative changes, the working group recommends clarifying that qualifying alternative experience may include experience as an attorney at the Habeas Corpus Resource Center (HCRC) or the California Appellate Project–San Francisco (CAP-SF).

The working group also recommends adopting a separate writing sample provision for attorneys with alternative experience. This would be necessary because the proposed general writing sample provision would require previously filed habeas corpus petitions, which attorneys with alternative experience may not have. Proposed subdivision (d) of rule 8.652, which would address writing samples for counsel with alternative experience, would require that the writing samples include habeas corpus petitions filed by the attorney only if any exist.

Reorganization of other rules

The Judicial Council, at its meeting on September 21, 2018, adopted rules governing the preparation of the record on appeal in capital cases, which included the creation within the Appellate Rules of a new division 2, Rules Relating to Death Penalty Appeals and Habeas Corpus Proceedings. The working group recommends renumbering and reorganizing several rules, chapters, and divisions in title 8 that do not relate to capital proceedings so as to permit the rules regarding posttrial capital proceedings in the Supreme Court and Courts of Appeal to be located together, for the most part, in new division 2. (See recommendation 5 above.)

Policy implications

Government Code section 68665, as amended by Proposition 66, directs the Judicial Council and the Supreme Court to reevaluate the qualifications standards, as needed, to ensure that they meet the articulated criteria. Proposition 66 also calls for the Judicial Council to adopt "rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

To help fulfill these statutory requirements, the working group tried to identify where qualifications standards might need to be increased to achieve competent representation or to qualify for chapter 154, and where the standards could be reduced while still assuring competent representation. Factored into this calculus was the need to avoid unduly restricting the available pool of attorneys, in part to avoid further delays to state habeas corpus review, and the need to avoid limiting the experience requirements to defense experience. In making its recommendations, the working group tried to balance these arguably competing policy interests and implications.

As discussed further in the Comments section below, this balancing act generally cautioned against overhauling or otherwise making too many changes to the current qualifications standards, which, in the experience of working group members, have generally been successful in achieving competent representation without being so onerous as to unduly restrict most interested and capable counsel from qualifying. Circumstances may change in the future, particularly as death penalty–related habeas corpus proceedings are increasingly heard in the superior courts and the qualifications are implemented and applied to counsel appointed in the superior courts. These developments may merit revisiting some of the comments and suggestions made when the proposals were circulated. That the working group did not recommend certain suggested changes is not intended to foreclose such future consideration.

Comments

This proposal circulated for public comment in a special cycle between August 3 and August 24, 2018. It was distributed to the standard list of presiding judges and justices, court executive officers, and bar associations. Working group members also were asked to distribute it to all those they thought might be interested in commenting.

Fourteen individuals or entities submitted comments on this proposal, including one superior court, ten organizations or individuals who represent criminal defendants, one victims' rights organization, one foreign government, and one lawyers' association. One commenter indicated that it agreed with the proposal, two indicated that they agreed with the proposal if amended, one indicated that she disagreed with the proposal, and the remainder did not specify an overall position on the proposal, but provided comments. Many commenters agreed with parts of the proposal and disagreed with or suggested modifications to other parts.

The text of comments directly addressed to the proposal, along with the working group responses, are available in the comment chart attached at pages 45–117. The chart begins with a table of the 14 individuals and entities that submitted comments. That table is followed by additional tables containing the substantive comments organized by rule number, form number, or topic. Following the chart are copies of the complete set of comments received by the working group on this proposal. The name of the commenter in the first part of the comment chart links to the copy of the full text of that individual's or entity's comments.

The main substantive comments and the working group responses to those comments are discussed below.

Definitions: assisting counsel or entity

Several commenters addressed the definition of an assisting counsel or entity. In addition, several commenters to the related proposal addressing the appointment of habeas corpus counsel by the superior courts, included in the separate report, suggested that CAP-SF be identified as the default or presumptive assisting entity for death penalty–related habeas corpus counsel. Proposed new rule 8.601(5) would identify a non-exhaustive list of eligible entities, but as noted by one commenter, lacks any additional guidance as to who an appointing court may designate to "provide appointed counsel with consultation and resource assistance."

The working group declined to identify CAP-SF as the exclusive or presumptive assisting entity. The California Rules of Court have, for the last 20 years, also identified HCRC and the Office of the State Public Defender for possible designation as assisting entities. Additionally, by statute, HCRC has the general power and duty to "provide legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law" and to "provide assistance and case progress monitoring as needed." (Gov. Code, § 68661(g), (j).) The main difference between existing rule 8.605(c)(5) and proposed new rule 8.601(5), in defining assisting entities, is that the proposed new rule would add "a Court of Appeal district appellate project" to the list of entities that may be designated. The district appellate projects have experience assisting in noncapital cases before the Courts of Appeal, which may be of value to counsel appointed in the newly authorized appeals from the denial of habeas corpus.

Furthermore, a rule of court that requires a superior court to utilize the services of CAP-SF would effectively mandate the court's use of a specific private contractor. CAP-SF is not a governmental entity; it is a nonprofit corporation that provides services to the Supreme Court in connection with capital cases pursuant to a contract. Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity. This is doubly true where it remains unclear who will fund these services—the counties or the state.

The working group also declined to limit the definition to only those entities identified in proposed new rule 8.601(5). While other entities capable of providing the necessary assistance do not currently exist, the working group concluded that the definition should allow for the possible formation of local or regional entities in the future as Proposition 66 is implemented and death penalty–related habeas corpus proceedings, including counsel appointments, are increasingly conducted in the superior courts.

With respect to assisting counsel, the working group agreed with the comment that more guidance would be helpful and modified the definition of "assisting counsel" in proposed new rule 8.601(5) to clarify that "[a]n assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate." The modified definition would further clarify that "[a]n assisting counsel in an automatic appeal must, at a minimum, meet the qualifications for appointed appellate counsel," including the criminal defense experience requirements, while "[a]n assisting counsel in a habeas corpus proceeding must, at a minimum, meet the qualifications for appointed habeas corpus counsel, including" having filed a death penalty–related habeas corpus petition in California state court.

Aside from this clarification, the working group declined to modify the proposed new rule to include additional qualifications at this time. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that the question of whether additional qualifications for assisting counsel would be beneficial be referred for consideration by the appropriate Judicial Council advisory body at a later date.

The working group appreciates that designating an assisting counsel or entity would be an entirely new responsibility for the superior courts. Additionally, as several commenters noted, capital case assistance involves different skills and responsibilities from direct representation. As such, practical guidance outside of formal rules may be particularly helpful. To that end, members of the working group have offered to prepare a list of persons who have been designated as assisting counsel in death penalty–related habeas corpus proceedings in the last 10 years that can be provided to the superior courts, as appropriate. The working group also recommends that the Center for Judicial Education and Research help make available to the superior courts education (e.g., through trainings or informational materials) on what, specifically, death penalty–related habeas corpus case assistance entails and requires.

Cooperation with an assisting counsel or entity for habeas corpus counsel

Several commenters objected to the language in proposed new rule 8.652(b) requiring that "[a]n appointed attorney must be willing to cooperate with an assisting counsel or entity that the appointing court designates." One suggested that a willingness to cooperate with assisting counsel does not belong in the qualifications rules. Another took the opposite tack and suggested that willingness was not sufficient and counsel should be "required" to cooperate. The "cooperation" provision in proposed new rule 8.652(b) is identical to the existing provision in rule 8.605(b). The separate council report addressing appointment of counsel in death penalty–related habeas corpus proceedings recommends that a superior court be required to designate an assisting counsel or entity when private counsel is appointed. Given this recommendation, the working group concluded it was important to retain the provision that counsel be "willing to cooperate" with an assisting counsel or entity. The working group declined, however, to expressly require cooperation in advance of appointment.

Combined case experience for habeas corpus counsel

The proposed new, combined case experience requirement would newly require counsel to have filed at least two habeas corpus petitions involving serious felonies or one death penalty–related habeas corpus petition, but also would streamline the other existing case experience requirements. Multiple commenters suggested modifications to this proposal.

Additional experience. Multiple commenters suggested increasing the combined case experience requirement further by requiring more habeas corpus proceedings, one or more murder cases, or additional cases involving serious or violent felonies. In particular, several commenters suggested that attorneys with no prior death penalty–related habeas corpus experience as appointed or supervised counsel should have filed at least two habeas corpus petitions involving murder convictions.

The working group does not disagree that habeas corpus experience in murder cases may, as one commenter put it, "better approximate the skills required for adequate representation in capital habeas corpus proceedings." However, the working group concluded that requiring such experience could unduly restrict an already limited pool of available and qualified attorneys. For the same reason, the working group declined at this time to modify the proposal to increase the number of habeas corpus petitions filed, to increase the number of cases required to involve

serious or violent felonies, or to expressly require that the petitions included postconviction investigation experience.

The entitlement to counsel for purposes of noncapital habeas corpus proceedings is itself limited. A person seeking to collaterally attack a conviction generally is not entitled to counsel until he or she has filed "adequately detailed factual allegations stating a prima facie case."[16] Put another way, it is only once a petitioner has "stated facts sufficient to satisfy the court that a hearing is required . . . [that] he is entitled to have counsel appointed to represent him."[17] As a result, the pool of available and qualified counsel who have filed one or more habeas corpus petitions collaterally attacking murder convictions is likely limited—certainly more limited than those who have filed petitions challenging the broader category of serious felonies.

Additionally, while the pool of attorneys who have represented appellants in direct appeals from murder convictions or defendants charged with murder in a jury trial likely is larger, the working group remains concerned that including a murder case experience requirement—in addition to the proposed habeas corpus experience requirement of two filed petitions in cases involving serious felonies—could unduly restrict and further shrink an already limited pool of available attorneys who may be capable of providing competent representation.

Service as counsel of record for either party. One commenter questioned whether the Judicial Council has the authority to require any prior defense experience. The commenter suggested deleting the requirement that counsel have filed two habeas corpus petitions in serious felonies, because the requirement could delay former prosecutors from qualifying for appointment. Several other commenters took the opposite position, suggesting that no prosecution experience should satisfy the prior case experience, or at least no prosecution experience in habeas corpus proceedings should qualify,[18] or that prosecution experience should be limited to no more than half of the case experience requirements.

The working group did not modify the proposal in response to the above comments. In the view of the working group, the proposal, which would require filing two habeas corpus petitions in serious felonies while permitting the other combined case experience to be satisfied by representing either party, strikes the appropriate balance among the criteria articulated in Government Code section 68665. In the experience of working group members, this requirement is unlikely to unduly restrict the eligible pool of counsel because attorneys with no prior experience filing a habeas corpus petition generally do not want their first attempt to be in a

[16] *People v. Shipman* (1965) 62 Cal.2d 226, 232.

[17] *Ibid.*

[18] Another commenter noted that the proposal, as circulated for comment, would seem to permit a case to satisfy part of the combined case experience requirement even where counsel of record had not filed anything, such as where no response or return was required in a habeas corpus proceeding. The working group modified the proposal in response to specify that an appeal in which counsel did not file a brief or a habeas corpus proceeding in which counsel did not file a petition, informal response, or a return does not satisfy any part of the combined case experience requirement. (See the discussion in the accompanying comment chart.)

capital case. Furthermore, such an attorney, who has little to no prior experience filing a habeas corpus petition in a serious felony, would still have the opportunity to qualify with alternative experience, as recommended in the proposed new and amended rules.

The working group's view is that adoption of the proposed new rule is well within the scope of the Judicial Council's authority because it is not inconsistent with Government Code section 68665.[19] Section 68665, as amended by Proposition 66, directs that "[e]xperience requirements shall not be limited to defense experience." The case experience requirements in proposed new rule 8.652(c)(2)(B) and (C) would not be limited to defense experience but instead would provide that, aside from the two habeas corpus petitions, service as counsel "for either party" would satisfy the remaining combined case experience. This would be in addition to providing an opportunity to qualify instead with alternative experience. (See proposed new rule 8.652(d).)

Attorneys without trial experience

New rule 8.652(e) would provide that, when an evidentiary hearing is ordered in a habeas corpus proceeding, an appointed attorney who lacks experience in conducting trials or evidentiary hearings "must associate with an attorney who has such experience." One commenter suggested that when this occurs, the superior court should be required to appoint associate counsel from the statewide panel proposed in the separate council report addressing appointments. The rules in this proposal and in the separately submitted appointment report, together, already would require that, *if* the superior court appoints associate counsel for any purpose, including to provide evidentiary hearing experience, then that counsel must be vetted by the regional committees or by the superior court pursuant to a local rule. However, the proposed new and amended rules leave open whether a superior court must appoint additional counsel or whether counsel lacking such experience can "associate with" a trial-experienced counsel without appointment by the court—for example, by engaging supervised counsel with such experience. Given that the situation arises so infrequently, the working group does not recommend mandating the appointment of additional counsel at this time.

Additional skills and areas of experience for habeas corpus counsel

The proposed new rule, like the existing rule, would require counsel to meet the minimum qualifications, which include having prior case experience sufficient to demonstrate proficiency in investigation, issue identification, and writing, and also demonstrate the commitment, knowledge, and skills necessary to competently represent a person in a death penalty–related habeas corpus proceeding. (Proposed new rule 8.652(b), (c)(2).)

Several commenters suggested additional skills, experience, and knowledge that counsel should be encouraged or required to obtain prior to appointment. One commenter, noting the 61 foreign

[19] See Cal. Const., art. VI, § 6(d) (giving the Judicial Council authority to "adopt rules for court administration, practice and procedure" that "shall not be inconsistent with statute"); see *In re Alonzo J.* (2014) 58 Cal.4th 924, 937 (a rule is inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent); *Butterfield v. Butterfield* (1934) 1 Cal.2d 227, 228 ("the mere fact that the rule goes beyond the statutory provision does not make it inconsistent therewith").

nationals on California's death row, suggested that representing foreign nationals requires additional skills, experience, and training beyond that necessary for death penalty–related habeas corpus representation generally. Another suggested that settlement of death penalty–related habeas corpus proceedings should be encouraged, in part by having the rules identify experience in settlement negotiations as a valuable asset. Several commenters suggested that counsel, and particularly counsel without prior death penalty–related habeas corpus experience, should have additional familiarity, experience, or demonstrated proficiency in certain specific criminal defense issues, including death qualification in jury selection, the forensic sciences or criminal forensic issues, mental health issues including intellectual disability, mitigation, use of expert witnesses, and social history investigation.

The working group does not recommend requiring or otherwise specifying the suggested additional skills, experience, and knowledge at this time. One concern is that mandating additional requirements could unduly restrict the available pool of attorneys. For example, a requirement that prior case experience be sufficient to demonstrate familiarity with death qualification in jury selection could effectively require that an attorney have prior capital experience. Another concern is that specifying optional qualifications, or adding mandatory qualifications for only certain separate types of cases or categories of persons, would make the rules too unwieldy and would detract from a central purpose of the rules, which is to set forth minimum qualifications standards that all death penalty–related habeas corpus counsel should meet. Whether a specific attorney is well-suited to a specific case is something to be considered by the recommending committee or the superior court vetting counsel pursuant to a local rule, and the judge making the appointment. The working group expects, as is true now, that matching an attorney and the attorney's specific skill set to a particular case will continue to be a key step in the recommendation and appointment process.

Training for habeas corpus counsel

The proposed training provisions would increase the overall number of required training hours, as well as the subset of hours that must be focused on death penalty–related habeas corpus proceedings. These training hours would have to be completed before inclusion on a panel, which—as proposed in the separate council report addressing appointment—requires reapplication after six years, or before appointment by the Supreme Court or a superior court pursuant to local rule.

Comments received include the following:

- One commenter objected to the proposed increase in hours, while other commenters objected that the proposed increase was still too low, and should be increased further, with one commenter suggesting a supplemental multiday training for counsel without recent capital trial or habeas corpus experience;
- Several commenters suggested that only death penalty habeas corpus defense–specific training should be required (in other words, appellate criminal defense or habeas corpus defense training, if not capital case–specific, would not satisfy the required hours);

- Multiple commenters suggested that trainings should be more recent, with some suggesting two years before inclusion on a panel and before any appointment, and others suggesting some training should be required in the year before an appointment; and
- One commenter suggested that the training hours should come from different training providers and at least three separate sessions.

The working group agrees that many practitioners will benefit from even greater training hours, but declined to recommend mandating additional training, beyond the increase proposed, by modifying the frequency, recentness, or specific hours of training required. The suggested modifications could make the training requirement more burdensome and discourage interested counsel from seeking appointment, or otherwise shrink the pool of available counsel. At the same time, it is not clear that the suggested modifications are necessary to assure competent representation.

The working group also recommends retaining the provision that appellate criminal defense or habeas corpus defense training that is not capital case–specific may still satisfy part of the training requirement. The working group recommends that counsel be given this flexibility to participate in noncapital-specific training, which may still be relevant to death penalty–related habeas corpus work, and to have such training satisfy at least some of the training hours. Removing this flexibility could make the training hours seem more burdensome, as well as discourage counsel from participating in relevant training simply because it is not specifically tailored to death penalty–related habeas corpus issues.

In addition to the above comments, several commenters addressed the proposed provision that would permit prior death penalty–related habeas corpus work to satisfy some or all of the training requirement, at the discretion of the vetting entity. The provision would parallel the existing training qualification rules for capital appellate counsel. One commenter disapproved of the provision while another approved. Several other commenters addressed the provision that would permit instructors of qualifying courses to receive training credit for instruction. The commenters did not agree on the number of training hours that should be credited for each hour of instruction. The working group did not modify the proposed training provisions in response to these comments.

One commenter also addressed the provision that would require the State Bar to approve any qualifying training, and suggested that trainings also should be approved by the regional committees responsible for vetting attorneys. The working group concluded that having trainings approved statewide and only by the State Bar would both promote uniformity and relieve the committees of an additional duty.

Alternative experience qualification for habeas corpus counsel

Existing language in rule 8.605(f) provides that counsel satisfying the “alternative” experience qualification must also satisfy the general writing sample requirement. The proposed rules circulated with the invitation to comment retained this language and would have required

attorneys satisfying the alternative experience provision to also satisfy the general writing sample requirement. However, that proposal failed to take into account that the working group has also proposed modifying the general writing sample requirement to require at least two filed habeas corpus petitions involving serious felonies or one filed death penalty–related habeas corpus petition. As a result, the proposal circulated with the invitation to comment inadvertently would have required counsel with alternative experience to have filed two habeas corpus petitions involving serious felonies or one death penalty–related habeas corpus petition. As noted by one commenter, such a proposal would be contrary to the purpose of the alternative experience provision, which is intended to provide an avenue for counsel who may not have the usual case experience, yet who will still provide high-quality legal representation, to qualify for appointment. The working group has corrected the error and has modified proposed rule 8.652(d) to clarify that the writing samples must present analyses of complex legal issues and must include habeas corpus petitions written by counsel only if any exist.

Another commenter suggested modifying the alternative experience provision to expressly state that no one may be found qualified based on prosecutorial experience alone. The working group does not recommend this modification, which would single out attorneys with former prosecution experience but not attorneys with other alternative experience such as complex civil litigation or academia. Additionally, prior experience—whether for the prosecution or the defense—is only one component of the proposed qualifications. All attorneys, including those with prior criminal defense experience, would still have to meet the other qualifications standards, including demonstrating the requisite commitment, knowledge, and skills, and satisfying the required training.

Automatic disqualifications from cases in certain counties for former prosecutors

One commenter expressed concerns about potential conflicts of interest, particularly those that are not readily apparent on the face of a case, when an appointed counsel has previously represented the state in felony appeals involving a capital appellant or related witnesses, or in felony trials, habeas corpus proceedings, or appeals involving a death penalty–related habeas petitioner. The commenter suggested adopting rules that would automatically preclude such attorneys from accepting categories of cases from any county in which counsel had tried criminal cases or defended criminal judgments for the State of California.

The working group agrees that an appointment in a case where counsel must later withdraw due to a conflict may delay habeas corpus proceedings. On the other hand, automatically precluding counsel from accepting cases in which there is no conflict also could unnecessarily delay death penalty–related habeas corpus appointments by limiting the pool of attorneys available to accept cases from certain counties. On balance, the working group declined to recommend such a modification at this time.

Alternatives considered

The working group considered many different alternatives to the recommended actions. While most of these have been addressed above in the Comments section, additional alternatives are discussed below.

Organization of the qualification rules

The working group considered organizing the rules by the court hearing the proceeding. For example, the working group considered whether the proposed rule on qualifications of counsel in death penalty–related habeas corpus proceedings should be located in title 4, Criminal Rules, which currently contains rules regarding procedures in habeas corpus proceedings in the superior courts, as well as the rule addressing qualifications for capital trial counsel.[20] The working group concluded that having all the qualifications rules relating to capital review proceedings in one place would make them easier to locate for practitioners and the courts.

Qualifications of counsel for death penalty appeals

The working group considered whether, for counsel in automatic appeals, to grant additional training credit for instructors. For example, for counsel appointed to represent a child in family law proceedings, rule 5.242(e)(4) provides for "1.5 hours of course participation credit for each hour of course instruction." Similarly, the State Bar provides that an instructor may claim educational credit for actual speaking time multiplied by four for the first presentation. The working group ultimately concluded that the determination whether, and to what extent, instructors receive training credit should be left to the discretion of the Supreme Court.

Qualifications of lead and associate counsel for death penalty–related habeas corpus proceedings

The working group considered establishing different qualifications requirements for lead counsel and associate counsel in order to try to build capacity. The concept was that by setting lower experience requirements for associate counsel, who would be required to work under the supervision of lead counsel, more counsel would qualify, serve, and learn in this associate capacity. One possible model is rule 4.117, which articulates different qualifications requirements for lead and associate trial counsel in capital cases. Specifically, rule 4.117 provides that lead counsel must have at least 10 years' litigation experience in the field of criminal law, while associate counsel must have at least 3 years of such experience.

The working group concluded that establishing different standards would be unnecessarily complex. Also, it is unclear whether lower standards for associate counsel would have the intended effect of building capacity if, in practice, only one habeas corpus counsel is appointed, as has generally been the case in the past. In the experience of several working group members, when lead and associate counsel are appointed to a case, both tend to be experienced counsel who have an existing working relationship with one another. Additionally, the existing rules already provide for the use of supervised counsel who do not meet the qualifications for appointment.

[20] The separate report to the council addressing the appointment of counsel in death penalty–related habeas corpus proceedings in the superior courts recommends rules that are located in title 4.

Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases—in particular, those provisions generally giving to the superior courts responsibility for appointing counsel for, and hearing, initial death penalty–related habeas corpus petitions—will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. However, the specific rule changes recommended herein, with respect to qualifications of counsel, are unlikely on their own to impose any appreciable implementation requirements, costs, or operational impacts.

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 26
2. Roster of Proposition 66 Rules Working Group, at pages 27–28
3. Cal. Rules of Court, rules 8.495, 8.496, 8.498, 8.499, 8.600, 8.601, 8.605, and 8.652, at pages 29–44
4. Chart of comments, at pages 45–117
5. Copies of comments received, at pages 118–183
6. Link A: Certification Process for State Capital Counsel System, final rule (Sept. 23, 2013), *www.gpo.gov/fdsys/pkg/FR-2013-09-23/pdf/2013-22766.pdf*
7. Link B: Text of Prop. 66, pp. 212–222, and ballot description and arguments for and against Prop. 66, pp. 104–109, from Nov. 2016 *Official Voter Information Guide*, *vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf*

Charge to Proposition 66 Rules Working Group

The Proposition 66 Rules Working Group is charged with reviewing California Rules of Court, Standards of Judicial Administration, Judicial Council forms, and other authorities relevant to the processing of capital appeals and state habeas corpus petitions to determine whether and what modifications should be recommended to fulfill the Judicial Council's rule-making obligations under Proposition 66, the Death Penalty Reform and Savings Act of 2016.

The working group will consider what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including those governing:

- Appointment of counsel for indigent capital inmates for both the direct appeal and habeas corpus proceedings, including the time frame for appointments and the qualifications necessary to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code (Pen. Code, § 1509 and § 1239.1 and Gov. Code, § 68665);
- The filing of habeas corpus petitions and other matters in the sentencing court and all procedures attendant thereto, including those pertaining to assignment of habeas corpus matters, briefing requirements, certificates of appealability, successive or untimely petitions, and method of execution (Pen. Code, § 1509 and § 3601.1(c));
- Appeals of the sentencing court's rulings on capital habeas corpus petitions to the Court of Appeal and all procedures attendant thereto, including those pertaining to certificates of appealability, priority of such appeals, and the possibility of California Supreme Court review (Pen. Code, § 1509.1); and
- Supreme Court procedures and time frames pertaining to record preparation and briefing in capital appeals (Pen. Code, § 190.6).

In formulating any proposed new or amended court rule, judicial administration standard, or Judicial Council form, the working group will strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness to both defendants and victims. The working group will take into account the language of the act, *Briggs v. Brown* ((2017) 3 Cal.5th 808), and constitutional standards and principles. While participating in the working group, members are expected to not act as advocates of the interests of any stakeholder group, but to contribute to this statewide endeavor by drawing on their expertise in capital litigation, court administration, or other matters relevant to the act.

The working group will propose recommendations to the Judicial Council for adoption, effective April 26, 2019.

Proposition 66 Rules Working Group

As of February 5, 2018

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Rules 8.601 and 8.652 of the California Rules of Court are adopted, rule 8.605 is amended, rule 8.600 is amended and renumbered as 8.603, and rules 8.495, 8.496, 8.498, and 8.499 are renumbered, effective April 25, 2019, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapters 1–7 * * *

Chapter 8. ~~Miscellaneous Writs~~ [Reserved]

Rule 8.495. Renumbered effective April 25, 2019.
Rule 8.495 renumbered as rule 8.720.

Rule 8.496. Renumbered effective April 25, 2019.
Rule 8.496 renumbered as rule 8.724.

Rule 8.498. Renumbered effective April 25, 2019.
Rule 8.498 renumbered as rule 8.728.

Rule 8.499. Renumbered effective April 25, 2019.
Rule 8.499 renumbered as rule 8.730.

Chapter 9. Proceedings in the Supreme Court * * *

Division 2. Rules Relating to Death Penalty Appeals and Habeas Corpus Proceedings

Chapter 1. General Provisions

Rule 8.601. Definitions

For purposes of this division:

(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal, death penalty–related habeas corpus proceedings, or an appeal of a decision in death penalty–related habeas corpus proceedings. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project–San Francisco, or a Court of Appeal district appellate project who is responsible for the overall conduct of the case and

for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a person jointly in a death penalty appeal, in death penalty–related habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.

(3) "Associate counsel" means an appointed attorney who does not have the primary responsibility for the case but nevertheless has casewide responsibility. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel but is not appointed by the court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. An assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate. An assisting counsel in an automatic appeal must, at a minimum, meet the qualifications for appointed appellate counsel, including the case experience requirements in rule 8.605(c)(2). An assisting counsel in a habeas corpus proceeding must, at a minimum, meet the qualifications for appointed habeas corpus counsel, including the case experience requirements in rule 8.652(c)(2)(A). Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project–San Francisco, and a Court of Appeal district appellate project.

(6) "Trial counsel" means both the defendant's trial counsel and the prosecuting attorney.

(7) "Panel" means a panel of attorneys from which superior courts may appoint counsel in death penalty–related habeas corpus proceedings.

(8) "Committee" means a death penalty–related habeas corpus panel committee that accepts and reviews attorney applications to determine whether applicants are qualified for inclusion on a panel.

Advisory Committee Comment

Number (3). The definition of "associate counsel" in (3) is intended to make it clear that, although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility.

Chapter ~~10~~2. Automatic Appeals From Judgments of Death

Article 1. General Provisions

Rule 8.603.~~8.600~~. In general

(a) Automatic appeal to Supreme Court

If a judgment imposes a sentence of death, an appeal by the defendant is automatically taken to the Supreme Court.

(b) Copies of judgment

When a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment to the Supreme Court, the Attorney General, the Governor, the Habeas Corpus Resource Center, and the California Appellate Project ~~in –~~San Francisco.

~~(c) Definitions~~

~~For purposes of this part "Trial counsel" means both the defendant's trial counsel and the prosecuting attorney.~~

Rule 8.605. Qualifications of counsel in death penalty appeals ~~and habeas corpus proceedings~~

(a) Purpose

This rule defines the minimum qualifications for attorneys appointed by the Supreme Court in death penalty appeals ~~and habeas corpus proceedings related to sentences of death~~. These minimum qualifications are designed to promote competent representation and to avoid unnecessary delay and expense by assisting the court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel. An attorney is not entitled to appointment simply because the attorney meets these minimum qualifications.

(b) General qualifications

The Supreme Court may appoint an attorney only if it has determined, after reviewing the attorney's experience, writing samples, references, and evaluations under (c) and (d) ~~through (f)~~, that the attorney has demonstrated the commitment,

knowledge, and skills necessary to competently represent the defendant. An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate.

~~(c)~~ ~~Definitions~~

~~As used in this rule:~~

~~(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal or death penalty–related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.~~

~~(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, or the California Appellate Project in San Francisco who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a defendant jointly in a death penalty appeal, in death penalty–related habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.~~

~~(3) "Associate counsel" means an appointed attorney who does not have the primary responsibility for the case but nevertheless has casewide responsibility to perform the duties for which that attorney was appointed, whether they are appellate, habeas corpus, or appellate and habeas corpus duties. Associate counsel must meet the same minimum qualifications as lead counsel.~~

~~(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.~~

~~(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco.~~

~~(d)~~(c) Qualifications for appointed appellate counsel

Except as provided in (d), an attorney appointed as lead or associate counsel in a death penalty appeal must ~~have at least~~ satisfy the following minimum qualifications and experience:

(1) *California legal experience*

Active practice of law in California for at least four years.

(2) *Criminal appellate experience*

Either:

(A) Service as counsel of record for ~~a defendant~~ either party in seven completed felony appeals, including as counsel of record for a defendant in at least four felony appeals, one of which was a murder case; or

(B) Service as:

(i) Counsel of record for ~~a defendant~~ either party in five completed felony appeals, including as counsel of record for a defendant in at least three of these appeals; and

(ii) ~~as~~ Supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney performed substantial work on the case and recommends the attorney for appointment.

(3) *Knowledge*

Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.

(4) *Training*

(A) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. Counsel who serves as an instructor in a

course that satisfies the requirements of this rule may receive course participation credit for instruction, on request to and approval by the Supreme Court, in an amount to be determined by the Supreme Court.

(B) If the Supreme Court has previously appointed counsel to represent a ~~defendant~~ person in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

(5) *Skills*

Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration all of the following:

(A) Two writing samples—ordinarily appellate briefs—written by the attorney and presenting an analysis of complex legal issues;

(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

~~**(c) Qualifications for appointed habeas corpus counsel**~~

~~An attorney appointed as lead or associate counsel to represent a person in death penalty–related habeas corpus proceedings must have at least the following qualifications and experience:~~

~~(1) Active practice of law in California for at least four years.~~

~~(2) Either:~~

~~(A) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as~~

~~counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or~~

~~(B) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment.~~

~~(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty–related habeas corpus proceedings.~~

~~(4) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.~~

~~(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration all of the following:~~

~~(A) Three writing samples—ordinarily two appellate briefs and one habeas corpus petition—written by the attorney and presenting an analysis of complex legal issues;~~

~~(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;~~

~~(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and~~

~~(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.~~

~~(f)~~(d) Alternative qualifications

The Supreme Court may appoint an attorney who does not meet the California law practice requirement~~s~~ of ~~(d)~~(c)(1) ~~and (2) or (e)(1) and~~ or the criminal appellate experience requirements of (c)(2) if the attorney has the qualifications described in ~~(d)~~(c)(3)–(5) ~~or (e)(3)–(5)~~ and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under ~~(d)~~(c) ~~or (e)~~.

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court.

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court will determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of the attorney's individual background and experience. If the Supreme Court has previously appointed counsel to represent a ~~defendant~~ person in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

~~(g) Attorneys without trial experience~~

~~If an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding and an attorney appointed under either (e) or (f) to represent a defendant in that proceeding lacks experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience.~~

~~(h)~~(e) Use of supervised counsel

An attorney who does not meet the qualifications described in (c) or (d)~~, (e), or (f)~~ may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

~~(i)~~(f) Appellate and habeas corpus appointment

(1) An attorney appointed to represent a ~~defendant~~ person in both a death penalty appeal and death penalty–related habeas corpus proceedings must meet the minimum qualifications of both ~~(d) and (e)~~ (c) or (d) and ~~of~~ ~~(f)~~ rule 8.652.

(2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a ~~defendant~~ person jointly in both a death penalty appeal and death penalty–related habeas corpus proceedings if the Supreme Court finds that one attorney satisfies the minimum qualifications set forth in ~~their qualifications in the aggregate satisfy the provisions of both (d) and (e)~~ (c) or (d), and the other attorney satisfies the minimum qualifications set forth in ~~of~~ ~~(f)~~ rule 8.652.

~~(j)~~(g) Designated entities as appointed counsel

(1) Notwithstanding any other provision of this rule, both the State Public Defender ~~is qualified to serve as appointed counsel in death penalty appeals, the Habeas Corpus Resource Center is qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings,~~ and the California Appellate Project ~~in –~~San Francisco ~~is~~ are qualified to serve as appointed counsel in ~~both classes of proceedings~~ death penalty appeals.

(2) When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project ~~in –~~San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under ~~(d)~~(c)(1)–(5) or the Supreme Court finds the attorney qualified under ~~(f)~~(d).

~~(3) When serving as appointed counsel in a death penalty–related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (e)(1)–(5) or the Supreme Court finds the attorney qualified under (f).~~

~~(k) Attorney appointed by federal court~~

~~Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty–related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds that attorney has the commitment, proficiency, and knowledge necessary to represent the defendant competently in state proceedings.~~

~~**Advisory Committee Comment**~~

~~**Subdivision (c).** The definition of "associate counsel" in (c)(3) is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility to perform the duties for which he or she was appointed, whether they are appellate duties, habeas corpus duties, or appellate *and* habeas corpus duties.~~

Chapter 3. Death Penalty–Related Habeas Corpus Proceedings

Rule 8.652. Qualifications of counsel in death penalty–related habeas corpus proceedings

(a) Purpose

This rule defines the minimum qualifications for attorneys to be appointed by a court to represent a person in a habeas corpus proceeding related to a sentence of death. These minimum qualifications are designed to promote competent representation in habeas corpus proceedings related to sentences of death and to avoid unnecessary delay and expense by assisting the courts in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether a person received effective assistance of counsel. An attorney is not entitled to appointment simply because the attorney meets these minimum qualifications.

(b) General qualifications

An attorney may be included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, only if it is determined, after reviewing the attorney's experience, training, writing samples, references, and evaluations, that the attorney meets the minimum qualifications in this rule and has demonstrated the commitment, knowledge, and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death. An appointed attorney must be willing to cooperate with an assisting counsel or entity that the appointing court designates.

(c) Qualifications for appointed habeas corpus counsel

An attorney included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, must satisfy the following minimum qualifications:

(1) *California legal experience*

Active practice of law in California for at least five years.

(2) *Case experience*

The case experience identified in (A), (B), or (C).

(A) Service as counsel of record for a petitioner in a death penalty–related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court.

(B) Service as:

(i) Supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment; and

(ii) Counsel of record for either party in a combination of at least five completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. Service as counsel of record in an appeal where counsel did not file a brief, or in a habeas corpus proceeding where counsel did not file a petition, informal response, or a return, does not satisfy any part of this combined case experience. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing.

(C) Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. Service as counsel of record in an appeal where counsel did not file a brief, or in a habeas corpus proceeding where counsel did not file a petition, informal response, or a return, does not satisfy any part of this combined case experience. The

combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing.

(3) *Knowledge*

Familiarity with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings.

(4) *Training*

(A) Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, completion of at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty–related habeas corpus proceedings.

(B) Counsel who serves as an instructor in a course that satisfies the requirements of this rule may receive course participation credit for instruction, on request to and approval by the committee, the Supreme Court, or a court appointing counsel under a local rule as provided in rule 4.562, in an amount to be determined by the approving entity.

(C) If the attorney has previously represented a petitioner in a death penalty–related habeas corpus proceeding, the committee, the Supreme Court, or the court appointing counsel under a local rule as provided in rule 4.562, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

(5) *Skills*

Demonstrated proficiency in issue identification, research, analysis, writing, investigation, and advocacy. To enable an assessment of the attorney's skills:

(A) The attorney must submit:

(i) Three writing samples written by the attorney and presenting analyses of complex legal issues. If the attorney has previously served as lead counsel of record for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include one or more habeas corpus petitions filed by the

attorney in that capacity. If the attorney has previously served as associate or supervised counsel for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include the portion of the habeas corpus petition prepared by the attorney in that capacity. If the attorney has not served as lead counsel of record for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include two or more habeas corpus petitions filed by the attorney as counsel of record for a petitioner in a habeas corpus proceeding involving a serious felony; and

(ii) Recommendations from two attorneys familiar with the attorney's qualifications and performance.

(B) The committee, the Supreme Court, or the court appointing counsel under a local rule as provided in rule 4.562, must obtain and review:

(i) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in those proceedings; and

(ii) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(d) Alternative experience

An attorney who does not meet the experience requirements of (c)(1) and (2) may be included on a panel or appointed by the Supreme Court if the attorney meets the qualifications described in (c)(3) and (5), excluding the writing samples described in (c)(5)(A)(i), and:

(1) The committee or the Supreme Court finds that the attorney has:

(A) Extensive experience as an attorney at the Habeas Corpus Resource Center or the California Appellate Project–San Francisco, or in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or as a prosecutor), for at least five years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under (c)(1) and (2); and

(B) Demonstrated proficiency in issue identification, research, analysis, writing, investigation, and advocacy. To enable an assessment of the attorney's skills, the attorney must submit three writing samples written by the attorney and presenting analyses of complex legal issues, including habeas corpus petitions filed by the attorney, if any.

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court.

(3) Within two years before being included on a panel or appointed by the Supreme Court, the attorney has completed at least 18 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which involve death penalty–related habeas corpus proceedings. The committee or the Supreme Court will determine whether the training completed by an attorney satisfies the requirements of this subdivision in light of the attorney's individual background and experience.

(e) Attorneys without trial experience

If an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding and an attorney appointed under (c) or (d) to represent a person in that proceeding lacks experience in conducting trials or evidentiary hearings, the attorney must associate with an attorney who has such experience.

(f) Use of supervised counsel

An attorney who does not meet the qualifications described in (c) or (d) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(g) Appellate and habeas corpus appointment

(1) An attorney appointed to represent a person in both a death penalty appeal and death penalty–related habeas corpus proceedings must meet the minimum qualifications of both (c) or (d) and rule 8.605.

(2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a person jointly in both a death penalty appeal and death penalty–related habeas corpus proceedings if it is determined that one attorney satisfies the minimum qualifications stated in (c) or (d) and the other attorney satisfies the minimum qualifications stated in rule 8.605.

(h) Entities as appointed counsel

(1) Notwithstanding any other provision of this rule, the Habeas Corpus Resource Center and the California Appellate Project–San Francisco are qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings.

(2) When serving as appointed counsel in a death penalty–related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project–San Francisco must not assign any attorney as lead counsel unless it finds the attorney is qualified under (c) or (d).

(i) Attorney appointed by federal court

Notwithstanding any other provision of this rule, a court may appoint an attorney who is under appointment by a federal court in a death penalty–related habeas corpus proceeding for the purpose of exhausting state remedies in the California courts if the court finds that the attorney has the commitment, proficiency, and knowledge necessary to represent the person competently in state proceedings. Counsel under appointment by a federal court is not required to also be appointed by a state court in order to appear in a state court proceeding.

Division 3. Rules Relating to Miscellaneous Appeals and Writ Proceedings

Chapter ~~11~~1. Review of California Environmental Quality Act Cases Under Public Resources Code Sections 21168.6.6, 21178–21189.3, and 21189.50–21189.57

Chapter ~~12~~2. Appeals Under Code of Civil Procedure Section 1294.4 f~~F~~rom an Order Dismissing or Denying a Petition to Compel Arbitration

Chapter 3. Miscellaneous Writs

Rule 8.720.~~8.495.~~ Review of Workers' Compensation Appeals Board cases * * *

Rule 8.724.~~8.496.~~ Review of Public Utilities Commission cases * * *

Rule 8.728.~~8.498.~~ Review of Agricultural Labor Relations Board and Public Employment Relations Board cases * * *

Rule 8.730.~~8.499.~~ Filing, modification, and finality of decision; remittitur * * *

Division ~~2~~4. Rules Relating to the Superior Court Appellate Division

Division ~~3~~5. Rules Relating to Appeals and Writs in Small Claims Cases

Division ~~4~~6. Transfer of Appellate Division Cases to the Court of Appeal

Division ~~5~~7. Publication of Appellate Opinions

SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
1.	Robert D. Bacon Attorney at Law Oakland, California	NI	Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful. To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. **1. General observations: the "cardiac surgery of legal representations"** A. Given what is at stake in any capital case, a relevant analogy that the Council might keep in mind in crafting these rules – and encourage regional committees and superior courts to keep in mind in applying and implementing them – is the procedure for board certification of a physician in a medical specialty. (See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[1] see also Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* (2008) 36 Hofstra L. Rev. 775, 777 [capital	

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

SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			defense is the "cardiac surgery of legal representations"].) [1] "The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice – for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice." (*Ibid.*) * * * [3] I also commend to the Council the comments submitted by California Attorneys for Criminal Justice (CACJ). I am a member of that organization but I did not personally participate in the writing of their comments. See comments on specific provisions below.	See responses to specific comments below.
2.	California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	NI	These comments are being submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals.	

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			See comments on specific provisions below.	See responses to specific comments below.
3.	California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	NI	The piecemeal issuance of rules by the working group and the lack of information about funding mechanisms make it particularly difficult to respond constructively to these rules. It is nonetheless clear that in light of the accelerated timeline for litigation contemplated by Proposition 66, enhanced staffing of cases is critical to competent representation. See comments on specific provisions below.	See responses to specific comments below.
4.	California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	NI	These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for qualification and appointment of habeas corpus counsel in capital cases. CACJ's comments would be more thorough and reflective but for the abbreviated comment period and complexity of the matters at issue. * * * CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the appointment of competent post-conviction counsel. * * *	

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

SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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			CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In addition, since Proposition 66 allows for the reopening on appeal of issues handled by first habeas counsel based on their ineffective assistance, failure to insure the appointment of competent and experienced counsel in the Superior Court will only require extensive re-litigation in the Court of Appeal with different counsel under new Penal Code Section 1509.1(b). See comments on specific provisions below.	See responses to specific comments below.
5.	California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	NI	The Committee on Appellate Courts appreciates the working group's efforts to balance the mandates of Proposition 66 with the need to ensure qualified representation for death penalty appeals and habeas proceedings. **SP18-12: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings** *Proposal as a Whole:* The Committee agrees with the working group's concern that factors other than the current qualification standards dissuade private attorneys from seeking appointment in capital cases. As the working group identifies, these other factors include the level of compensation, the lengthy time	

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			commitment required, and the nature of the cases. The new one-year deadline for filing a habeas petition may very well exacerbate the problem. Holding this aside, the working group's proposed rules will help expand the applicant pool, but the Committee has some concerns and suggestions with regard to competency requirements. See comments on specific provisions below.	See responses to specific comments below.
6.	California Public Defenders Association (CPDA) by Robin Lipetzky, President Sacramento, California	AM	<u>Statement of Interest</u> CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes approximately 4000 attorneys who are employed as public defenders or are in private criminal defense practice. CPDA has been a leader in continuing legal education for defense attorneys for over 34 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, CPDA is the co-sponsor of the annual Capital Case Defense Seminar, co-sponsored by California Attorneys for Criminal Justice, which is held over four days every President's Day Weekend for more than thirty-five years; and the co-publisher of the California Death Penalty Defense Manual. CPDA is also active in the California Legislature, attending key Senate and Assembly committee meetings on a weekly basis, taking positions on hundreds of bills, and sponsoring legislation in a constant effort to ensure that our	

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			criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In addition, CPDA has appeared as amicus curiae in well over 50 decisions published by the California Supreme Court and Courts of Appeal, and served as amicus curiae in the United States Supreme Court. Position We agree with some of the proposals if they are modified. We do not agree with others. Our position is spelled out in detail below. See comments on specific provisions below.	See responses to specific comments below.
7.	Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	NI	The Criminal Justice Legal Foundation, a nonprofit organization formed to protect and advance the rights of victims of crime, submits these comments on the above proposals. The Judicial Council is tasked by statute, enacted in Proposition 66, to "adopt rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6, subd. (d).) It would be difficult to overstate the extent to which Proposal 18-13 fails in that goal. Instead of obeying the mandate of the voters to fix what is wrong with the present system and expedite the cases, the proposal doubles down on the current failures. It is contrary to Proposition 66 in spirit, in purpose, and in letter. Proposal 18-12 is	

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			also deeply flawed, violating the direction of Proposition 66 to avoid needlessly constricting the supple of attorneys. * * * **The Qualification Proposal** The statutory mandate for qualifications (see Gov. Code, § 68665, subd. (b)) requires consideration of four factors: 1. Achieving competent representation; 2. Avoiding unduly restricting the available pool of attorneys; 3. Qualifying for Chapter 154 of Title 28 of the U.S. Code; and 4. Not limiting experience requirements to the defense side. Under criteria 2 and 4, changes from existing standards should all be in the direction of broadening the available pool, and particularly including attorneys who have recently left a prosecuting office, unless there is a compelling reason under criteria 1 or 3 for a more restrictive standard. * * * For an increase in restrictiveness to be justified under the more general criterion 1, a compelling showing of need should be required, not just a vague impression. It is worth noting in this regard that even the American Bar Association —certainly no friend	

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			of capital punishment—has acknowledged that its earlier emphasis on "quantitative measures of attorney experience—such as years of litigation experience and number of jury trials"—was misguided. (See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 962 (2003).) That said, Chapter 154 does require "standards of competency" (see 28 U.S.C. § 2265(a)(1)(C)), and the implementing regulations do employ quantitative measures for presumptive adequacy, so it would not be wise to abandon the existing standards. However, we are aware of no evidence that the existing bars are not high enough, and the background discussion in Proposal SP 18-12 does not cite any. Again, we should bear in mind the ABA's conclusion that quantitative measures are really not worth much. See comments on specific provisions below.	See responses to specific comments below.
8.	Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	NI	On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for superior court appointment of counsel in death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.	

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			The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad. There are currently 39 Mexican nationals on death row in California. Twenty-two of those do not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply. Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case	

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			circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death. [1] See, e.g., Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261. * * * Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States. See comments on specific provisions below.	See responses to specific comments below.
9.	Habeas Corpus Resource Center (HCRC) by Michael Hersek Interim Executive Director San Francisco, California	NI	The below comments to SP 18-12 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, with the exception to comments on two provisions, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments,	

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	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			found at pages 12-13 of the Invitation to Comment. See comments on specific provisions below.	 See responses to specific comments below.
10.	Marylou Hillberg Attorney at Law Sebastopol, California	N	As counsel of record on two capital habeas appointments (S221802 & S211187), as well as unappointed associate counsel for nearly ten years in another, (S168103), my evaluation of the proposed qualifications is that they will lead to grossly under-qualified counsel. Moreover, given the one year time line to file under Prop 66, there simply won't be enough time to climb the steep learning curve required to adequately investigate and prepare a constitutionally adequate habeas petition. See comments on specific provisions below.	 See responses to specific comments below.
11.	Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	NI	My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring in the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates. Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and	

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			vital to the clients we represent that California appoint qualified counsel to represent these persons. See comments on specific provisions below.	See responses to specific comments below.
12.	Office of the State Public Defender (OSPD) by Mary McComb State Public Defender Oakland, California	NI	The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience See comments on specific provisions below.	See responses to specific comments below.
13.	Superior Court of Los Angeles County	A	The Los Angeles Superior Court supports this proposal as written. These comments are from the Los Angeles Superior Court and not from any one person in particular.	The working group notes the commenter's support for these rules.
14.	Kristin Traicoff Attorney Law Office of Kristin Traicoff Sacramento, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Defense Counsel Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	An Assisting Entity or Counsel This concern may not be important in the short run, so long as the Habeas Corpus Resource Center [HCRC] continues to accept representation of the person in the Superior Court under proposed Rule 8.654(e)(2), that requires the court first to request that HCRC accept such representation. However, HCRC's resources are finite, and at some point appointments will be made under subdivision (e)(3), which states: "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel." The potential problem relates to the qualifications for "an assisting entity or counsel." Proposed Rules 8.605 and 8.652 establish qualifications for counsel in death penalty appeals and death penalty–related habeas corpus proceedings, respectively. However, no rule establishes qualifications for "an *assisting* entity or counsel." (Emphasis added.) In contrast, proposed Rule 8.601(5) merely defines "assisting counsel or entity" as "an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance," and includes only a non-exclusive list of potential assisting entities. When the time arrives that	The working group agrees that additional clarification would be helpful and has modified the definition of assisting counsel in proposed rule 8.601(5) to clarify that "[a]n assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate." At a minimum, assisting counsel in an automatic appeal must meet the qualifications for appointed appellate counsel, including the non-alternative case experience requirements, and in a habeas corpus proceeding must have filed a death penalty–related habeas corpus petition in a California state court. Aside from this clarification, the working group declined to modify the proposed rule to include additional qualifications for assisting counsel at this time. Under rule 10.22, non-minor substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Courts and justice partners require time to implement these and other Proposition 66–related rules before they go into effect on April 25, 2019. Therefore, the working group recommends that the question of whether additional qualifications should be developed be

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
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	Superior Court judges are making appointments under proposed Rule 8.654(e)(3), the court would designate the assisting entity or counsel without further guidance or limitation as to what or who that assisting entity or counsel might be. For these reasons, CADC respectfully suggests that the Working Group should consider further definition or qualification of "an assisting entity or counsel," or should consider limiting the universe of such counsel and entities.	considered by the appropriate Judicial Council advisory body at a later time. With respect to the universe of assisting entities, the working group declined to limit the definition to only those entities currently identified in proposed rule 8.601(5). While local or regional assisting entities do not currently exist, the working group concluded that the definition should allow for the possible formation of such entities in the future, as Proposition 66 is implemented and death penalty–related habeas corpus proceedings, including counsel appointments, are increasingly conducted in the superior courts. The working group appreciates that designating an assisting entity or counsel, as required in proposed rule 4.561(e)(2), included in a separate report, will be an entirely new responsibility for the superior courts. Additionally, as several commenters noted, capital case assistance involves different skills and responsibilities from direct representation. As such, practical guidance outside of formal rules may be particularly helpful. To that end, members of the working group have offered to prepare a list of persons who have been designated as assisting counsel in death penalty–related habeas corpus proceedings in the last 10 years that can be provided to superior courts. The working group also recommends that the Center for Judicial Education and Research help make available to the superior courts education (e.g., through trainings or informational materials) on what

Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		specifically death penalty–related habeas corpus case assistance entails and requires.
California Appellate Project–San Francisco (CAP-SF) By Joseph Schlesinger Executive Director	More than thirty-five years ago, the California Supreme Court voiced concern about the quality of representation in death penalty cases by reaching out to the State Bar for assistance. In response, to advance the quality of lawyering in death judgment cases, the State Bar established the California Appellate Project-San Francisco (CAP-SF). CAP-SF's mission was, and still is, to facilitate competent representation in indigent capital appeal and habeas cases. Proposition 66's mandate to significantly shorten the time in which to file a capital habeas petition - while simultaneously imposing new restrictions on the availability of second or successive applications for relief -- heightens rather than diminishes the concern for quality representation in death judgment cases. The new rules will create many changes and challenges to be met by experienced capital litigators as well as attorneys with no capital experience. Now more than ever, capital habeas attorneys will need assistance by experienced capital attorneys in order to meet the inherent challenges of capital representation coupled with the additional hurdles imposed by Proposition 66. CAP-SF is the entity best able to provide that assistance. **Proposed Rule 8.601(5): Definitions** **8.601(5): Definition of "Assisting Counsel or Entity"**	The working group agrees that CAP-SF has the greatest experience and expertise of any entity in providing assistance in capital cases in California state courts. However, the working group declined to remove all entities other than CAP-SF from the definition of potential assisting entities. The California Rules of Court have, for the last twenty years, also identified HCRC and OSPD for possible designation as assisting entities. The main difference between existing rule 8.605(c)(5) and proposed new rule 8.601(5), in defining assisting entities, is that the proposed rule would add "a Court of Appeal district appellate project" to the list of entities that may be designated. The working group recommends adding these projects to the list because Proposition 66 created a statutory right to appeal a superior court's denial of a death penalty–related habeas corpus petition. Because such appeals are newly authorized by Proposition 66, no entity has experience assisting counsel with such appeals. Additionally, a rule of court that requires a superior court to utilize the services of CAP-SF would effectively mandate the court's use of a specific private contractor. CAP-SF is not a governmental entity. It is a non-profit corporation that provides services to the Supreme Court in connection with capital cases pursuant to a contract.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	"Assisting counsel or entity" means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project in San Francisco, and a Court of Appeal district appellate project." CAP-SF objects to the definition of "Assisting counsel or entity" in the proposed rules. The definition provided fails to appreciate the difference between providing capital direct representation and capital case assistance. It suggests that the Habeas Corpus Resource Center (HCRC), a capital direct representation agency, could serve as assisting counsel. Although HCRC has considerable expertise providing direct representation of habeas petitioners and makes significant contributions to training appointed counsel, it has virtually no experience serving as an assisting entity. Assistance work is highly specialized and although the skill set overlaps with direct representation, it requires knowledge and experience all its own. Moreover, assuming HCRC developed the skills and devoted its staff to assistance work, the end result would be a reduction in the number of direct representation cases it could handle. This would not promote the goal of Proposition 66 to increase the number of state habeas appointments.	Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity. This is doubly true where it remains unclear who will fund these services – the counties or the state.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	Similarly, the Office of the State Public Defender's expertise is in direct representation in direct appeal cases, and not serving as an assisting entity to appointed counsel. The Court of Appeal district appellate (DCA) projects are even less qualified to provide capital case assistance. Their expertise and focus is in providing assistance in non-capital cases only, and almost exclusively on direct appeals. They have very limited familiarity with capital or habeas corpus practice and are not staffed to provide assistance in capital cases. CAP-SF is the only qualified and fully staffed entity in California capable of offering full-time capital assistance to appointed counsel. CAP-SF has been assisting appointed counsel for thirty-five years and has developed contacts and resources in the capital defense community that foster its ability to do so effectively. CAP-SF should continue to be defined as the presumptive assisting entity in these cases and the rules should specifically state as much in order to avoid confusion and the risk of unqualified assistance. For example, the rule could state *"assistance from CAP-SF or, in the event of a conflict, other assisting counsel that the court may designate."* * * * **8.652(b) General qualifications** CAP-SF recommends a modification to proposed Rule	With respect to proposed rule 8.652(b), regarding cooperation with an assisting entity, the working group declined to modify this provision, which is

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	8.652(b). These proposed rules fail to require that appointed counsel cooperate with the assisting entity, on direct appeal and habeas corpus, respectively. Currently the last sentence of these rules reads "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." The last sentence should be modified to read that appointed counsel "*is required to cooperate* with an assisting counsel or entity that the court designates." The modification is necessary because an experienced assisting entity or counsel helps appointed counsel provide quality representation to indigent appellants/petitioners. An assisting counsel or entity cannot adequately assist appointed counsel who will not fully cooperate with it. The California Supreme Court addresses this issue by expressly requiring appointed counsel in capital cases to cooperate with the assisting counsel or entity. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, section 5 "Progress Payments.") In the Supreme Court, appointed counsel may only receive fixed fee payments after they submit to the assisting counsel or entity the type of working documents *(e.g.* transcript notes, issues list, investigation plan) that enables the assisting counsel to offer more meaningful assistance to appointed counsel. Absent similar requirements for counsel appointed by the superior court the proposed rules should, minimally, include language that requires appointed counsel to work with the assisting entity.	identical to the existing provision in current rule 8.605(b). The working group concluded that a willingness to cooperate is sufficient for purposes of determining whether an attorney meets the minimum qualifications for appointment, and declined to expressly require cooperation in advance of appointment. This does not foreclose individual courts, the regional committees, or the relevant governmental funding source from adopting policies requiring appointed counsel to submit certain working documents to the assisting entity.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
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Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The qualifications rule retains the language of present Rule 8.605(b): "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." This is not a qualification and does not belong in this rule. A rule governing the relationship between appointed counsel and the assisting entity is in order, though, and it requires balance and a recognition of counsel's role as the decision- maker.	The working group declined to delete this provision requiring a willingness to cooperate with a designated assisting counsel or entity from the proposed qualification rules. Proposed rule 4.561(e)(2), in the companion report regarding appointment of counsel in death penalty–related habeas corpus proceedings in the superior courts, generally requires that a court designate an assisting entity or counsel. Given this recommendation, the working group concluded it was important to retain the provision requiring counsel to be "willing to cooperate" with an assisting entity or counsel.
Habeas Corpus Resource Center By Michael Hersek Interim Executive Director San Francisco, California	Proposed Rule 8.601(5) suggests that HCRC may be designated by an appointing court as the "assisting counsel or entity" to "provide appointed counsel with consultation and resource assistance." HCRC's ability to serve as an assisting entity, however, is limited by Government Code section 68661. Specifically, Proposition 66 amended subdivision (g) of section 68661 to limit HCRC to providing "legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law." Proposition 66 struck language from the original statute that permitted HCRC to provide "any other assistance" to appointed counsel "to the extent [the assistance was] not otherwise available." By limiting HCRC's functional mandate in subdivision (g), Proposition 66 has created uncertainty about the level of "consultation and resource assistance" HCRC could provide directly to appointed counsel when designated as an	To the extent the commenter suggests that HCRC should be eliminated from the definition of "assisting counsel or entity," the working group declines to make this change. As noted by the commenter, Government Code section 68661, as modified by Proposition 66, continues to specify that HCRC has the power and duty "[t]o provide legal or other advice to appointed counsel . . . ." (*Id*., subd. (g)). Section 68661 also provides that HCRC has the power and duty "[t]o provide assistance and case progress monitoring as needed." (*Id*., subd. (j).)

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	assisting entity.	
Marylou Hillberg Attorney at Law Sebastopol, California	The other comment I have is that I greatly benefited from the assistance of an experienced, and extremely capable lawyer when I was an unappointed associate counsel with him in a case for nearly a decade. Then when I accepted my own capital habeas appointments, I learned just how overwhelming and difficult this work is for a sole practitioner. I could not have done an adequate job in these petitions, within the three years of my appointments, without the assistance of CAP.	The working group appreciates this input and notes that the separately proposed rules on appointment of habeas corpus counsel retain the requirement that an assisting counsel or entity be designated.

Rule 8.605(c)(4): Training—automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
California Public Defenders Association by Robin Lipetzky President Sacramento, California	The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case experience should not satisfy any portion of the training requirement. * * * Rule 8.605(c)(4)(B): for the reasons explained above, we urge the deletion of this subdivision.	The working group agrees that prior capital case experience should not automatically satisfy the training requirement. The working group concluded that permitting the Supreme Court, which has decades of experience applying the training qualifications in current rule 8.605, to continue exercising its discretion in this area strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. The working group therefore declined to delete this provision.

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Rule 8.605(c)(4): Training—automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**

Rules 8.605(c)(2), (c)(5) and 8.652(c)(2), (c)(5): Separate requirements for skills and experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**3. Quantitative measures of attorney experience are of limited value** While experience with a particular number of cases has a place in measuring an attorney's qualifications, the Council should insure that those implementing these rules not rely too heavily on this factor. A raw count of cases makes a lawyer who churns cases, and works them up only superficially, appear to be better qualified than a lawyer who better serves her clients by litigating cases more intensely and as a result can take fewer of them. The first lawyer will meet the numerical experience standard sooner than the second, but the second one is better qualified. (See Stetler & Wendel, *supra*, 41 Hofstra L. Rev. at pp. 682-684.) The Council can take a lesson from the drafters of the ABA Guidelines: "In the original [1989] edition, [Guideline 5.1] emphasized quantitative measures of attorney experience – such as years of litigation experience and number of jury trials – as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised [2003] edition, the inquiry focuses on counsel's ability to provide high quality legal representation. … [¶] [Q]uantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with	The working group appreciates this input and agrees that having experience is not synonymous with having skills. As the commenter notes, the case experience requirements, which specify types and numbers of cases, are different and articulated separately from the skills requirements, which require review of writing samples, recommendations, and evaluations. The working group concluded that additional clarifying language was not necessary.

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Rules 8.605(c)(2), (c)(5) and 8.652(c)(2), (c)(5): Separate requirements for skills and experience		
Commenter	**Comment**	**Proposed Working Group Response**
	substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster." (ABA Guidelines, Commentary to § 5.1, 31 Hofstra L. Rev. at pp. 962, 964.) Making perhaps the same point a different way, the Rules of Professional Conduct define "competence in any legal service" to include both "learning and skill" and, separately, the "mental, emotional, and physical ability reasonably necessary." (Rule 1.1(b) [effective November 1, 2018]; accord, Rule 3-110(B) [effective until November 1, 2018] [also including "diligence" within the definition of competence].) The mental and emotional ability required for post-conviction capital litigation is extraordinary. Sadly, experience does not always insure that an attorney will have that ability. I would suggest an explicit statement in the text of the rules (or, at an absolute minimum, in the commentary and in whatever training materials are sent to regional committees and superior courts) that having the experience set forth in Rules 8.605(c)(2) and 8.652(c)(2) is ***not*** prima facie evidence that the individual attorney possesses the skills required by Rules 8.605(c)(5) and 8.652(c)(5). The experience and skills requirements should each be addressed separately by those implementing the rules, just as they are set out separately in the rules.	

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

Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience *alone*.	The working group concluded that the suggested amendment could unduly discourage persons with prosecutorial experience from applying for appointment under the alternative qualifications provision. The proposed rule, which is substantially identical to the existing language in current rule 8.605(f), maintains the Supreme Court's ability to exercise its discretion, based on its lengthy experience making appointments in capital appeals, to determine whether past prosecutorial, civil, or academic experience, may satisfy the alternative experience qualifications for any given case. The comment regarding proposed rule 8.652(d)(1), is addressed in the chart below at pages 105–106.
California Public Defenders Association by Robin Lipetzky President Sacramento, California	Rule 8.605(d)(3): as explained above, we recommend increasing the required training hours from 18 to 20, and death-penalty specific habeas training from nine to ten hours, so that the first sentence reads, "Within two years before appointment, the attorney has completed at least 20 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty appellate or habeas corpus proceedings."	The working group concluded that these current requirements of 18 and 9 hours, which have been in place since 1998, are not too low, and strike the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. The working group declined to increase the required training hours in this provision.
Kristin Traicoff Attorney Law Office of Kristin Traicoff Sacramento, California	1) Proposed rules 8.605(d) and 8.652(d)(1) provide for alternative qualifications for appointment as lead counsel in capital direct appeals and habeas corpus proceedings, respectively, allowing for appointment if these qualifications	The superior courts, Courts of Appeal, and the Supreme Court all share original jurisdiction over habeas corpus petitions. In contrast, direct appeals in capital cases are heard only by the Supreme Court. "The committee" in

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Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
	are found to have been met. As a preliminary matter, it appears 8.605(d) vests solely in the Supreme Court authority to make this determination and 8.652(d)(1) allows both the Supreme Court and "the committee" to make this determination. It does not appear that there is any basis to give the committee this authority with regards to habeas appointments, but not appellate appointments, and thus I suggest 8.605(d) also include language that gives the committee this authority. 2) Proposed rules 8.605(g)(2) addresses the qualifications for assignment as lead counsel among the attorneys at OSPD. I am perplexed that this rule requires that, should the attorney be qualified under alternative qualifications (proposed rule 8.605(d)), the Supreme Court must remain the entity vested with the authority to determine if the person qualifies as lead counsel. It appears sensible that OSPD could be vested with this authority, given the other statutory and other mechanisms that exist to ensure that that agency--regardless of which attorney is assigned to represent a particular client--is, as a whole, providing effective representation to all clients whom OSPD has been appointed to represent. This is particularly true since and 8.652(h)(2) grants HCRC the authority to determine if an attorney qualifies as lead counsel under 8.652(d); again, the disparate treatment of these two agencies is perplexing and does not seem to be grounded in any material difference between the management capacities of the two agencies. Moreover, as a practical matter, it seems quite unlikely that a line attorney at OSPD would feel comfortable approaching the Supreme Court (or committee, should the rule be amended to grant the committee this authority) to essentially ask for greater	proposed rule 8.652(d)(1) refers to a regional committee created to assist superior courts in recruiting and screening counsel, and thus is inapplicable to direct appeals, in which only the Supreme Court makes appointments. Proposed rule 8.605(g)(2) retains the existing language in current rule 8.605(j)(2), which provides that the Supreme Court, and not the designated entity (i.e., OSPD or CAP-SF) is to determine whether an attorney meets the alternative qualifications for lead counsel in an automatic appeal. Unlike the responsibility for vetting counsel for habeas counsel appointments, which under separately proposed rules would be shared between multiple entities, the responsibility for vetting counsel for automatic appeals remains solely with the Supreme Court. As a result, the working group concluded that it remains appropriate for the Supreme Court alone to continue to determine whether counsel—including designated entity counsel—meet alternative qualifications.

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Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
	work responsibilities at their job. As someone who worked at OSPD, doing so would have made me feel profoundly uncomfortable, as it would have felt as though I was essentially skipping over the internal management structure of the agency to essentially ask for a promotion form the Court. This simply seems unrealistic and I would be surprised if many OSPD attorneys chose to avail themselves of this option.	

Rule 8.605(f): Joint appellate and habeas corpus appointment		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the State Public Defender (OSPD) by Mary McComb State Public Defender Oakland, California	2. Proposed rule 8.605(f) seems to be outdated and unnecessary. It appears to contemplate a joint appellate and habeas appointment in the California Supreme Court. Under the new procedures, it is unclear whether this situation would ever occur.	The working group agrees that this provision may prove to be unnecessary, but retained it in an abundance of caution. Thus, the working group declined to delete this provision at this time.

Rule 8.652(c)(1): Years of legal experience		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The proposal contains one, and only one, defensible increase in restriction. The present California standard for capital habeas attorneys is four years admission to the bar (see present Rule 8.605(e)(1)) while the corresponding federal standard is five years. (See 18 U.S.C. § 3599, subd. (c).) An increase to meet the federal standard does improve California's chance of qualifying for Chapter 154, if only marginally, with little impact on the available pool, and it is warranted. (See Proposed	The working group notes the commenter's support for proposed rule 8.652(c)(1).

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

Rule 8.652(c)(1): Years of legal experience		
Commenter	**Comment**	**Proposed Working Group Response**
	Rule 8.652(c)(1).)	

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**2. Appellate experience on behalf of the prosecution can appropriately be counted, but no credit should be given for habeas experience on behalf of the prosecution** I learned the appellate lawyer's craft representing the prosecution in responding to appeals from felony convictions. That experience, plus a small number of non-capital criminal appeals on the defense side, was an appropriate background when I began representing death-sentenced clients on appeal. I have no problem with recognizing appellate experience as a prosecutor as a permissible part of the background for a lawyer applying to represent death-sentenced clients on appeal, so long as the lawyer also has significant experience representing criminal defendants on appeal, and meets all the other qualifications. (Rule 8.605(c)(2).) However, I strongly recommend that experience responding to habeas corpus petitions on behalf of the prosecution not be given any weight in assessing a lawyer's qualifications to represent capital habeas petitioners. Rule 8.652(c)(2) should be modified accordingly. Most California habeas petitions, capital and otherwise, are resolved based on the factual showing made in the petition. Under California's informal briefing process and prima facie	The working group declined to modify the case experience provision to exclude habeas corpus case experience on behalf of respondent from satisfying any part of the combined case experience. Proposed rule 8.652(c)(2) would already require experience as counsel of record for the petitioner in one or more habeas corpus proceedings. The working group concluded that permitting additional habeas corpus experience on behalf of the prosecution to satisfy the overall case experience requirements strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	case standard, factual investigation by the prosecution in preparing to respond to a habeas petition is not only unnecessary, it is inappropriate. The prosecution's function in responding to a habeas petition is more akin to the appellate practice: briefing the law on a closed record. That experience does not meaningfully prepare a lawyer for the intensive factual investigation required to prepare a capital habeas petition on behalf of the petitioner.	
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Attorney Qualifications Considering Proposition 66's Expedited Timeframes** Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial: • prior knowledge of state and federal habeas corpus procedures, including the implications of the Anti-terrorism and Effective Death Penalty Act (AEDPA); • experience conducting evidentiary hearings; • knowledge of current capital trial standards of practice; • experience employing current standards in forensics and mental health; • complex case management experience; and, • effective use of expert witnesses.	The working group appreciates this input regarding knowledge of state and federal habeas corpus procedures, and has retained the provision in proposed rule 8.652(c)(3), requiring familiarity with with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings. The working group appreciates this input regarding evidentiary hearings, and has retained the provision in proposed rule 8.652(e) requiring that, if an evidentiary hearing is ordered, counsel must have such experience or associate with an attorney who does. The bullet points regarding capital trial standards of practice, standards in forensics and mental health, complex case management, and expert witnesses are addressed in the chart below, regarding additional skills and areas of experience, at page 87.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	Experience Necessary for Appointment as Habeas Corpus Counsel The expedited timeframes of Proposition 66 necessitate a team approach to capital habeas corpus defense. A capital habeas corpus team must utilize at least the following: • At least one team member must have capital habeas corpus experience. • At least one team member must have substantial capital trial experience. • At least one team member must have substantial experience in forensic sciences. • At least one team member must have substantial experience with mitigation and mental health. • Prosecution experience alone is not sufficient. • Attorneys should have at least 5 years of murder trial experience with demonstrated skills in research and writing and forensics. • A petition for a writ of habeas corpus is typically hundreds of pages in length with many dozens of exhibits. Experience with other types of writs is not comparable or sufficient.	The current appointment rules, as well as those proposed in the separate report addressing death penalty–related habeas corpus appointments, do not require the court to appoint more than one attorney in a death penalty–related habeas corpus case. As a result, the draft rules propose qualifications that must be met by individual attorneys, and not a team of attorneys. The working group concluded that requiring the combined case experience to include prior death penalty–related habeas corpus experience, substantial capital trial experience, or murder trial experience, would unduly restrict the pool of attorneys eligible to accept appointments. In response to the comment that experience with writs other than habeas corpus writs is not comparable or sufficient, the working group appreciates this input and agrees that other writs should not be part of the combined case experience. Proposed rule 8.652(c)(2) would limit qualifying cases to completed appeals, habeas corpus proceedings, or jury trials in felony cases. In response to the comment that prosecution experience alone is not sufficient, the working group appreciates this input and notes that proposed rule 8.652(c)(2)(B) and (C) requires service as counsel of record for petitioner in at least two habeas corpus proceedings.

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Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		The bullet pointed comments that counsel must have substantial experience in forensic sciences, with mitigation, and with mental health, are addressed in the chart below, regarding additional skills and areas of experience, at page 87.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	**Proposed Rule 8.652 (c): Qualifications for appointed habeas corpus counsel** **8.652(c)(2): Case experience** The case experience identified in (A), (B), or (C). Read in combination with the definitions in proposed Rule 8.601, the committee's intent in subsections 2(A) and 2(B) seems fairly clear, but there is nonetheless ambiguity in wording regarding who counsel must have represented that should be resolved. It is recommended that in 2(A) the word person be changed to petitioner and in 2(B)(i) that the word petitioner be added. The suggested modification results in sections 2(A) and (B)(i) reading as follows: Subsection 2(A): "Service as counsel of record for a ~~person~~ *petitioner* in a death penalty-related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court." Subsection (B)(i):	The working group has made the suggested clarification to rule 8.652(c)(2)(A).

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	"Supervised counsel *for a* petitioner in two death penalty-related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty-related habeas corpus proceeding will apply toward this qualification only if lead or." Subsection 2(C): "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including , including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing." The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation. Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health	The working group concluded that this change to rule 8.652(c)(2)(B)(i) was not necessary. The definitions in proposed rule 8.601 already establish that "supervised counsel" is counsel for a petitioner.

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	issues, intellectual disability and social history development. Additionally, as written this proposed rule might allow counsel to seek and attain qualification where (s)he has litigated a serious felony habeas corpus petition that was limited to a single narrow legal issue. This does not comport with the purpose of the rule. Specifically, the language of Section (2)(C) requires experience in "at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed." To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows: "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases. In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed.* *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification; and familiarity with death*	The working group agrees that prior habeas corpus experience on behalf of a petitioner is critical, particularly now that counsel generally will have one year in which to file the initial death penalty–related habeas corpus petition. Accordingly, proposed rule 8.652(c)(2)(B) and (C) would require that counsel have filed at least two habeas corpus petitions involving serious felonies. This departs from current rule 8.605(e)(2)(A), which requires experience in at least three jury trials *or* habeas corpus proceedings involving serious felonies. The working group declined to also require that at least four of the eight cases involve serious felonies, and that the two habeas corpus petitions involve murder convictions. The working group concluded that further increasing the combined case experience requirement could unduly restrict an already limited pool of available and qualified attorneys, particularly with respect to the murder convictions. A person seeking to collaterally attack a conviction generally is not entitled to counsel until he or she filed detailed factual allegations stating a prima facie case and sufficient to satisfy a court that a

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case."	hearing is required. As a result, the pool of available and qualified counsel who have filed one or more habeas corpus petitions collaterally attacking murder convictions is likely limited. The comment's suggested modification concerning demonstrated proficiency and service as supervised counsel is addressed in the chart below, regarding additional skills and areas of experience, at page 88.
California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	• The Committee agrees that representation of either party—the prosecution or the defense—in felony appeals, habeas corpus proceedings, or jury trials should satisfy some case requirements for appointment in death penalty–related habeas corpus proceedings. However, we suggest that counsel should have experience representing the defendant/appellant/petitioner in at least half of the proceedings, including at least two qualifying habeas proceedings. • For attorneys who do not have death penalty–related experience, the requirements should be increased, either by increasing the number of felony habeas cases to 5 or more, or by requiring that qualifying habeas cases involve post-conviction investigation.	The working group declined to modify proposed rule 8.652(c)(2)(C) to require that half of the case experience be defense-side experience. (Proposed rule 8.652(c)(2)(B) already requires at least four prior cases on behalf of petitioner: two cases as supervised counsel in a capital case and two cases as counsel of record in petitions involving serious felonies.) The working group also declined to increase the number of required habeas corpus proceedings to at least five, or to require that any qualifying habeas corpus petitions involve post-conviction investigation. The working group agrees that representing a petitioner involves different skills and substantive knowledge than does representing the State. The working group also agrees that prior habeas corpus experience and investigation skills are necessary. However, the working group is mindful of the need to expand the pool of qualified attorneys, and encourage interested attorneys—including those with prosecution experience—to apply

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		for appointment. The existing qualifications rule does not specifically require any habeas corpus experience or post-conviction investigation experience. Requiring more habeas corpus experience than the proposed two petitions could unduly restrict the pool of attorneys eligible to accept appointments. Ultimately, the working group concluded that requiring service as counsel for petitioner in at least two habeas corpus petitions involving serious felonies, but otherwise permitting the remaining case experience requirements to be on behalf of either party, strikes the appropriate balance between these competing interests. For investigation experience, rather than modify the quantitative habeas corpus experience requirement to include post-conviction investigation, the working group concluded that retaining the qualitative provisions requiring proficiency in investigation would be sufficient. Proposed rule 8.652 would require that counsel "demonstrate proficiency in investigation" and have the "knowledge[] and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death."
California Public Defenders Association by Robin Lipetzky President Sacramento, California	The Judicial Council asked, "[w]hether permitting any combination of case experience-instead of set numbers of each type of case-is appropriate, because an attorney could then qualify for appointment without having completed any felony appeals or any jury trials." (Invitation, page 8.) We agree with the concern expressed by the Judicial Council, and object to	The working group declined to require a set number of each type of case experience. The working group concluded that such category-specific requirements could discourage some capable attorneys from applying. For example, an attorney with no appellate experience may have significant habeas corpus experience sufficient

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	permitting any combination of case experience instead of set numbers. The specific requirements for each type of case are important. Each represents an important component that is necessary for competent representation in a capital habeas corpus proceeding.	to demonstrate the requisite proficiency in investigation, issue identification, and writing. The working group concluded that using a combined case experience requirement that includes two habeas corpus petitions affords both counsel and entities responsible for vetting and appointing counsel some flexibility while still achieving competent representation.
	With respect to "[w]hether counsel should be required to have handled a murder case and, if so, in what context (e.g., trial, appeal, habeas corpus proceeding), or whether it is sufficient that the past cases involve serious felonies" (page 8), we submit that counsel should be required to have handled a murder case as lead counsel at trial or on appeal, or as second (or lead) on a completed habeas petition. We recognize that experience in habeas corpus litigation is essential. However, previous representation on a murder case is critical because of the significant differences between murder charges and any other serious felony. Further, if counsel has not already represented an individual convicted of murder in a habeas proceeding, then they should have at least been lead counsel in a murder trial or a direct appeal from a murder conviction.	With respect to the suggested murder requirement, as discussed in the response to the comments of CAP-SF above, the working group has concerns that the pool of attorneys who have prior experience filing habeas corpus petitions in murder cases may be quite limited. While the pool of attorneys who have represented appellants in direct appeals from murder convictions or defendants charged with murder in a jury trial likely is larger, including a murder experience requirement in addition to the proposed habeas corpus experience requirement could unduly restrict and further shrink an already limited pool of available attorneys who may be capable of providing competent representation.
	The Council considers whether prior service as counsel for the prosecution should satisfy the experiential qualifications. (Page 8.) We object to allowing service as counsel for the prosecution to satisfy any part of the requirements. The rules already allow for an alternative basis for qualification that does not require any prior defense experience. Thus, in the extremely rare (if ever) circumstance where an applicant must rely on	The working group declined to exclude prosecution experience from satisfying any part of the combined case experience. The suggested modification could discourage former prosecutors who might otherwise be interested and qualified from seeking appointment. Also, proposed rule 8.652(c)(2)(B) and (C) already would require service as counsel for petitioner in two habeas corpus proceedings involving serious felonies. The

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	prosecutorial experience in order to meet the minimum qualifications for appointment as capital habeas counsel, the existing rules allow for consideration of a potentially exceptional applicant. We object to treating service as habeas counsel from convictions on serious felonies in two separate cases as a satisfactory substitute for having never represented a condemned prisoner on a habeas petition from a death sentence. (Page 8.) We believe that a lawyer who has never filed a habeas petition from a death sentence should have filed more than two prior habeas petitions from serious felony convictions in order to be appointed on a capital habeas case. The timeline in these cases will be so compressed that if the lawyer is not well-versed in habeas procedure, he or she will not be able to meet the deadlines. Filing two habeas petitions from robbery or residential burglary convictions pales in contrast to the demands of filing a habeas petition from a death sentence. The consequences of procedural error or failing to raise all potentially meritorious issues can be catastrophic because of limitations on successor petitions. The requirement should be five habeas petitions with a minimum of three from violent felony convictions or two from murder convictions. * * * Our additional comments to specific Rules are as follows: * * * Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C): for the reasons	working group concluded that permitting additional experience on behalf of the prosecution to satisfy the overall case experience requirements strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. With respect to the suggestion regarding increased habeas corpus experience, please see the responses to the comments of CAP-SF above, regarding requiring habeas corpus experience in murder cases, and of CLA above, regarding increasing the number of habeas corpus petitions.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	explained above, replace "for either party" with "as defense counsel". In addition, change "including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed" to "including as counsel of record for a petitioner in at least three habeas corpus proceedings, each involving a violent felony in which the petition has been filed, or at least two habeas corpus proceedings involving murder convictions in which the petition has been filed."	
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	One essential element of the Proposition 66 reform for broadening the pool is to require prosecution experience to fully count. Relegating highly experienced former prosecutors to the "back of the bus" of alternative qualification was uncalled for from the very beginning. It is highly doubtful whether the Judicial Council has authority under Government Code section 68665 to require defense-side experience at all. If we assume for the sake of argument that defense-side experience can be required in some degree, the requirement that counsel's experience include two habeas corpus cases *for the petitioner* in Proposed Rule 8.652(c)(2)(B)(ii) and (C) seems designed to insure that experienced attorneys leaving prosecuting offices will not qualify for some time, directly contrary to the intent of the Proposition 66 reform. An experienced attorney can learn the ropes of a procedure from either side. This restriction must be deleted.	The working group's view is that adoption of the proposed rule is well within the scope of the Judicial Council's authority because it is not inconsistent with statute. Government Code section 68665, as amended by Proposition 66, directs that "[e]xperience requirements shall not be limited to defense experience." The proposed rule is not limited to defense experience but instead would provide that, aside from the two petitions that are required to be filed on behalf of petitioner, service as counsel "for either party" would satisfy the combined case experience. The working group declined to omit the proposed requirement that qualifying case experience include filing habeas corpus petitions. Preparing a habeas corpus petition involves not just procedural knowledge, but different skills and substantive knowledge than responding to a petition. Due in part to the newly created one-year deadline for filing an initial death penalty–related habeas corpus petition, the working group agreed

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		that death penalty–related habeas corpus counsel will have little time to learn on the job, and thus it is important for counsel to have prior experience on behalf of a habeas corpus petitioner. Some working group members are of the view that counsel ideally should have filed more than two habeas corpus petitions before accepting an appointment in a death penalty–related habeas corpus case. However, the working group is also mindful of the need to expand the pool of qualified attorneys, and encourage attorneys—including those with prosecution experience—to apply for appointment. The working group ultimately concluded that serving as counsel of record for petitioner in at least two habeas corpus petitions involving serious felonies strikes the appropriate balance. In the experience of working group members, this requirement is unlikely to unduly restrict the eligible pool of counsel because attorneys with no prior experience filing a habeas corpus petition generally do not want their first attempt to be in a capital case. Additionally, the working group retained the alternative experience provision, which would not require prior habeas corpus experience.
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	• *Should service as counsel on behalf of any party satisfy the requirement for prior case experience, or should some or all of the experience be as counsel for the defendant/appellant/habeas corpus petitioner?* The proposed rules do not and should not allow service as counsel on behalf of any party to satisfy the requirement for	The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(2)(B)

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	prior case experience. Representing petitioners in capital habeas corpus proceedings is unique and requires a high degree of skill and technical proficiency, especially regarding the identification, development, and presentation of mitigation evidence. In its 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the American Bar Association emphasized that "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." 31 Hofstra L. Rev. 913, 923 (2002). Just as the defense of ordinary criminal cases is different from capital-case defense, so too is the prosecution of criminal cases – even death penalty cases. Prosecution experience alone should not satisfy the requirement of prior case experience. * * * •*What minimum combination of past case experience should counsel have before being eligible for appointment in a death penalty-related habeas corpus proceeding?* • *Should counsel be required to have experience in habeas corpus proceedings, appeals, jury trials, and/or other writ proceedings?* • *Should counsel seeking appointment in a death penalty-related habeas corpus proceeding have prior case experience relating to a murder charge or conviction?* As discussed above with respect to training requirements,	and (C), requiring service as counsel of record for petitioner in at least two habeas corpus proceedings.

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	representation of petitioners in capital habeas corpus proceedings presents unique challenges not inherent in other areas of criminal practice. Non-capital criminal cases – even murder cases – do not involve a penalty phase, and therefore experience in non-capital cases will not prepare an attorney for that critical aspect of capital habeas corpus defense representation. Moreover, representation of defendants in capital in murder trials often does not involve extensive briefing and the understanding of labyrinthine state and federal procedural rules and standards of review required by counsel representing petitioners in capital habeas proceedings. Appellate cases – even in the capital context – do not involve development of extra-record facts, and therefore experience on criminal appeals, even when capital, will not prepare an attorney to do that work in a capital habeas proceeding. Representation of the state in criminal cases – even in capital cases – does not require mitigation investigation, nor does it present issues of client relations present in the representation of criminal defendants, and specifically death row inmates. To better approximate the skills required for adequate representation of petitioners in capital habeas corpus proceedings, proposed rule 8.652(c)(2)(C) should require habeas corpus case experience in *at least* four serious felony cases, including at least two habeas corpus proceedings involving a murder conviction in which the petition has been filed. In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in	Please see the response to the comments of CAP-SF above, regarding habeas corpus case experience. The suggested modification concerning demonstrated proficiency is addressed in the chart below, regarding additional skills and areas of experience, at page 92.

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Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.	
Marylou Hillberg Attorney at Law Sebastopol, California	One of the most glaring omissions is that these rules do not even require prior experience in a murder case. That is extremely perplexing to me as most of the habeas work I have done, and what I have read in other cases, involves the impact of mental states and defenses on criminal behaviors. As a criminal defense attorney, one does not really begin to comprehend how the various forms of mental illness and disabilities affect the behaviors of our clients until we must apply them to defense in the varied degrees of homicide. I've handled more than seventy-five murder cases and can count on one hand (probably with fingers left over) how many of these cases were "who dun it"[s]. The issues I've encountered generally involved varied mental states as defenses to the crimes. Most other types of serious crimes, do not require this kind of analysis.	Please see the response to the comments of California Public Defenders Association above, regarding prior experience in a murder case.
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	We have a second concern regarding Proposed Rule 8.652(c)(2) and trial prosecutorial experience. This Rule accepts experience as prosecution trial counsel in habeas corpus appointments. Representing the State in a trial may or may not provide relevant defendant/petitioner habeas corpus experience. As the Council is aware, a trial prosecutor may have nothing to do in a habeas corpus proceeding. Once a petitioner files a petition for writ of habeas corpus in the	The working group agrees that a case in which counsel did no substantive work should not satisfy the minimum case experience requirements. The working group has revised the proposed rule to clarify that a case in which counsel did not file a brief in an appeal, or did not file a petition, informal response or return in a habeas corpus proceeding, does not satisfy any part of the combined case experience.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	superior court, the court may rule on the petition by issuing an order to show cause, denying the petition, or requesting an informal response. *See* Rule 4.551(a)(4). If the court summarily denies the petition, then the prosecutor never files anything. We suggest the Proposed Rule be modified to state, "A former state or county prosecutor's habeas corpus case experience qualifies under this rule only if the prosecutor filed an informal response or filed a return to an order to show cause." As with habeas corpus petitions in the superior court, habeas corpus petitions filed in the Court of Appeal or the Supreme Court may be resolved summarily, without involving the prosecutor. *See* Rule 8.385. We recommend a prosecutor's qualifying experience regarding habeas corpus petitions filed in **any** court be limited to those cases where the prosecutor filed an informal response or a return to an order to show cause.	

Rule 8.652(e): Attorneys without trial experience		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	Proposed Rule 8.652(e) directs an attorney appointed as habeas counsel, who does not have experience in trials or evidentiary hearings, must "associate with an attorney who has such experience" if an evidentiary hearing is ordered. This proposal raises questions: What mechanism or process does appointed counsel use to "associate" with counsel who has trial experience? Is the superior court that appointed habeas counsel required to appoint an associate counsel once it orders	The proposed rule is substantially identical to current rule 8.605(g), which also requires that counsel lacking such experience must "associate an attorney who has such experience" if an evidentiary hearing is ordered. In the experience of members of the working group, this situation occurs infrequently. Rather than add a requirement that a superior court formally appoint "associate counsel" in all such situations, the working group retained the existing language, which is silent on

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Rule 8.652(e): Attorneys without trial experience		
Commenter	**Comment**	**Proposed Working Group Response**
	an evidentiary hearing? Does associate counsel have to meet Proposed Rule 8.652(c)'s qualifications? Must associate counsel be appointed only from the panel? We recommend the rule require the superior court appoint associate counsel from the panel.	the particulars. This arguably leaves to the discretion of the court whether to appoint additional counsel, and leaves to the discretion of appointed counsel the details of exactly how to associate with more experienced counsel. Different cases may call for different decisions as to the necessity of additional appointed counsel. However, the working group agrees that where a court determines that additional counsel who has experience in trials or evidentiary hearings should be appointed, associate counsel must meet the qualifications of 8.652(c) or (d), and must be appointed from the panel or pursuant to a court's local rule. This already would be required for appointed counsel by the proposed rules in the separate report addressing the appointment of habeas corpus counsel in the superior courts.

Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**4. The rules should identify experience in settlement negotiations as a valuable asset for capital counsel** One means of making the substantial additional capital habeas caseload more manageable for the superior court will be to encourage settlement of capital habeas cases. The percentage that settle may not be as high as for other types of complex, document- intensive civil litigation, but if the attempt is made the settlement rate is likely to be significant. This will benefit	The working group declined to modify the proposed rules to include a reference to settlement negotiation experience and skills at this time. The proposed rules are intended to set forth minimum qualification standards that all death penalty–related habeas corpus counsel must meet. Additionally, the topic of recommending that superior courts encourage settlement of death penalty–related

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	the courts, the survivors of homicide victims, and the habeas petitioners. The regional committees should be encouraged to inquire whether applicants have experience in settlement negotiations, mediation, and other forms of alternative dispute resolution in either civil or criminal cases. Even though such experience should not be a requirement, it should be weighed in an applicant's favor. Reference to this subject in the rules and by the regional committee would send an appropriate signal to all concerned that settlement should be considered in every capital habeas case.	habeas corpus proceedings was not considered by the working group in developing the proposed rules prior to circulation for comment. There is not sufficient time for this working group to consider, develop, and circulate a separate proposal on this topic. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Attorney Qualifications Considering Proposition 66's Expedited Timeframes** Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial: * * * • knowledge of current capital trial standards of practice; • experience employing current standards in forensics and mental health; • complex case management experience; and, • effective use of expert witnesses. **Experience Necessary for Appointment as Habeas Corpus Counsel**	The working group declined to modify the proposed rules to require the additional experience suggested. The existing qualifications rules do not include the suggested requirements, such as substantial experience in mitigation and forensic sciences. The working group has concerns that including these additional experience requirements could unduly restrict the pool of attorneys eligible for appointment. The working group also declined to modify the proposed rules to include the specific knowledge suggested in the comment, and concluded that retaining the more general requirement that counsel demonstrate the "knowledge[] and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death" was sufficient at this time.

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	* * * • At least one team member must have substantial experience in forensic sciences. • At least one team member must have substantial experience with mitigation and mental health.	
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation. Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health issues, intellectual disability and social history development. * * * To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows: "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases.*	The suggested modification concerning serious felony and murder cases is addressed in the response above, regarding combined case experience, at pages 75–76. The working group declined to modify the rules to require that the combined case experience be sufficient to demonstrate the additional areas of proficiency and familiarity specified in the comment. The existing qualifications rules do not include the suggested requirements. The working group had concerns that mandating these additional requirements could unduly restrict the already limited pool of attorneys eligible and available for appointment. For example, requiring that an attorney's combined case experience be sufficient to demonstrate "familiarity with death qualification in jury selection," would seem to require the attorney to have prior capital experience. The working group agrees that encouraging less experienced attorneys to serve as supervised counsel—as well as encouraging more experienced attorneys to work with and engage supervised counsel—may be

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed. *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification; and familiarity with death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case."*	critical to expanding the pool of qualified available counsel. In response to this and other comments, the working group has modified proposed rule 4.562, recommended in the separate report addressing appointment of habeas corpus counsel, to include an advisory committee comment encouraging regional committees and courts to provide mentoring and training programs and opportunities to engage and serve as supervised counsel.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	The proposal, SP 18-12, requests specific comments on 12 questions. With the exception of the first two questions, they all address the sufficiency of the proposed requirements for training and experience of attorneys appointed to represent petitioners in state habeas corpus proceedings. Mexico's primary concern about these proposed requirements is that they do not account for the special needs of foreign nationals in death penalty cases. Representing foreign nationals requires additional skills, experience, and training beyond that necessary for capital habeas corpus representation generally. Indeed, the American Bar Association's widely cited *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,*	The working group declined to add specific additional qualifications for counsel eligible to represent foreign nationals. The working group appreciates this comment and acknowledges that representing a foreign national may require certain skills, experience, or training that may not be necessary or beneficial when representing a U.S. citizen. However, the same may be true for other subsets of persons sentenced to death. Additionally, individual foreign nationals will have different legal needs. For example, a legal permanent resident who has resided in the U.S. since infancy may not necessarily require counsel who has experience in coordinating investigation in a foreign country or who is familiar with immigration-related trauma. Rather than attempt to

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	(Rev. ed. 2003) include an entire guideline, Guideline 10.6, specifically addressing "Additional Obligations of Counsel Representing a Foreign National." In addition to working with consulates, attorneys representing Mexican nationals in death penalty habeas corpus proceedings must at a minimum be familiar with relevant treaties and international law issues; have an understanding of the cultural differences that may affect the client and witnesses in their interactions with counsel and the legal system; be experienced in coordinating an extensive investigation in a foreign country; and be familiar with issues that frequently arise in these cases that are comparatively rare in U.S. citizen cases, such as problems with language barriers and interpreters, the location and evaluation of culturally knowledgeable and appropriate experts, and mitigation themes such as exposure to pesticides and immigration-related trauma. Because habeas corpus counsel must evaluate the sufficiency of trial counsel's representation in addition to re-investigating both the guilt-innocence and penalty portions of the case, he or she must understand what competent trial-level representation of a Mexican national entails. The proposed rules fail to account for these necessary skills and experience. They require no training on cultural issues; indeed, proposed Rule 8.652(c)(4)(C) would allow an attorney who has completed just one death penalty-related habeas corpus proceeding for a U.S. citizen to be appointed on a Mexican national's case with no required training at all. They allow for the appointment of attorneys who have never litigated or even researched an issue regarding a treaty, such as the Vienna Convention on Consular Relations, the U.S./Mexico Mutual	create separate qualifications for each type of case or category of persons, these state-wide rules are intended to set forth minimum qualification standards that all death penalty–related habeas corpus counsel should meet. Whether a specific attorney is well-suited to a specific case is something to be considered by the recommending committee or superior court vetting counsel pursuant to a local rule, and the judge making the appointment. The working group expects, as is true now, that matching an attorney and their specific skill set to a particular case will continue to be a key step in the recommendation and appointment process.

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	Legal Assistance Treaty,2 and the bilateral U.S./Mexico Consular Convention. A Mexican national defendant could find himself represented by an attorney who had never before met a person from Mexico, never left the United States, speaks no Spanish and has never worked with an interpreter, and has never attempted to gather or analyze records or interview witnesses in a foreign country. While these omissions would be of concern any time an attorney takes on representation of a foreign national, they are especially worrisome in view of Proposition 66's one-year time limit on preparing and filing the petition. Appointed attorneys will have no time to familiarize themselves with new areas of law, unfamiliar cultural issues, or logistical challenges associated with investigation abroad. An attorney with no training or experience in these areas simply cannot provide effective representation to these individuals under such limitations. At a minimum, the qualifications for counsel appointed in death penalty habeas corpus proceedings in the cases of foreign nationals must include substantial training and experience in representing such clients. The proposed rules already account for additional requirements in a subset of cases with greater needs; Rule 8.652(e) recognizes that experience conducting trials evidentiary hearings may not be necessary for adequate representation in every case, but may become necessary in certain cases, requiring the involvement of an attorney with such experience. Thus, including requirements for the requisite experience where necessary need not increase the required experience for counsel in every case. It would be quite feasible to account for the needs of this subset of specialized cases	

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	without significantly compromising the goal of increasing the pool of available counsel for death penalty habeas corpus cases generally.	
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.	Please see the response to the comments of CAP-SF above.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	The proposed rule fails to ensure that appointed counsel have adequate familiarity with, and training in, capital habeas corpus jurisprudence and practice. One of many important differences that makes death penalty cases unique from other serious felony and special circumstance murder cases is the bifurcated penalty phase. Identifying and developing mitigation issues in the penalty phase involves a knowledge and skill set that is not required in non-capital cases. Proposition 66's jurisdictional one year filing deadline makes it vital that appointed counsel have the skill and knowledge to identify and develop penalty phase mitigation issues as soon as they are appointed to a case.	The proposed case experience and training requirements are just two components of the proposed minimum qualifications standards. The proposed rules, like the existing rules, would also specifically provide that counsel must not only meet the minimum qualifications in the rules, but also must demonstrate the commitment, knowledge, and skills necessary to competently represent a person in a death penalty–related habeas corpus proceeding. Counsel lacking the necessary knowledge and skills would not qualify, even if they meet the quantitative experience and training requirements.

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	Counsel who have not represented a capital defendant or petitioner lack the necessary experience and familiarity with death-penalty specific issues. Specific habeas related training requirements, and a mandated training for counsel who have not previously represented a capital client, will help to ensure that appointed counsel has the necessary capital habeas skills and knowledge from day one of her appointment. The draft rule (8.652(c)(2)) clarifies that "experience for either party counts toward meeting the case experience requirements." (Invitation to Comment - SP18-12, at 6.) This language suggests that former prosecutors may be deemed qualified for appointment even where critical skills that can be acquired only through the experience of having represented a defendant or completed a petition are lacking. Former prosecutors may have familiarity with the case law governing the death qualification of jurors and the penalty phase of a capital trial, such knowledge, while important, does not include all the necessary skills that a capital defense litigator must possess. Attorneys who have developed death penalty skills from the prosecution side lack the fundamental defense skills of identifying and developing mitigation, key skills necessary to quality defense death penalty representation. In sum, without specific and intensive training and robust collaboration with an assisting entity, even death penalty prosecutors lack a vital skill set required to competently represent a capital habeas petitioner as lead counsel.	The working group agrees that death penalty–related habeas corpus–specific training is important and recommends increasing both the overall the hours of training and the minimum subject–specific training. The working group, however, declined to mandate that all proposed 15 hours of overall proposed training be devoted to death penalty–related habeas corpus–specific training, or that 10 hours be devoted to the more narrow topics of penalty phase issues and investigation. Individual courts and the regional committees would not be foreclosed, however, from encouraging counsel to satisfy additional or more specific trainings. Expanding the pool of qualified available attorneys will likely require attracting attorney applicants who not only may have no prior death penalty–related habeas corpus experience, but who also may have less appellate and habeas corpus experience than the pool of attorneys who have sought appointment from the Supreme Court in the past. The proposed combined case experience requirement, for example, would not specifically require that counsel have completed any felony appeals. As a result, some attorneys may find that they would benefit from training in appellate criminal defense or habeas corpus defense that is not necessarily specific to capital cases. Additionally, even attorneys experienced in death penalty–related habeas corpus proceedings may benefit from training in areas that are not capital case–specific, but still relevant, such as DNA evidence or jury

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	CAP-SF recommends two modifications to proposed Rule 8.652 (c) (4). 1. Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training ... , at least 10 hours of which address death penalty habeas corpus proceedings." The rule should be modified to require 15 hours in death penalty habeas corpus training, and 10 of those hours must address penalty phase issues and investigation. Proposed Modification: "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of ~~appellate criminal defense or~~ *death penalty* habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which ~~address death penalty habeas corpus proceedings~~ *penalty phase issues and investigation.*" 2. A sub-section should be added to Proposed Rule 8.652(c)(4) requiring additional training for appointed counsel who, within the preceding three years prior to applying for placement on the panel, has not represented either 1) a defendant in a capital trial through the penalty phase, or 2) a petitioner in a death penalty-related habeas corpus proceeding through the filing of the habeas petition. After counsel has been	selection. The working group concluded that the proposed training strikes the appropriate balance between requiring increased death penalty–related habeas corpus–specific training, and also permitting appellate criminal defense or habeas corpus defense training that may not be capital case–specific, but still relevant, to satisfy part of the training requirement. While the working group appreciates that many attorneys likely would benefit from attending an additional multi-day training, this suggested

Rule 8.652(c)(4), (d)(3): Training		
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	deemed qualified by the regional committee, but before any superior court appointment, such counsel must complete a multi-day training on death penalty specific issues such as death qualification in jury selection and identifying and developing mitigation issues. The CAP-SF currently provides such training for counsel appointed by the California Supreme Court; therefore, this training could be coordinated and provided by the assisting entity.	modification would triple or quadruple the existing training requirements for all counsel without recent capital trial or habeas corpus experience. The working group agrees that increased training is necessary, but declined to require more than the proposed 15 hours of training overall at this time. 15 hours is already 6 hours more than is required by the existing rules. Mandating a greater increase in hours at this time could discourage otherwise interested counsel from seeking appointment.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Training Requirements for Appointed Habeas Corpus Counsel** Criminal defense experience is no substitute for training. Specialized capital case training is available in California and through nation-wide criminal defense organizations. Qualified training programs must be vetted by the State Bar and the committee of attorneys who qualify counsel for inclusion on the Supreme Court roster. Attorneys must participate in 18 hours of capital case training over 3 years. Attorneys must complete at least 9 hours of capital case training within the year prior to appointment. Instructors of qualified training should receive credit for twice the number of Continuing Legal Education hours	The working group appreciates this input and agrees that trainings should not qualify unless approved for MCLE credit by the State Bar. The working group, however. declined to require that the regional committees, which are described in greater detail in the separate report addressing appointment, should also be required to approve training programs. The working group concluded that having trainings approved state-wide by a single entity would both promote uniformity and relieve the committees of an additional duty. With respect to the suggestion for increased capital case training, please see the response to the comments of CAP-SF above. The working group also declined to increase the frequency of the training or otherwise require training to be completed more recently. There were concerns that mandating such additional

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	allotted for their session(s).	requirements at this time could make the training requirement seem unduly burdensome, and thereby discourage otherwise interested counsel from seeking appointment. There was no clear agreement in the comments or even among members of the working group as to what amount of training credit instructors should receive for each hour of teaching a qualified course. Ultimately, the working group declined to specify the amount of credit. Instead, the working group retained the proposed provision, which also is in the proposed qualifications for capital appellate counsel, leaving the decision to the discretion of the vetting entity, whether that is the regional committee, a superior court, or the Supreme Court.
California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	• In terms of training, the Committee has the following suggestions: o The proposed rules require several training hours, only some of which have to be subject specific (either to "death penalty appeals" or to "death penalty habeas corpus proceedings"). The Committee questions whether the remaining hours of criminal defense training in unspecified topics is relevant and believes it is more important to focus on the subject-specific training and the recentness of the training. To this end, the Committee suggests using only the subject-specific training requirements proposed in the rule and perhaps increasing them. Additionally, the Committee	With respect to the subject specific training, the working group appreciates this input and has retained the proposed increase to such training hours. However, as discussed further in the response to the comments of CAP-SF above, the working group declined to modify the proposal to omit the more general appellate criminal defense or habeas corpus defense training, or to further increase the subject specific hours. With respect to the suggestion that some training be

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	suggests adding a requirement that (a) some number of the hours must be completed within the year prior to the application date and (b) persons placed on the habeas corpus panel must complete some number of hours of death-penalty-habeas-corpus training per year unless handling a case that year. o Prior capital case experience should be allowed to satisfy some or all of the training requirements, depending on the extent and recentness of the experience. The Committee supports the proposed rule that allows the appointing body to determine whether any additional training is required. o The Committee believes that trainings provided by other entities (such as appellate projects and state and criminal defense organizations) should qualify if they are subject-specific, in addition to any trainings approved by the State Bar and the vetting committees. o Instructors of qualifying trainings should be automatically credited with 2 hours of participation credit per hour taught.	more recent, please see the response to the comments of CACJ above. The working group appreciates the input regarding prior capital case experience and has retained the proposed provision. The working group agrees that trainings provided by other entities should qualify, as long as they are approved for MCLE credit by the State Bar. The working group concluded that having a single entity approving qualifying trainings will promote uniformity. With respect to instructional credit, please see the response to the comments of CACJ above.
California Public Defenders Association by Robin Lipetzky President Sacramento, California	We salute the proposed increase in the training requirement from 9 to 15 hours. (Pages 9, 11.) However, 15 hours is insufficient. Habeas litigation is unique in that it requires knowledge and experience in both trial and appellate skills in defending murder cases, and expertise in the complex technicalities of habeas litigation. Thus, the training requirement should be more than required to represent a capital defendant at trial. Further, it is important to receive training from different sources. Therefore, we urge a dual requirement combining a minimum of (1) three separate trainings, (2) with a	With respect to the suggestion for increased training, please see the response to the comments of CAP-SF above. The working group also declined to add a separate requirement that the training must come from different sources. There were concerns that mandating such an additional requirement could make the training requirement seem unduly burdensome, and thereby discourage otherwise interested counsel from seeking appointment.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	cumulative total of 20 hours of appellate criminal defense or habeas corpus defense training, at least 10 of which must address death penalty-related habeas corpus proceedings. With regards to whether training credit should automatically be given for teaching (pages 9, 11), we believe that such credit should be acknowledged, but should be granted in the amount of one hour credit for one hour of teaching. Regarding the recency of the trainings that have been attended (pages 9, 11), we agree that the trainings must be within two years before being included on the panel. However, because an attorney must continue to keep pace with new legal developments in capital habeas litigation, there must be a continuing training requirement, specifically requiring the same number of hours every two years in order to remain on the panel. (Again, we recommend 20 hours of training as the minimum.) In other words, no counsel should be appointed unless they have obtained the 20 hours within two years before being appointed; it is not sufficient to have had 20 hours within two years of being placed on the panel. The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case	With respect to instructional credit, please see the response to the comments of CACJ above. With respect to the suggestion regarding frequency and recentness of the training, please see the response to the comments of CACJ above. The working group declined to omit the proposed provision regarding prior capital case experience. The provision comes from the existing qualifications rule and was adopted in 1998 to avoid disqualifying very experienced counsel with recent death penalty–related habeas corpus experience who had not otherwise met the training standards. The working group agrees that all death penalty–related habeas corpus counsel must remain current with relevant legal developments, but ultimately decided to retain the provision giving the vetting entities the discretion to determine whether, in a specific case, recent death penalty–related habeas corpus experience may satisfy some or all of the training requirement. The working group concluded that this may help retain the pool of existing experienced death

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	experience should not satisfy any portion of the training requirement. Finally, concerning the providers of the requisite training (see page 12), we recommend that the trainings for habeas counsel must be approved by a state-wide entity, e.g., the State Bar, State Supreme Court, Habeas Corpus Resource Center or California Appellate Project. Our additional comments to specific Rules are as follows: * * * Rule 8.652(c)(4)(A): change "three years" to "two years." Change "15 hours" to complete at least "three separate trainings with a total of at least 20 cumulative hours". Further the Rule needs to clearly provide that the requirement applies both to (1) being included on a panel and (2) the time of appointment. For example, change "or" to "and" immediately before "appointed" in the second line; alternatively, add a new sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment." Rule 8.652(c)(4)(C): for the reasons explained above, we urge the deletion of this subdivision. Rule 8.652(d)(3): change 18 hours (second line) to 20 hours, and make clear the requirement applies both to (1) being included on a panel and (2) the time of appointment. As with Rule 8.652(c)(4)(A), this may be accomplished by changing "or" to "and" immediately before "appointed" in the first line, or by inserting a new second sentence providing: "This	penalty–related habeas corpus counsel, without compromising the goal of achieving competent representation. The working group appreciates the input regarding approval, and has retained the provision in proposed rule 8.652(c)(4)(A), requiring that trainings be approved by the State Bar of California.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	requirement applies both to the time of being included on a panel and to the time of appointment."	
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The concerns expressed in the proposal that the one-year limit instead of three justifies higher hurdles is not well founded. Other jurisdictions have had one-year limits for many years, and their quantitative requirements are not typically higher than California's. (See, *e.g.*, 28 U.S.C. § 2255, subd. (f) (collateral review statute of limitation for federal defendants); 18 U.S.C. § 3599, subd. (c) (standards for counsel).) There is also little reason to believe that increased hours of instruction above the current requirements will produce improved quality. Former capital appellate defense attorneys tell us that the instruction offered is frequently of poor quality and often far too elementary for the experienced attorneys required to attend it. To the extent that the proposal increases quantitative measures and training requirements beyond the current rule, all such increases should be removed. * * * *Training* Training can be helpful and may be necessary when learning a new subspecialty of practice, but we cannot assume that training will always be useful. As discussed near the beginning of this comment, it is difficult to believe that the abusive and unethical practices denounced in *In re Reno* could have become widespread if the ethics of practice and the duty of effective assistance (including *Smith v. Murray*, *supra*) had been	The working group concluded that additional training is warranted in part because expanding the pool of qualified available attorneys will likely require attracting attorney applicants who have little or no prior capital experience, and these less experienced attorneys will have little time to learn on the job while trying to meet a new one-year deadline. For those more experienced attorneys, the proposed rules permit recent capital case experience to satisfy some or all of the training requirement. The working group declined to modify the proposed

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

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	correctly taught at the required training. The defense bar likes to be secretive about its collective strategy, but if the power of government is going to be used to mandate attendance at training, then the public interest demands openness to insure that the course is correctly teaching ethics, not "unethics." As a condition of approval, all training providers should be required to admit any member of the bar who pays the fee.	rules to limit or otherwise add conditions to the State Bar's process in making its approval determinations. The working group concluded that the details of approving trainings are best left to the discretion of the State Bar, which has a wealth of experience approving trainings for MCLE credit, including trainings for specialized professionals, such as capital defense training for trial counsel as provided in existing rule 4.117.
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	Proposed Rule 8.652(c)(4) states that an attorney must complete specified training "[w]ithin three years of being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655." Proposed Rule 8.652(d)(3) requires that the training for the "alternate experience" qualification be completed by the attorney "[w]ithin two years before being included on a panel or appointed by the Supreme Court." To make these rules consistent, and to ensure currency of knowledge in the frequently changing legal and forensic landscape of capital habeas corpus proceedings, the time period in subdivision 8.652(c)(4) should be modified from three years to two years. In addition, subdivision (c)(4) should be modified to make clear that the training requirement must be met by the appointed habeas corpus counsel not only within the specified period prior to inclusion on the statewide panel, but within the specified period *prior to any actual appointment* by a court that selected the habeas counsel from the statewide panel. This suggested modification creates uniformity in the training requirement regardless of whether the appointment is	With respect to the suggestion regarding frequency and recentness of the training, please see the response to the comments of CACJ above.

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

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	made by a court that selects counsel from the statewide panel, by the Supreme Court, or by a superior court under a local rule. It also ensures that appointed counsel's training is current, in the event counsel is included on the statewide panel but not immediately appointed to a habeas corpus case. Similarly, proposed Rule 8.652(d)(3) should be modified to require that the training for the "alternate experience" qualification be completed by the attorney within two years of both inclusion on the statewide panel and any appointment by a court that selects the attorney from the panel. * * * • *How many hours of training is appropriate?* Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings." Representation of petitioners in non-capital habeas corpus proceedings may bear little resemblance to such representation in capital proceedings. Non-capital habeas corpus proceedings often involve peripheral issues including parole eligibility and conditions of confinement. Even when related to the bases for the underlying criminal conviction, habeas corpus proceedings in non-capital cases do not deal with penalty phase issues. Thus, training on non-capital habeas corpus proceedings may not enhance an attorney's qualification to represent death row	With respect to the suggestion for increased subject-specific training, please see the response to the comments of CAP-SF above.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	inmates in capital habeas corpus proceedings. Similarly, training in "appellate criminal defense," if that training is non-capital in nature, would not include penalty phase issues, and even if such appellate criminal defense training concerned capital representation, it would not cover development of extra-record facts – the quintessential task of the capital habeas litigator. For these reasons, the rule should be modified to require "at least 15 hours of training in the representation of petitioners in death penalty habeas corpus proceedings."	
Marylou Hillberg Attorney at Law Sebastopol, California	I think your MCLE requirements are grossly understated; since I started working on capital cases about 15 years ago, I've taken more 500 hours of MCLE, mostly in mental health areas. I do not believe that any attorney, without extensive prior training and experience, can adequately learn these areas AND file a petition within one year. * * * I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.	Please see the response regarding training hours to the comments of CAP-SF above.
Kristin Traicoff Attorney	4) I believe the committee should require that the trainings discussed in the rule be recent, e.g., within the last 2 years. The	With respect to the suggestion regarding frequency and recentness of the training, please see the response to the

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
Law Office of Kristin Traicoff Sacramento, California	reason is simply that capital case law is very volatile, in the sense that the US Supreme Court, 9th Circuit, and California Supreme Court frequently (i.e., multiple times per year) issue opinions that alter in some material way the understanding of the procedural or substantive law relevant to capital cases. As someone who has conducted trainings for other death penalty attorneys on legal developments, staying abreast of these developments requires significantly more effort than I have found is generally true in many other areas of the law with which I am personally familiar. An attorney who has an outdated understanding of the legal rules relevant to our work cannot provide effective representation.	comments of CACJ above.

Rule 8.652(c)(5): Writing samples		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	Attorney applicants should electronically submit a sample complex habeas corpus petition for consideration. They should have been the one of the primary authors of the petition.	The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(5)(A), requiring an attorney to submit either one death penalty–related habeas corpus petition or two habeas corpus petitions involving serious felonies, written and filed by the attorney. The working group declined to require electronic submission in the rule, to give the regional committees and courts screening applications the discretion to determine what methods of submission are preferable.
Kristin Traicoff Attorney	3) In response to the committee's question of whether filing two habeas corpus petitions in felony cases is too low or too	The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(5)(A),

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Rule 8.652(c)(5): Writing samples		
Commenter	**Comment**	**Proposed Working Group Response**
Law Office of Kristin Traicoff Sacramento, California	high as an element of required experience for appointment as habeas counsel, I would suggest simply that the rules require that the writing samples the applicant submit be, at least, those two habeas petitions. The fact that someone has filed two habeas petitions does not necessarily mean that those petitions were of the quality that would ensure effective representation of a capitally-sentenced inmate in habeas corpus proceedings.	requiring two habeas corpus petitions involving serious felonies.

Rule 8.652(d)(1): Alternative experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience alone.	The working group declined to include the proposed modification to proposed rule 8.652(d)(1). The suggested amendment, which would single out attorneys with former prosecution experience but not attorneys with other alternative experience such as complex civil litigation or academia, could unduly discourage persons with prosecutorial experience from applying. Additionally, prior case experience is only one component of the qualifications. All attorneys, including those with prior criminal defense experience, must still meet the other qualification standard, and demonstrate the requisite commitment, knowledge, skills, and training. The response to the comment with respect to 8.605(d)(1) can be found above, on page 67, where alternative qualifications for automatic appeals is addressed.

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Rule 8.652(d)(1): Alternative experience		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	Even worse, the "alternative experience" provision has a stealth provision to exclude recent departees from district attorney offices who could have qualified under the current "alternative" rule. Proposed Rule 8.652(d) incorporates (c)(5). That paragraph, in turn, requires submission of writing samples including "two or more habeas corpus petitions filed by the attorney *as counsel of record for the petitioner . . . .*" While the whole point of "alternative qualifications" under the current rule is to allow appointment without criminal defense experience, and the proposed rule ostensibly is for people who don't meet the (c)(2) requirements, the defense-side experience requirement is treacherously brought in through the back door of the writing sample requirement. "Dirty pool" would be an understatement.	The working group agrees that the alternative experience provision is intended to provide an avenue for counsel who may not have the usual case experience, yet who will still provide high quality legal representation, to qualify for appointment. The proposed rule, as noted by the commenter, inadvertently required counsel with alternative experience to have prior habeas corpus experience. The working group has corrected the error and modified proposed rule 8.652(d) to clarify that the writing samples must present analyses of complex legal issues, but are not required to be habeas corpus petitions.

Mentorship and "greening programs"		
Commenter	**Comment**	**Proposed Working Group Response**
Marylou Hillberg Attorney at Law Sebastopol, California	I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.	The working group agrees that mentorship is critical to expanding the pool of available qualified counsel. The working group has modified proposed rule 4.562, recommended in the separate report addressing appointments, to include an advisory committee comment encouraging committees and courts to provide mentoring and training programs and opportunities to engage and serve as supervised counsel. However, requiring the completion of a specific "greening program" as a component of the qualifications rules is premature, as no such formal mentorship program for death penalty–related habeas proceedings currently

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Mentorship and "greening programs"		
Commenter	**Comment**	**Proposed Working Group Response**
		exists in California. Instead, the proposed rules recognize that counsel who do not meet the criteria for appointment may gain capital case experience by serving as "supervised counsel." The proposed rules also recognize that in some cases the appointment of more than one counsel may be appropriate, which may provide an opportunity for mentorship between appointed counsel in a case. Additionally, the separate report addressing appointments in death penalty–related habeas corpus proceedings recommends requiring the appointment of an assisting entity or assisting counsel to provide additional advice and guidance.

Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	Proposed Rule 8.605(c)(2): Pursuant to Proposed Rule 8.605(c)(2) concerning the Panel for appointments to represent in their automatic appeal proceedings persons sentenced to death, attorney applicants must have served as counsel of record for either party (the State or a defendant) in a specified number of felony appeals. We are concerned about the potential conflicts of interest when a Panel applicant previously represented the People of the State of California in felony appeals involving a capital appellant or witnesses involved in the capital appellant's case. Sometimes those conflicts are difficult to ascertain until the lawyer deeply involved in the case and reads the voluminous records. To	 Mindful of the need to avoid unduly restricting the available pool of attorneys, the working group declined to add the suggested provisions to the qualification rules at this time. The working group acknowledges that an automatic disqualification provision could help counsel—whether due to former prosecution experience

Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
	avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate experience on behalf of the State of California are precluded from accepting automatic appeal appointments in cases from the county or counties in which they previously defended, for the State of California, criminal judgments on appeal." This requirement would affect former California Attorney General's Office employees, from the Office which is charged with defending criminal judgments on appeal. While such an attorney may have defended criminal judgments from several California counties, thus disqualifying that person from accepting appointments in those counties, it would not prevent that lawyer from accepting any automatic appeal appointments from other counties. It is unlikely a former deputy attorney general would have defended criminal judgments from each of California's 58 counties. Proposed Rule 8.652(c)(2): This Proposed Rule provides the minimum qualifications for attorneys who accept appointment in capital habeas corpus cases in California. Like Proposed Rule 8.605, this Rule allows the committee to consider prosecutorial experience. The qualifying prosecutorial experience may include appeals, habeas corpus proceedings, and felony jury trials. *See* Proposed Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C). As with Proposed Rule 8.605, we are concerned about the	or former defense experience—avoid spending time and resources on a case from which they must later withdraw due to a conflict. However, such a provision would also automatically disqualify counsel from cases in which there is no conflict. Rather than mandate such a blanket disqualification rule at this time, the working group concluded that potential conflicts may be addressed regionally and may be mitigated by the procedures and standards the regional committees and superior courts operating pursuant to local rules, as proposed in the separate report addressing appointments, establish to match counsel to cases.

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Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
	potential conflicts of interest when an applicant previously represented the People of the State of California in felony trials, habeas corpus proceedings or appeals involving a capital habeas petitioner or witnesses involved in the capital habeas petitioner's case. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate, habeas corpus or felony trial experience on behalf of the State of California are precluded from accepting capital habeas cases appointments in cases from the county or counties in which they previously tried felony cases for the State of California and/or defended, for the State of California, criminal judgments on appeal or in habeas corpus proceedings." This provision would affect prosecutors in the Attorney General's office and in the 58 California County district attorney offices.	

ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	B. The working group briefly acknowledges its review of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter "ABA Guidelines").[2] (Proposal, p. 3.) The Guidelines are never referred to again. I would suggest that language be added to the commentary, and to whatever training materials are published for regional committees and superior courts, instructing them to look to the ABA Guidelines for a summary of the tasks of capital counsel. The ultimate question in certifying an applicant is whether or not	The ABA Guidelines certainly were considered in developing the proposed rules, as they were when the qualifications rules were first adopted in 1998. However, the working group declined to formally adopt or endorse the ABA Guidelines within the proposed rules and accompanying commentary. In some ways, the guidelines are not directly applicable to the counsel system in California. For example, the guidelines are predicated on a team of two or more attorneys, whereas in California generally only one attorney is appointed as

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	that attorney is capable of performing the work laid out in the Guidelines. [2] Accessible at (2003) 31 Hofstra L. Rev 913.	capital appellate or habeas corpus counsel. Likewise, Guideline 5.1—Qualifications of Defense Counsel, ABA Guidelines (2003), is focused on the overall skillset of the state-wide pool of attorneys, rather than of each individual attorney. Such a system of qualifications is difficult to implement here where California will, post-Proposition 66, no longer have a single pool of qualified attorneys vetted by a single entity. That vetting responsibility instead will be shared by a number of regional committees and superior courts, as proposed in the separate report addressing appointments in death penalty–related habeas corpus proceedings, in addition to the Supreme Court.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	CACJ endorses the standards established in the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The Guidelines have been cited with approval in Supreme Court, Ninth Circuit Court of Appeals and California Supreme Court cases as a starting point for determining professional standards for competent capital representation. [*Fn. 2 omitted] To put attorney qualifications in perspective, CACJ will address the duties of habeas corpus counsel. **ABA GUIDELINE 10.15.1-DUTIES OF POST-CONVICTION COUNSEL** A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's	Please see the response to the comments of Robert D. Bacon above.

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution. B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora. C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review. D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency. E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:	

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	1. maintain close contact with the client regarding litigation developments; and 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position; 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and 4. continue an aggressive investigation of all aspects of the case.	
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	In 1989, and again in 2003, the American Bar Association issued "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." These Guidelines gather decades of wisdom and experience regarding what skills a capital defense attorney needs in order to perform competently and effectively, and what procedures should be in place for ensuring that all capital defendants receive competent counsel. Of particular relevance to this committee's tasks are Guidelines 4.1 (staffing necessary to competently litigate a capital case), 5.1 (necessary qualifications for counsel), 7.1 (need for continuing supervision of appointed counsel), and 8.1 (necessary training). These Guidelines highlight the breadth of knowledge and expertise required of capital defense counsel and recognize the difficulty for an individual attorney to represent capital defendants competently without substantial	Please see the response to the comments of Robert D. Bacon above.

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	assistance. We strongly urge the working group to adopt rules that comport with these standards set forth by the ABA.	

Longer comment period		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	Due to the extensive changes Prop 66 will bring, it is difficult to comment on the appointment and qualification rules in a piecemeal fashion. Most significantly, it is difficult to meaningfully assess the proposed rules without knowing what resources appointed counsel will have at their disposal (e.g. how much money for investigation, paralegal assistance, co-counsel, etc.) and what form habeas corpus petitions will take under the new process. Additionally, the time offered to comment on the proposed rule changes was inadequate to allow for a thorough consideration of the changes and the likely ramifications of the suggested changes. The lack of a meaningful comment period, coupled with the piecemeal consideration of the newly proposed rules, strongly favors a final comment period once all the rules are drafted and can be considered in total.	Due to the statutory time period by which the Judicial Council must adopt initial rules, and based on comments regarding the time courts and other justice partners need to implement these proposed rules, there is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to extend the comment period until all related draft rules proposals can be considered together. However, the Judicial Council welcomes suggestions for changes to the California Rules of Court at any time. Future suggestions may be considered by the appropriate Judicial Council advisory body or bodies at a later time. Rules of court are not static and may be modified in the future, particularly as actual implementation reveals changes that may be necessary or beneficial. Here, the Judicial Council has a continuing obligation to "monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceeding . . . ." As a result, the working group anticipates that

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Longer comment period		
Commenter	**Comment**	**Proposed Working Group Response**
		there will be opportunities to revisit and amend these rules as necessary or appropriate.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex. Mexico cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.	Please see the response to the comments of CAP-SF above.

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	C. Section 68665 of the Government Code charges the Council with considering "the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment." What unduly restricts the available pool of capital habeas attorneys is the inadequate compensation the Supreme Court currently offers to them, both for attorney's fees and for investigation and expert expenses. Your new rules will fail without substantially increased per-case appropriations. I discuss that point in more detail in my comments on proposal SP-18-13, and I do not repeat that discussion here, but it is relevant to this proposal also.	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding appointments in death penalty–related habeas corpus proceedings in the superior courts.
California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee	<u>The Important Date in Footnote 4</u> There is an important -- yet possibly inaccurate -- observation at page four, footnote 4: "The Consolidated Appropriations Act	The working group appreciates this input and agrees that the current hourly rate has not increased since at least

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
Oakland, California	of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the Supreme Court is $145, a rate that has not increased *since 2012*." (Emphasis added.) Our recollection is that the situation is more dire and that 2012 may not be accurate. Our belief is that the last hourly increase for capital counsel took effect more than a decade ago, probably in mid-2007. Although our comment does not address the Working Group's proposed rules, a correct date may become important in future as a "baseline" for consideration of capital compensation increases. The Working Group is respectfully directed to the 2008 "Final Report and Recommendation on the Administration of the Death Penalty in California," authored by the California Commission on the Fair Administration of Justice. (See http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1601) That 2008 Final Report notes on page 132: "Currently, private lawyers who accept an appointment to handle death row appeals are compensated at a rate of $145 per allowable hour." (Footnote 62 omitted.) In addition, the 2008 report states on page 135: "Like the attorneys handling appeals, appointed habeas counsel are paid $145 per hour." The omitted footnote 62 on page 132 refers to an internet link	2008.

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
	to the 2008 Supreme Court Brochure. Although the link is no longer functioning, the brochure is probably still available.	
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Expanding Pool of Counsel** The proposed changes to the rules will expand the pool of qualified counsel with other systemic changes. Qualified experienced counsel earn $188 per hour in federal habeas corpus cases. State attorneys earn $145 per hour, with limitations on investigator and expert hourly rates. State habeas corpus practitioners are forced to accept deferred and denied payments, and arbitrary and inconsistent payment practices. On the other hand, the federal courts authorize ancillary funding for experts, mitigation specialists, investigators and others at reasonable rates and provide for prompt payment of these providers. The expedited timeframes of Proposition 66 diminish the already shallow pool of qualified habeas corpus practitioners. Accepting appointment under Proposition 66 deadlines would require an attorney's full-time commitment and abandonment of current clients and other legal activities. Few experienced attorneys are willing to so limit their law practices to accept appointment on these cases without the safeguards of adequate funding and the protections afforded by these proposed comments.	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding appointments in death penalty–related habeas corpus proceedings in the superior courts.
Office of the State Public Defender (OSPD) by Mary McComb	1. As mentioned in our comments with regard to SP18-13, there is a significant and debilitating omission in these rules: the lack of provisions for the compensation of	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding

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

SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
State Public Defender Oakland, California	counsel and the funding of expenses.	appointments in death penalty–related habeas corpus proceedings in the superior courts.

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STATE BAR NO. 73297

August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, California 94102

Re: No. SP18-12: Qualifications of Capital Counsel

Ladies and Gentlemen:

Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful.

To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts.

1. General observations: the "cardiac surgery of legal representations"

A. Given what is at stake in any capital case, a relevant analogy that the Council might keep in mind in crafting these rules – and encourage regional committees and superior courts to keep in mind in applying and implementing them – is the procedure for board certification of a physician in a medical specialty. **(**See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[1] see also Fox, *Capital Guidelines and Ethical Duties: Mutually*

[1] "The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice – for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital

Reinforcing Responsibilities (2008) 36 Hofstra L. Rev. 775, 777 [capital defense is the "cardiac surgery of legal representations"].)

B. The working group briefly acknowledges its review of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter "ABA Guidelines").[2] (Proposal, p. 3.) The Guidelines are never referred to again. I would suggest that language be added to the commentary, and to whatever training materials are published for regional committees and superior courts, instructing them to look to the ABA Guidelines for a summary of the tasks of capital counsel. The ultimate question in certifying an applicant is whether or not that attorney is capable of performing the work laid out in the Guidelines.

C. Section 68665 of the Government Code charges the Council with considering "the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment." What unduly restricts the available pool of capital habeas attorneys is the inadequate compensation the Supreme Court currently offers to them, both for attorney's fees and for investigation and expert expenses. Your new rules will fail without substantially increased per-case appropriations. I discuss that point in more detail in my comments on proposal SP-18-13, and I do not repeat that discussion here, but it is relevant to this proposal also.

2. *Appellate* experience on behalf of the prosecution can appropriately be counted, but no credit should be given for *habeas* experience on behalf of the prosecution

I learned the appellate lawyer's craft representing the prosecution in responding to appeals from felony convictions. That experience, plus a small number of non-capital criminal appeals on the defense side, was an appropriate background when I began representing death-sentenced clients on appeal. I have no problem with recognizing appellate experience as a prosecutor as a permissible part of the background for a lawyer applying to represent death-sentenced clients on appeal, so long as the lawyer also has significant experience representing criminal defendants on appeal, and meets all the other qualifications. (Rule 8.605(c)(2).)

However, I strongly recommend that experience responding to habeas corpus petitions on behalf of the prosecution ***not*** be given any weight in assessing a lawyer's qualifications to represent capital habeas petitioners. Rule 8.652(c)(2) should be modified accordingly.

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defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice." (*Ibid.*)

[2] Accessible at (2003) 31 Hofstra L. Rev. 913.

Most California habeas petitions, capital and otherwise, are resolved based on the factual showing made in the petition. Under California's informal briefing process and prima facie case standard, factual investigation by the prosecution in preparing to respond to a habeas petition is not only unnecessary, it is inappropriate. The prosecution's function in responding to a habeas petition is more akin to the appellate practice: briefing the law on a closed record. That experience does not meaningfully prepare a lawyer for the intensive factual investigation required to prepare a capital habeas petition on behalf of the petitioner.

In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience *alone*.

3. Quantitative measures of attorney experience are of limited value

While experience with a particular number of cases has a place in measuring an attorney's qualifications, the Council should insure that those implementing these rules not rely too heavily on this factor. A raw count of cases makes a lawyer who churns cases, and works them up only superficially, appear to be better qualified than a lawyer who better serves her clients by litigating cases more intensely and as a result can take fewer of them. The first lawyer will meet the numerical experience standard sooner than the second, but the second one is better qualified. (See Stetler & Wendel, *supra*, 41 Hofstra L. Rev. at pp. 682-684.)

The Council can take a lesson from the drafters of the ABA Guidelines: "In the original [1989] edition, [Guideline 5.1] emphasized quantitative measures of attorney experience – such as years of litigation experience and number of jury trials – as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised [2003] edition, the inquiry focuses on counsel's ability to provide high quality legal representation. … [¶] [Q]uantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster." (ABA Guidelines, Commentary to § 5.1, 31 Hofstra L. Rev. at pp. 962, 964.)

Making perhaps the same point a different way, the Rules of Professional Conduct define "competence in any legal service" to include both "learning and skill" and, separately, the "mental, emotional, and physical ability reasonably necessary." (Rule 1.1(b) [effective November 1, 2018]; accord, Rule 3-110(B) [effective until November 1, 2018] [also including "diligence" within the definition of competence].) The mental and emotional

ability required for post-conviction capital litigation is extraordinary. Sadly, experience does not always insure that an attorney will have that ability.

I would suggest an explicit statement in the text of the rules (or, at an absolute minimum, in the commentary and in whatever training materials are sent to regional committees and superior courts) that having the experience set forth in Rules 8.605(c)(2) and 8.652(c)(2) is ***not*** prima facie evidence that the individual attorney possesses the skills required by Rules 8.605(c)(5) and 8.652(c)(5). The experience and skills requirements should each be addressed separately by those implementing the rules, just as they are set out separately in the rules.

4. The rules should identify experience in settlement negotiations as a valuable asset for capital counsel

One means of making the substantial additional capital habeas caseload more manageable for the superior court will be to encourage settlement of capital habeas cases. The percentage that settle may not be as high as for other types of complex, document-intensive civil litigation, but if the attempt is made the settlement rate is likely to be significant. This will benefit the courts, the survivors of homicide victims, and the habeas petitioners. The regional committees should be encouraged to inquire whether applicants have experience in settlement negotiations, mediation, and other forms of alternative dispute resolution in either civil or criminal cases. Even though such experience should not be a requirement, it should be weighed in an applicant's favor. Reference to this subject in the rules and by the regional committee would send an appropriate signal to all concerned that settlement should be considered in every capital habeas case.

Thank you again for the opportunity to comment.[3]

Sincerely,

/s/ *Robert D. Bacon*
Robert D. Bacon

[3] I also commend to the Council the comments submitted by California Attorneys for Criminal Justice (CACJ). I am a member of that organization but I did not personally participate in the writing of their comments.

Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

BY E-MAIL

Re: Proposition 66 Working Group Proposed Rules
Request for Comments
Qualifications of Counsel

Introduction

These comments are being submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals.

CADC has two observations relevant to the proposed "Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings. " The first concerns whether there should be minimum qualifications or other limitation as to "an assisting entity or counsel." The second concerns whether a date in an important footnote is historically accurate.

An Assisting Entity or Counsel

This concern may not be important in the short run, so long as the Habeas Corpus Resource Center [HCRC] continues to accept representation of the person in the Superior Court under proposed Rule 8.654(e)(2), that requires the court first to request that HCRC accept such representation. However, HCRC's resources are finite, and at some point appointments will be made under subdivision (e)(3), which states: "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a

local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

The potential problem relates to the qualifications for "an assisting entity or counsel." Proposed Rules 8.605 and 8.652 establish qualifications for counsel in death penalty appeals and death penalty–related habeas corpus proceedings, respectively. However, no rule establishes qualifications for "an *assisting* entity or counsel." (Emphasis added.)

In contrast, proposed Rule 8.601(5) merely defines "assisting counsel or entity" as "an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance," and includes only a non-exclusive list of potential assisting entities. When the time arrives that Superior Court judges are making appointments under proposed Rule 8.654(e)(3), the court would designate the assisting entity or counsel without further guidance or limitation as to what or who that assisting entity or counsel might be.

For these reasons, CADC respectfully suggests that the Working Group should consider further definition or qualification of "an assisting entity or counsel," or should consider limiting the universe of such counsel and entities.

<u>The Important Date in Footnote 4</u>

There is an important -- yet possibly inaccurate -- observation at page four, footnote 4: "The Consolidated Appropriations Act of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the Supreme Court is $145, a rate that has not increased *since 2012*." (Emphasis added.)

Our recollection is that the situation is more dire and that 2012 may not be accurate. Our belief is that the last hourly increase for capital counsel took effect more than a decade ago, probably in mid-2007. Although our comment does not address the Working Group's proposed rules, a correct date may become important in future as a "baseline" for consideration of capital compensation increases.

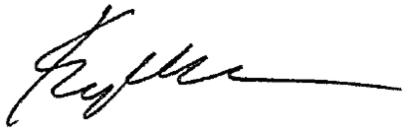
The Working Group is respectfully directed to the 2008 "Final Report and Recommendation on the Administration of the Death Penalty in California," authored by the California Commission on the Fair Administration of Justice. (See http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1601)

That 2008 Final Report notes on page 132: "Currently, private lawyers who accept an appointment to handle death row appeals are compensated at a rate of $145 per allowable hour." (Footnote 62 omitted.) In addition, the 2008 report states on page 135: "Like the attorneys handling appeals, appointed habeas counsel are paid $145 per hour."

The omitted footnote 62 on page 132 refers to an internet link to the 2008 Supreme Court Brochure. Although the link is no longer functioning, the brochure is probably still available.

Thank you for your time and consideration.

Very truly yours,



KYLE GEE
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a non-profit corporation established by the State Bar of California

August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, CA 94102
via email invitations@jud.ca.gov

Re: Invitations to Comment SP18-12, SP18-13

The California Appellate Project-San Francisco ("CAP-SF") submits the following comments on the proposed "Rules and Forms: Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings" (Item Number SP18-12) and the proposed rules and forms "Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-13).

General Comments on All Proposed Rules

1. Due to the extensive changes Prop 66 will bring, it is difficult to comment on the appointment and qualification rules in a piecemeal fashion. Most significantly, it is difficult to meaningfully assess the proposed rules without knowing what resources appointed counsel will have at their disposal (e.g. how much money for investigation, paralegal assistance, co-counsel, etc.) and what form habeas corpus petitions will take under the new process. Additionally, the time offered to comment on the proposed rule changes was inadequate to allow for a thorough consideration of the changes and the likely ramifications of the suggested changes. The lack of a meaningful comment period, coupled with the piecemeal consideration of the newly proposed rules, strongly favors a final comment period once all the rules are drafted and can be considered in total.

2. In 1989, and again in 2003, the American Bar Association issued "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." These Guidelines gather decades of wisdom and experience regarding what skills a capital defense attorney needs in order to perform competently and effectively, and what procedures should be in place for ensuring that all capital defendants receive competent counsel. Of particular relevance to this committee's tasks are Guidelines 4.1 (staffing necessary to competently litigate a capital case), 5.1 (necessary qualifications for counsel), 7.1 (need for continuing supervision of appointed counsel), and 8.1 (necessary training). These Guidelines highlight the breadth of knowledge and expertise required of capital defense counsel and recognize the difficulty for an individual

attorney to represent capital defendants competently without substantial assistance. We strongly urge the working group to adopt rules that comport with these standards set forth by the ABA.

3. More than thirty-five years ago, the California Supreme Court voiced concern about the quality of representation in death penalty cases by reaching out to the State Bar for assistance. In response, to advance the quality of lawyering in death judgment cases, the State Bar established the California Appellate Project-San Francisco (CAP-SF). CAP-SF's mission was, and still is, to facilitate competent representation in indigent capital appeal and habeas cases.

Proposition 66's mandate to significantly shorten the time in which to file a capital habeas petition – while simultaneously imposing new restrictions on the availability of second or successive applications for relief -- heightens rather than diminishes the concern for quality representation in death judgment cases. The new rules will create many changes and challenges to be met by experienced capital litigators as well as attorneys with no capital experience. Now more than ever, capital habeas attorneys will need assistance by experienced capital attorneys in order to meet the inherent challenges of capital representation coupled with the additional hurdles imposed by Proposition 66. CAP-SF is the entity best able to provide that assistance.

Proposed Rule 8.601(5): Definitions

> **8.601(5): Definition of "Assisting Counsel or Entity"**
> "Assisting counsel or entity" means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project in San Francisco, and a Court of Appeal district appellate project."

CAP-SF objects to the definition of "Assisting counsel or entity" in the proposed rules. The definition provided fails to appreciate the difference between providing capital direct representation and capital case assistance. It suggests that the Habeas Corpus Resource Center (HCRC), a capital direct representation agency, could serve as assisting counsel. Although HCRC has considerable expertise providing direct representation of habeas petitioners and makes significant contributions to training appointed counsel, it has virtually no experience serving as an assisting entity. Assistance work is highly specialized and although the skill set overlaps with direct representation, it requires knowledge and experience all its own. Moreover, assuming HCRC developed the skills and devoted its staff to assistance work, the end result would be a reduction in the number of direct representation cases it could handle. This would not promote the goal of Proposition 66 to increase the number of state habeas appointments. Similarly, the Office of the State Public Defender's expertise is in direct representation in direct appeal cases, and not serving as an assisting entity to appointed counsel.

The Court of Appeal district appellate (DCA) projects are even less qualified to provide capital case assistance. Their expertise and focus is in providing assistance in non-capital cases only, and almost exclusively on direct appeals. They have very limited familiarity with capital or habeas corpus practice and are not staffed to provide assistance in capital cases.

CAP-SF is the only qualified and fully staffed entity in California capable of offering full-time capital assistance to appointed counsel. CAP-SF has been assisting appointed counsel for thirty-five years and has developed contacts and resources in the capital defense community that foster its ability to do so effectively. CAP-SF should continue to be defined as the presumptive assisting entity in these cases and the rules should specifically state as much in order to avoid confusion and the risk of unqualified assistance. For example, the rule could state "*assistance from CAP-SF or, in the event of a conflict, other assisting counsel that the court may designate*."

Throughout the proposed rules addressing the appointment of counsel, the need for assistance is mentioned, but proposed rules never expressly state that assistance is required. Assistance should be required in all capital appointments for all of the reasons it was necessary thirty-five years ago and for the additional concerns raised by Proposition 66 (new rules, inexperienced lawyers, and significantly shortened filing deadlines).

Additionally, a rule should be adopted that the regional committees have the additional task of vetting qualified assisting counsel for cases in which CAP-SF has a conflict. This is necessary to safeguard against the designation of an unqualified assisting attorney.

Proposed Rule 8.605: Qualifications of counsel in death penalty appeals and habeas corpus proceedings.

Proposed Rule 8.652: Qualifications of counsel in death penalty–related habeas corpus proceedings.

8.652(b) General qualifications

CAP-SF recommends a modification to proposed Rule 8.652(b). These proposed rules fail to require that appointed counsel cooperate with the assisting entity, on direct appeal and habeas corpus, respectively.

Currently the last sentence of these rules reads "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." The last sentence should be modified to read that appointed counsel "*is required to cooperate* with an assisting counsel or entity that the court designates."

The modification is necessary because an experienced assisting entity or counsel helps appointed counsel provide quality representation to indigent appellants/petitioners. An assisting counsel or entity cannot adequately assist appointed counsel who will not fully cooperate with it. The California Supreme Court addresses this issue by expressly requiring appointed counsel in capital cases to cooperate with the assisting counsel or entity. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, section 5 "Progress Payments.") In the Supreme Court, appointed counsel may only receive fixed fee payments after they submit to the assisting counsel or entity the type of working documents (*e.g.* transcript notes, issues list, investigation plan) that enables the assisting counsel to offer more meaningful assistance to appointed counsel. Absent similar requirements for counsel appointed by the superior court the

proposed rules should, minimally, include language that requires appointed counsel to work with the assisting entity.

Proposed Rule 8.652 (c): Qualifications for appointed habeas corpus counsel

8.652(c)(2): Case experience
The case experience identified in (A), (B), or (C).

Read in combination with the definitions in proposed Rule 8.601, the committee's intent in subsections 2(A) and 2(B) seems fairly clear, but there is nonetheless ambiguity in wording regarding who counsel must have represented that should be resolved. It is recommended that in 2(A) the word person be changed to petitioner and in 2(B)(i) that the word petitioner be added. The suggested modification results in sections 2(A) and (B)(i) reading as follows:

Subsection 2(A):

"Service as counsel of record for a ~~person~~ *petitioner* in a death penalty–related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court."

Subsection (B)(i)

"Supervised counsel *for a* petitioner in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or."

Section 2(C) states:

"Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing."

The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation.

Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health issues, intellectual disability and social history development. Additionally, as written this proposed rule might allow counsel to seek and attain qualification where (s)he has litigated a serious felony habeas corpus petition that was limited to a single narrow legal issue. This does not comport with the purpose of the rule.

Specifically, the language of Section (2)(C) requires experience in "at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed." To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows:

> "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases. In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed.*
>
> *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification; and familiarity with death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case*."
>
> **8.652(c)(4) (A): Training**
> "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings."

The proposed rule fails to ensure that appointed counsel have adequate familiarity with, and training in, capital habeas corpus jurisprudence and practice.

One of many important differences that makes death penalty cases unique from other serious felony and special circumstance murder cases is the bifurcated penalty phase. Identifying and developing mitigation issues in the penalty phase involves a knowledge and skill set that is not required in non-capital cases. Proposition 66's jurisdictional one year filing deadline makes it vital that appointed counsel have the skill and knowledge to identify and develop penalty phase mitigation issues as soon as they are appointed to a case.

Counsel who have not represented a capital defendant or petitioner lack the necessary experience and familiarity with death-penalty specific issues. Specific habeas related training requirements, and a mandated training for counsel who have not previously represented a capital client, will help to ensure that appointed counsel has the necessary capital habeas skills and knowledge from day one of her appointment.

The draft rule (8.652(c)(2)) clarifies that "experience for either party counts toward meeting the case experience requirements." (Invitation to Comment - SP18-12, at 6.) This language suggests that former prosecutors may be deemed qualified for appointment even where critical skills that can be acquired only through the experience of having represented a defendant or completed a

petition are lacking. Former prosecutors may have familiarity with the case law governing the death qualification of jurors and the penalty phase of a capital trial, such knowledge, while important, does not include all the necessary skills that a capital defense litigator must possess. Attorneys who have developed death penalty skills from the prosecution side lack the fundamental defense skills of identifying and developing mitigation, key skills necessary to quality defense death penalty representation. In sum, without specific and intensive training and robust collaboration with an assisting entity, even death penalty prosecutors lack a vital skill set required to competently represent a capital habeas petitioner as lead counsel.

CAP-SF recommends two modifications to proposed Rule 8.652 (c) (4).

1. Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training …, at least 10 hours of which address death penalty habeas corpus proceedings." The rule should be modified to require 15 hours in death penalty habeas corpus training, and 10 of those hours must address penalty phase issues and investigation.

> Proposed Modification: "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of ~~appellate criminal defense or~~ *death penalty* habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address ~~death penalty habeas corpus proceedings~~ *penalty phase issues and investigation*."

2. A sub-section should be added to Proposed Rule 8.652(c)(4) requiring *additional training for appointed counsel who, within the preceding three years prior to applying for placement on the panel, has not represented either 1) a defendant in a capital trial through the penalty phase, or 2) a petitioner in a death penalty-related habeas corpus proceeding through the filing of the habeas petition. After counsel has been deemed qualified by the regional committee, but before any superior court appointment, such counsel must complete a multi-day training on death penalty specific issues such as death qualification in jury selection and identifying and developing mitigation issues*. The CAP-SF currently provides such training for counsel appointed by the California Supreme Court; therefore, this training could be coordinated and provided by the assisting entity.

Proposed Rules 8.654 – 8.655: Appointment of Counsel

General comment

The piecemeal issuance of rules by the working group and the lack of information about funding mechanisms make it particularly difficult to respond constructively to these rules. It is nonetheless clear that in light of the accelerated timeline for litigation contemplated by Proposition 66, enhanced staffing of cases is critical to competent representation.

Although the proposed rules acknowledge the possibility of the appointment of more than one attorney in capital state habeas cases, the rules should contain a more robust endorsement of the

appointment of associate counsel. The rules should provide that where HCRC is not able to be appointed to a complex case,[1] two attorneys must be appointed. Further, the rule should expressly state that, where the appointment of two attorneys is deemed necessary, those attorneys are each entitled to separate and reasonable fees.

Proposition 66's funding mechanism must allow for separate fees to individual attorneys, rather than requiring them to split a single capped fee as is currently the case under the Supreme Court rules. Our experience as an assisting agency has shown that the current fee structure deters experienced counsel from employing less experienced attorneys as associates or supervised counsel. Given that the proposed rules create a path to qualification as lead or associate counsel by serving as supervised counsel,[2] the rules should provide a separate stream of funding for supervised counsel as well. Adopting rules which encourage experienced counsel to collaborate with less experienced counsel serves one of the core purposes of Proposition 66, which is to expand the pool of attorneys willing and qualified to accept appointments to capital habeas cases.

Additionally, under an accelerated litigation process, the need to provide counsel with more robust funding to hire support staff such as paralegals, consulting experts, or other assistance must be addressed.

Proposed Rule 8.654: Superior court appointment of counsel in death penalty–related habeas corpus proceedings

8.654(d): Notice of Oldest Judgement without Counsel

Rule 8.654(d) (1)-(2), (6) state:

> "(1) Within 30 days of the effective date of this rule, the Habeas Corpus Resource Center must identify the persons on the list required by (c) with the 25 oldest judgments of death for whom death penalty–related habeas corpus counsel have not been appointed.
>
> (2) The Habeas Corpus Resource Center must notify the presiding judges of the superior courts in which these 25 judgments of death were entered that these are the oldest cases in which habeas corpus counsel have not been appointed. The Habeas Corpus Resource Center will send a copy of the notice to the administrative presiding justice of the appellate district in which the superior court is located.
>
> ....
>
> (6) When a copy of an appointment order, or information indicating that an appointment is for any reason not required, has been received by the Habeas Corpus Resource Center for 20 judgments, the center will identify the next 20 oldest judgments of death in cases in which death penalty–related habeas corpus counsel have not been appointed and send out a notice identifying these 20 judgments, and the procedures required by paragraphs (3) through (6) of this subdivision must be repeated."

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[1] Complex cases are generally those with multiple defendants, multiple victims, multiple crime scenes, extensive expert testimony or significant forensic or mental health issues.
[2] Rule 8.652(c)(2)(B)(i).

The initial appointment of counsel to the oldest twenty five cases, and thereafter to the next oldest twenty cases, is overly ambitious and does not take into account the complexity of these cases. It will be difficult to assess and find appropriate counsel for twenty-five, or even twenty, of these cases in any predictable timeframe. A review of just the first group of twenty-five oldest judgements reveals several defendants who were pro se at trial; have documented severe mental and/or physical illnesses or both; and/or, have a case that poses significant investigative and/or forensic challenges. In addition, within this group of cases, there are two defendants in their 70's and five defendants that pose conflicts for CAP-SF. For the oldest twenty-five cases, as well as several of the other cases waiting for habeas counsel, finding qualified counsel with the necessary knowledge and experience will be a time consuming and involved process. The process is further complicated for those cases in which CAP-SF has a conflict and a qualified assisting entity or counsel will need to be found. CAP-SF, therefore, recommends limiting the first group of cases to 15, and subsequent groups to ten to twelve cases.

8.654(e)(3): Appointment of counsel

> "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by proposed Rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

1. A modification is necessary to harmonize the rule with proposed Rule 8.655(d)(5), which states that the regional committee "must assist a participating superior court in matching one or more qualified attorneys from the statewide panel to a person for whom counsel must be appointed under Government Code section 68662."

CAP-SF recommends this rule be modified to clarify that the superior court will request the regional committee's assistance in identifying appropriate panel attorneys to appoint. The rule should be modified as follows: "If the Habeas Corpus Resource Center declines to represent the person, the court must *request that the regional committee identify an appropriate attorney or attorneys for the case, and then* appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

2. As set forth in this rule and proposed Rule 8.655(g), CAP-SF objects to allowing superior courts to adopt local rules regarding the appointment of counsel. The process set forth in proposed Rule 8.655(d)(2)–(4) is not burdensome and should be followed by all appointed counsel. Giving superior courts the authority to deem an applicant qualified, without approval by the regional committee, permits the superior courts – whether intentional or not – to take a more lenient view of the qualification standards than the regional committee. Allowing a superior court to adopt local rules for the appointment of counsel unnecessarily introduces the possibility of unqualified counsel appointed to represent capital habeas petitioners. Requiring that

appointments be made only to counsel approved by the regional committees will assist in guaranteeing uniformity in the assessment of counsel's qualifications.

Proposed Rule 8.655: Recruitment and determination of qualifications of attorneys for appointment in death penalty–related habeas corpus proceedings.
The committee will have the following responsibilities

8.655(c): Composition of regional habeas corpus panel committees

Section (c) (1) states: Each committee must, at a minimum, be composed of:

(A) One justice, designated by the administrative presiding justice of the Court of Appeal, to serve as the chair of the committee;

(B) A total of three judges, as agreed on by the presiding judges of the superior courts located within the appellate district; and

(C) A total of three attorneys drawn from the following categories, as selected by the judicial officers on the committee [see definition of categories (i)-(vi)]:

CAP-SF opposes Section (c)(1)(C) of this rule unless minor but significant modifications are made.

The language of subsection (c)(1)(C) defining the participation on the committee by attorneys from six possible categories seems to suggest that only one attorney per category will be selected to the committee, but the language is not definitive. The subsection language should expressly state that only one attorney per category will be selected to the committee.

If subsection (c)(1)(C) allows only one attorney per category, CAP-SF's primary concerns are that the rule as written could lead to a scenario where the three selected attorney members on a regional committee would have little to no capital habeas experience/knowledge. For example, it is possible a regional committee could be comprised of one DCA project attorney, one attorney from the public defender's office, and one attorney "designated by another entity" (subsection (vi) see below discussion). There is nothing written in the rule that would require the DCA project attorney to have capital habeas knowledge/experience. This is important because most DCA project attorneys practice in non-capital appeals. There is nothing written in the rule that would require the attorney from the public defender's office to have capital habeas knowledge/experience. This is important because there is a wide range of skill levels at a public defender's office and the rule would allow for an attorney who practices solely in misdemeanor cases as well as an attorney who practices in serious felony cases. The third attorney as noted above from category (vi), one "designated by another entity," could be anyone the chair authorizes and there is nothing in this rule that would require that person have any capital habeas experience/knowledge.

To avoid this scenario and to ensure that the regional committee is staffed with experienced/knowledgeable capital habeas attorneys, the rule must indicate that at least two of

the three attorneys chosen from categories (i)-(vi) are representatives of capital post-conviction agencies (HCRC, CAP-SF, or a federal public defender capital habeas unit). These agencies are in the best position to vet and assess the skills of applicants and the volume and type of work necessary to litigate the case.

Further, to avoid subsection (c)(1)(C) (vi) being interpreted as allowing for an unqualified attorney to be named as regional committee member as illustrated above, section (vi) should be restated with clarity. Currently, subsection (c)(1)(C) (vi) states, "An attorney designated by another entity, as authorized by the chair." If the intent of this subsection is that one of the entities identified in subsection (i)-(v) may designate an attorney, it should state clearly state as much. If that is not the intent the subsection should be further defined so the intent is clear.

> Section (c)(2) states "Each committee may also include advisory members, as authorized by the chair."

CAP-SF objects to the vagueness of this rule. If the intent is for the committee to be able to seek out someone with specialized knowledge, for example DNA, that could assist in pairing cases, it appears there would be no need that this person be designated as a "member." Instead, the rule could be revised to allow the committee to consult with someone who has specialized knowledge. As written, there is no definition of when an advisory member would be necessary, what qualifications the advisory member must hold or how long an advisory member may serve. At a minimum, the advisory member should meet the same criteria as other panel committee members in order to avoid qualification concerns.

> Section (c)(3) states "When a member is unable to complete a term, a replacement will serve out the existing term."

Similar to 8.655(c)(2), this proposed provision is vague. Who selects the replacement member, and a requirement that the new member meet all of the panel committee qualifications, should be stated.

8.655(d)(4)(C): Reapplying to panel every 6 years

> "Unless removed from the panel under (d)(6), an attorney included on the panel may remain on the panel for up to six years without submitting a renewed application."

This proposed rule should provide a mechanism for evaluating appointed counsel's work on an ongoing basis as opposed to waiting six years. This could be accomplished by requiring the assisting entity to provide the committee with a confidential evaluation of appointed counsel's work on all appointed death penalty-related habeas corpus pleadings filed. A comprehensive confidential evaluation could be submitted to the committee within thirty days of the habeas matter being fully briefed. The committee could then consider the confidential evaluation in its assessment of future appointments to appointed counsel. A mechanism such as this, would provide a way to monitor counsel's work and ensure that those who produced valuable work would continue to receive appointments and those whose work was inadequate would be

precluded from future appointments or deemed qualified as supervised and not lead counsel. It would provide an incentive to counsel to provide competent representation and be a step towards the effort of appointing quality representation in capital cases.

8.655(d)(6): Removal from panel

"Suspension or disbarment of an attorney will result in removal of the attorney from the panel. Other disciplinary action, or a finding that counsel has provided ineffective assistance of counsel, may result in a reevaluation of the attorney's inclusion on the panel by the committee that initially determined the attorney to have met minimum qualifications."

In conjunction with the comments made to §8.655(d)(4)(C), an assessment should be made based on the assisting entity's confidential evaluation. Where counsel's performance has been determined to be inadequate, this should be considered as a basis for removal.

Thank you for this opportunity to comment.

Very truly yours,

Joseph Schlesinger
Executive Director

Fighting for justice since 1973
California Attorneys for Criminal Justice

To: **Judicial Council**
From: **Steve Rease, President of California Attorneys for Criminal Justice**
Re: **Comments on Proposed Rules SP18-12 and SP18-13**

These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for qualification and appointment of habeas corpus counsel in capital cases. CACJ's comments would be more thorough and reflective but for the abbreviated comment period and complexity of the matters at issue.

Appointment and qualification of habeas corpus counsel was addressed by Proposition 66 through addition or amendment of the following statutes:

Statute	Purpose
Pen.Code 1239.1	Duty of Supreme Court to expedite review of capital cases
Pen.Code 1509	Writ filed by person in custody pursuant to judgment of death
Gov.Code 68660.5	Purposes of chapter; Construction and administration consistent with purposes
Gov.Code 68661	Creation of center; Powers and duties
Gov.Code 68662	Order for appointment of counsel for state prisoners
Gov.Code 68665	Competency standards for capital appellate and habeas corpus counsel

CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the appointment of competent post-conviction counsel.

The language of Proposition 66 imposes requirements that must be followed and cannot be amended, except by a three-fourths vote of the legislature or the voters. See Section 20 of the Proposition.

As amended by Proposition 66, Govt. Code Section 68661(d) provides that the Habeas Corpus Resource Center (HCRC) may

> recommend attorneys to the Supreme Court for inclusion in a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases, provided that the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center.

The voters specifically voted on the amended language in this subsection. Hence, by statute,

the Supreme Court is responsible for the roster, and, makes "the final determination of whether to include an attorney in the roster" whether the Court previously maintained a roster or not.

As amended by Proposition 66, Govt. Code Section 68665 states that the Supreme Court and the Judicial Council are still responsible for adopting "by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings . . ." This is consistent with the constitutional obligation to appoint counsel that can meet the requirements of heightened reliability in capital litigation. In addition, the appointment of competent and experienced counsel is even more pressing because of the short time periods under which appointed habeas corpus counsel is expected to perform their duties under Proposition 66.

Considering the foregoing and commenting specifically on the proposals numbered SP 18-12 and 18-13, we are aware of the proposal to create regional committees to assist in evaluating candidates for appointment to capital habeas cases. We respectfully submit that such regional committees could accept applications and forward appropriate nominees to HCRC and the Supreme Court for inclusion, upon the Supreme Court's "final determination," on the roster. Unless the statute is amended by three fourths vote or approval of the voters, the statute clearly states that the Supreme Court's duties cannot be delegated and certainly cannot be delegated to individual superior courts or its judges.

CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In addition, since Proposition 66 allows for the reopening on appeal of issues handled by first habeas counsel based on their ineffective assistance, failure to insure the appointment of competent and experienced counsel in the Superior Court will only require extensive re-litigation in the Court of Appeal with different counsel under new Penal Code Section 1509.1(b).

Comments Specific to SP18-13

- **Mechanics of Case Distribution to Superior Court**

Whenever possible, counsel should be appointed first for those inmates with the oldest judgments. Proposed Rules 8.654(c)-(d) require that HCRC compile and maintain a statewide list of condemned inmates, ordered by date of judgment. HCRC should devise and manage the process of distributing the cases to superior courts. While it is the obligation of the Judicial Council to "continuously monitor the timeliness of review of capital cases" (Pen.Code § 190.6(d)), there is no statutory requirement that the Judicial Council dictate the distribution of cases to the presiding judge of a jurisdiction.

- **Mechanics of Attorney Appointment**

First, a superior court judge should not be authorized to appoint counsel if the Supreme Court has not yet transferred the case to the superior court.

Second, for purposes of prioritizing judgments without counsel (where California Appellate Project-San Francisco (CAP-SF) is a placeholder attorney), a case with the oldest judgment should be treated as the oldest case whether the case has appointed counsel or not, and regardless of whether there is a petition pending. The rule should assign oldest judgment cases first where possible.

The rules for appointment of counsel should follow the "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) (Guidelines), and accordingly authorize the judge to appoint two habeas corpus attorneys at a minimum. The appointment of two qualified counsel is particularly crucial because of Proposition 66's shortened timeframes.

Superior courts should be required to designate CAP-SF as the "assisting entity." CAP-SF, and its staff, have decades of professional and institutional experience with litigating capital habeas corpus cases and assisting and monitoring private counsel in those cases. The expertise within CAP-SF is found in no other organization in California. CAP-SF provides education, training, training materials, a capital case databank, and an experienced lawyer who is personally assigned to assist appointed counsel in their capital habeas corpus proceedings. Regional appellate projects are not qualified, as their sole focus is assisting private counsel in providing quality indigent representation in non-capital criminal, juvenile, dependency and mental health appeals. As a result, these nonprofit entities should not be appointed to assist appointed capital habeas corpus attorneys.

If adequate CAP-SF resources are not available, or a conflict of interest exists preventing CAP-SF from assisting a particular capital habeas counsel, the court should appoint the most experienced counsel from the Supreme Court roster of qualified capital habeas corpus attorneys.

A superior court judge should not appoint a public defender or alternate defender because, as a general matter, those agencies do not have the experience in handling capital habeas cases, and their budgets do not provide for the additional time consuming work required in these cases.

- **Regional Committees and Vetting**

Regional committees should be encouraged to recommend attorneys to HCRC for qualification. However, neither a regional committee nor a superior court have authority to qualify an attorney or unilaterally include an attorney on the Supreme Court roster.

- **Appointment Orders and Forms**

The Judicial Council should create a form for attorneys to submit to HCRC with their applications for qualification. HCRC may develop forms to document that counsel is qualified to be included on the Supreme Court roster.

- **Timing of Implementation of Proposition 66**

The rules for qualification and appointment of habeas corpus counsel cannot be implemented within a month of promulgation. Before the rules can be implemented considerable infrastructure is required. The tasks include:

1. Defining agency responsibility for creation and management of the financial arrangements between appointed counsel and the court before implementation of the rules.

    a. No qualified attorney should be expected to accept appointment without a contract. The judicial branch must develop a contract between the funding agency and appointed contractor habeas corpus counsel.

    b. The judicial branch must create a budget for timely payment of appointed

habeas corpus counsel at competitive rates.

c. The judicial branch must allocate or appropriate funds for attorneys, mitigation specialists[1], investigators, experts and others prior to implementation of the rules.

d. The agency must define the mechanism for invoice submission, review, and payment.

e. The agency must create a mechanism for resolution of payment disputes prior to implementation of the rules.

2. Funding HCRC and CAP-SF in advance of appointment of counsel to adequately meet the demands of Proposition 66 while adequately serving existing appointed counsel, clients and the court. Funding additional staff as required by the demands of Proposition 66.

3. Funding attorney participation in mandatory training programs.

4. Funding and implementation of trial court training.

5. Instituting a process for trial court training and feedback.

Comments specific to SP18-12

CACJ endorses the standards established in the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The Guidelines have been cited with approval in Supreme Court, Ninth Circuit Court of Appeals and California Supreme Court cases as a starting point for determining professional standards for competent capital representation.[2]

To put attorney qualifications in perspective, CACJ will address the duties of habeas corpus counsel.

ABA GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through

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[1] Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L.R. 677 (2008).

[2] See, *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor,* 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688 (1985); *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005); *Washington v. Lampert*, 422 F.3d 864, 872 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005); *Davis v. Woodford,* 384 F.3d 628, 661 (9th Cir. 2004); and *In re Welch,* 61 Cal 4th 689 (2015)).

all available fora.

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;

3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

Attorney Qualifications Considering Proposition 66's Expedited Timeframes

Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial:

- prior knowledge of state and federal habeas corpus procedures, including the implications of the Anti-terrorism and Effective Death Penalty Act (AEDPA);
- experience conducting evidentiary hearings;
- knowledge of current capital trial standards of practice;
- experience employing current standards in forensics and mental health;
- complex case management experience; and,
- effective use of expert witnesses.

Experience Necessary for Appointment as Habeas Corpus Counsel

The expedited timeframes of Proposition 66 necessitate a team approach to capital habeas corpus defense. A capital habeas corpus team must utilize at least the following:

- At least one team member must have capital habeas corpus experience.
- At least one team member must have substantial capital trial experience.
- At least one team member must have substantial experience in forensic sciences.
- At least one team member must have substantial experience with mitigation and mental health.

- Prosecution experience alone is not sufficient.
  Attorneys should have at least 5 years of murder trial experience with demonstrated skills in research and writing and forensics.
- A petition for a writ of habeas corpus is typically hundreds of pages in length with many dozens of exhibits. Experience with other types of writs is not comparable or sufficient.

Attorney applicants should electronically submit a sample complex habeas corpus petition for consideration. They should have been the one of the primary authors of the petition.

Training Requirements for Appointed Habeas Corpus Counsel

Criminal defense experience is no substitute for training. Specialized capital case training is available in California and through nation-wide criminal defense organizations. Qualified training programs must be vetted by the State Bar and the committee of attorneys who qualify counsel for inclusion on the Supreme Court roster.

Attorneys must participate in 18 hours of capital case training over 3 years. Attorneys must complete at least 9 hours of capital case training within the year prior to appointment.

Instructors of qualified training should receive credit for twice the number of Continuing Legal Education hours allotted for their session(s).

Removal of Appointed Counsel

If appointed habeas corpus counsel is not providing adequate representation, the rules must specify a mechanism for quick removal of appointed habeas corpus counsel, with a resetting of all deadlines. Assisting counsel, co-counsel, superior court, and the client should have authority to initiate proceedings for removal of appointed counsel.

Expanding Pool of Counsel

The proposed changes to the rules will expand the pool of qualified counsel with other systemic changes. Qualified experienced counsel earn $188 per hour in federal habeas corpus cases. State attorneys earn $145 per hour, with limitations on investigator and expert hourly rates. State habeas corpus practitioners are forced to accept deferred and denied payments, and arbitrary and inconsistent payment practices. On the other hand, the federal courts authorize ancillary funding for experts, mitigation specialists, investigators and others at reasonable rates and provide for prompt payment of these providers.

The expedited timeframes of Proposition 66 diminish the already shallow pool of qualified habeas corpus practitioners. Accepting appointment under Proposition 66 deadlines would require an attorney's full-time commitment and abandonment of current clients and other legal activities. Few experienced attorneys are willing to so limit their law practices to accept appointment on these cases without the safeguards of adequate funding and the protections afforded by these proposed comments.

These comments are respectfully submitted.

Sincerely,

STEVE REASE
President of California Attorneys for Criminal Justice

TO: Judicial Council of California
Presiding Justice Dennis M. Perluss, Chair

FROM: Committee on Appellate Courts, Litigation Section

DATE: August 24, 2018

RE: Invitation to Comment
SP18-12: Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings
SP18-13: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

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The Committee on Appellate Courts appreciates the working group's efforts to balance the mandates of Proposition 66 with the need to ensure qualified representation for death penalty appeals and habeas proceedings. The invitations to comment contain numerous issues, and the Committee provides the following responses for those issues where it has substantive suggestions.

SP18-12: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Proposal as a Whole:

The Committee agrees with the working group's concern that factors other than the current qualification standards dissuade private attorneys from seeking appointment in capital cases. As the working group identifies, these other factors include the level of compensation, the lengthy time commitment required, and the nature of the cases. The new one-year deadline for filing a habeas petition may very well exacerbate the problem. Holding this aside, the working group's proposed rules will help expand the applicant pool, but the Committee has some concerns and suggestions with regard to competency requirements.

Specific Comments:

- The Committee agrees that representation of either party—the prosecution or the defense—in felony appeals, habeas corpus proceedings, or jury trials should satisfy some case requirements for appointment in death penalty–related habeas corpus proceedings. However, we suggest that counsel should have experience representing the defendant/appellant/petitioner in at least half of the proceedings, including at least two qualifying habeas proceedings.

- For attorneys who do not have death penalty–related experience, the requirements should be increased, either by increasing the number of felony habeas cases to 5 or more, or by requiring that qualifying habeas cases involve post-conviction investigation.

- In terms of training, the Committee has the following suggestions:

    - The proposed rules require several training hours, only some of which have to be subject specific (either to "death penalty appeals" or to "death penalty habeas corpus proceedings"). The Committee questions whether the remaining hours of criminal defense training in unspecified topics is relevant and believes it is more important to focus on the subject-specific training and the recentness of the training.

      To this end, the Committee suggests using only the subject-specific training requirements proposed in the rule and perhaps increasing them. Additionally, the Committee suggests adding a requirement that (a) some number of the hours must be completed within the year prior to the application date and (b) persons placed on the habeas corpus panel must complete some number of hours of death-penalty-habeas-corpus training per year unless handling a case that year.

    - Prior capital case experience should be allowed to satisfy some or all of the training requirements, depending on the extent and recentness of the experience. The Committee supports the proposed rule that allows the appointing body to determine whether any additional training is required.

    - The Committee believes that trainings provided by other entities (such as appellate projects and state and criminal defense organizations) should qualify if they are subject-specific, in addition to any trainings approved by the State Bar and the vetting committees.

    - Instructors of qualifying trainings should be automatically credited with 2 hours of participation credit per hour taught.

SP18-13: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Prioritization and Appointment:

- The Committee agrees with the general principle of prioritizing the appointment of counsel for those individuals who are subject to the oldest judgments of death. However, it may be preferable to leave it to the superior courts to decide prioritization for themselves. Doing so would allow the courts flexibility in deciding which case to assign to available counsel, taking into consideration the nature of the case, size of the record, and any complicating factors, along with counsel's experience. At the same time, superior courts could be encouraged to prioritize the oldest cases first. Along the lines suggested by the working group, the Habeas Corpus Resource Center (HCRC) could provide each superior court with periodic updates on the persons subject to a judgment of death for whom habeas corpus counsel has not been appointed, listed with the oldest judgments first.

- If the working group instead implements the proposed system of sending rolling lists of the oldest judgments to the courts, the Committee agrees with the specifics of the proposed system.

- The Committee agrees with proposed Rule 8.654(e)(3), which would require the superior court to "designate an assisting entity or counsel to provide assistance" at the same time that it appoints private counsel. Given the one-year deadline, it is important to have the assisting entity or counsel in place immediately.

Regional Committees and Vetting of Attorney Qualifications

- The Committee agrees with the proposal to form regional vetting committees and believes that at least two of the attorney members should have death penalty–related habeas corpus experience.

- To give sufficient direction, yet flexibility, the rules should indicate that the chair of the committee appoints the members, unless the committee adopts an alternative rule.

- The Committee agrees with the proposed term limits and the staggering of terms. However, the working group might consider allowing the committees to lengthen the term limits or allow members to serve a second term.

- The Committee agrees with proposed Rule 8.655(d)(6), which allows each committee to decide whether to reevaluate and remove an attorney following

a finding in any proceeding that the attorney provided ineffective assistance of counsel. Given the wide range of conduct that could constitute ineffective assistance of counsel, and the fact that ineffective assistance in a different case may or may not reflect on counsel's fitness for appointment, automatic removal from the panel does not seem warranted.

- With the goal of expanding the pool of available counsel in mind, the Committee agrees that a superior court should be authorized to appoint qualified attorneys who are not members of the statewide panel. No approval from the regional committee should be required. As well, attorneys who are on the statewide panel should be allowed to seek inclusion on a local panel.

- The Committee supports the mandatory use of Judicial Council Form HC-100 for all applications to the statewide panel. This requirement will help ensure that the necessary information is provided and will streamline the review of applicants.

- The Committee provides the following suggestions with regard to the proposed Judicial Council Form HC-100:

    - For section 2.a.(2).(b), consider allowing the applicant to provide the contact information for lead counsel, rather than requiring attestations and recommendations.

    - Consider omitting section 3, which states: "I am familiar with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings." The qualification requirements are meant to ensure familiarity, and this stand-alone statement is vague about what it means to be "familiar" with the practices and procedures.

    - For section 8, consider adding "(*if applicable*)" after "Previous application."

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CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA 94102

RE: **Rules and Forms: Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings**, Item Number SP18-12

Dear Judicial Council of California:

I am pleased to submit the following comments on behalf of the California Public Defenders Association (hereinafter, "CPDA") in regards to the proposed changes to the Rules of Court in regard to **the Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings**, Item Number SP18-12.

Statement of Interest

CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes approximately 4000 attorneys who are employed as public defenders or are in private criminal defense practice. CPDA has been a leader in continuing legal education for defense attorneys for over 34 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. CPDA is the co-sponsor of the annual Capital Case Defense Seminar, co-sponsored by California Attorneys for Criminal Justice, which is held over four days every President's Day Weekend for more than thirty-five years; and the co-publisher of the California Death Penalty Defense Manual. CPDA is also active in the California Legislature, attending key Senate and Assembly committee meetings on a weekly basis, taking positions on hundreds of bills, and sponsoring legislation in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In addition, CPDA has appeared as amicus curiae in well over 50 decisions published by the California Supreme Court and Courts of Appeal, and served as amicus curiae in the United States Supreme Court.

Position

We agree with some of the proposals if they are modified. We do not agree with others. Our position is spelled out in detail below.

Comments

The Judicial Council asked, "[w]hether permitting any combination of case experience—instead of set numbers of each type of case—is appropriate, because an attorney could then qualify for appointment without having completed any felony appeals or any jury trials." (Invitation, page 8.) We agree with the concern expressed by the Judicial Council, and object to permitting any combination of case experience instead of set numbers. The specific requirements for each type of case are important. Each represents an important component that is necessary for competent representation in a capital habeas corpus proceeding.

With respect to "[w]hether counsel should be required to have handled a murder case and, if so, in what context (e.g., trial, appeal, habeas corpus proceeding), or whether it is sufficient that the past cases involve serious felonies" (page 8), we submit that counsel should be required to have handled a murder case as lead counsel at trial or on appeal, or as second (or lead) on a completed habeas petition. We recognize that experience in habeas corpus litigation is essential. However, previous representation on a murder case is critical because of the significant differences between murder charges and any other serious felony. Further, if counsel has not already represented an individual convicted of murder in a habeas proceeding, then they should have at least been lead counsel in a murder trial or a direct appeal from a murder conviction.

The Council considers whether prior service as counsel for the prosecution should satisfy the experiential qualifications. (Page 8.) We object to allowing service as counsel for the prosecution to satisfy any part of the requirements. The rules already allow for an alternative basis for qualification that does not require any prior defense experience. Thus, in the extremely rare (if ever) circumstance where an applicant must rely on prosecutorial experience in order to meet the minimum qualifications for appointment as capital habeas counsel, the existing rules allow for consideration of a potentially exceptional applicant.

We object to treating service as habeas counsel from convictions on serious felonies in two separate cases as a satisfactory substitute for having never represented a condemned prisoner on a habeas petition from a death sentence. (Page 8.) We believe that a lawyer who has never filed a habeas petition from a death sentence should have filed more than two prior habeas petitions from serious felony convictions in order to be appointed on a capital habeas case. The timeline in these cases will be so compressed that if the lawyer is not well-versed in habeas

procedure, he or she will not be able to meet the deadlines. Filing two habeas petitions from robbery or residential burglary convictions pales in contrast to the demands of filing a habeas petition from a death sentence. The consequences of procedural error or failing to raise all potentially meritorious issues can be catastrophic because of limitations on successor petitions. The requirement should be five habeas petitions with a minimum of three from violent felony convictions or two from murder convictions.

We salute the proposed increase in the training requirement from 9 to 15 hours. (Pages 9, 11.) However, 15 hours is insufficient. Habeas litigation is unique in that it requires knowledge and experience in both trial *and* appellate skills in defending murder cases, *and* expertise in the complex technicalities of habeas litigation. Thus, the training requirement should be more than required to represent a capital defendant at trial. Further, it is important to receive training from different sources. Therefore, we urge a dual requirement combining a minimum of (1) three separate trainings, (2) with a cumulative total of 20 hours of appellate criminal defense or habeas corpus defense training, at least 10 of which must address death penalty–related habeas corpus proceedings.

With regards to whether training credit should automatically be given for teaching (pages 9, 11), we believe that such credit should be acknowledged, but should be granted in the amount of one hour credit for one hour of teaching.

Regarding the recency of the trainings that have been attended (pages 9, 11), we agree that the trainings must be within two years before being included on the panel. However, because an attorney must continue to keep pace with new legal developments in capital habeas litigation, there must be a continuing training requirement, specifically requiring the same number of hours every two years in order to remain on the panel. (Again, we recommend 20 hours of training as the minimum.) In other words, no counsel should be appointed unless they have obtained the 20 hours within two years before being appointed; it is not sufficient to have had 20 hours within two years of being placed on the panel.

The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case experience should not satisfy any portion of the training requirement.

Finally, concerning the providers of the requisite training (see page 12), we recommend that the trainings for habeas counsel must be approved by a state-wide

entity, e.g., the State Bar, State Supreme Court, Habeas Corpus Resource Center or California Appellate Project.

Our additional comments to specific Rules are as follows:

Rule 8.605(c)(2)(A) and 8.605(c)(2)(B)(i): as explained above, we object to allowing prior experience as counsel for "either party" to satisfy the necessary qualifications. Instead, the proposed amendments to these subdivisions should be withdrawn.

Rule 8.605(c)(4)(B): for the reasons explained above, we urge the deletion of this subdivision.

Rule 8.605(d)(3): as explained above, we recommend increasing the required training hours from 18 to 20, and death-penalty specific habeas training from nine to ten hours, so that the first sentence reads, "Within two years before appointment, the attorney has completed at least 20 hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty appellate or habeas corpus proceedings."

Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C): for the reasons explained above, replace "for either party" with "as defense counsel". In addition, change "including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed" to "including as counsel of record for a petitioner in at least three habeas corpus proceedings, each involving a violent felony in which the petition has been filed, or at least two habeas corpus proceedings involving murder convictions in which the petition has been filed."

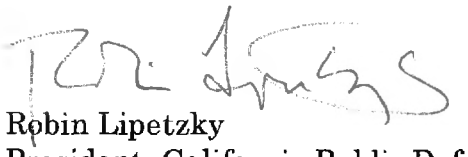
Rule 8.652(c)(4)(A): change "three years" to "two years". Change "15 hours" to complete at least "three separate trainings with a total of at least 20 cumulative hours". Further, the Rule needs to clearly provide that the requirement applies both to (1) being included on a panel and (2) the time of appointment. For example, change "or" to "and" immediately before "appointed" in the second line; alternatively, add a new sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment."

Rule 8.652(c)(4)(C): for the reasons explained above, we urge the deletion of this subdivision.

Rule 8.652(d)(3): change 18 hours (second line) to 20 hours, and make clear the requirement applies both to (1) being included on a panel and (2) the time of appointment. As with Rule 8.652(c)(4)(A), this may be accomplished by changing "or" to "and" immediately before "appointed" in the first line, or by inserting a new

second sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment."

Thank you for your consideration,



Robin Lipetzky
President, California Public Defenders Association

Criminal Justice Legal Foundation

Founded 1982

August 24, 2018

Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: SP 18-12, Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, and

SP 18-13, Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings.

Proposition 66 Rules Working Group:

The Criminal Justice Legal Foundation, a nonprofit organization formed to protect and advance the rights of victims of crime, submits these comments on the above proposals.

The Judicial Council is tasked by statute, enacted in Proposition 66, to "adopt rules and standards of administration designed to *expedite* the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6, subd. (d).) It would be difficult to overstate the extent to which Proposal 18-13 fails in that goal. Instead of obeying the mandate of the voters to fix what is wrong with the present system and expedite the cases, the proposal doubles down on the current failures. It is contrary to Proposition 66 in spirit, in purpose, and in letter. Proposal 18-12 is also deeply flawed, violating the direction of Proposition 66 to avoid needlessly constricting the supply of attorneys.

Like the proverbial "elephant in the living room," the primary problem is completely absent from the background discussion. Before getting to the specific problems with the proposals, therefore, it is necessary to provide a rather lengthy description of the missing background.

The Status Quo Ante

The best window into the problem is the California Supreme Court's decision in *In re Reno* (2012) 55 Cal.4th 428. *Reno* dealt specifically with successive habeas corpus petitions in capital cases. In that context, the court noted abusive practices that serve no purpose other than to throw sand in the gears, consume resources, and cause delay. In the particular case, the petitioner "filed a second habeas corpus petition . . . raising 143 claims in a 521-page petition, almost all of which are untimely without good cause." (*Id*. at p. 514.) In addition, almost all were additionally defaulted by not having been raised in prior reviews. (*Ibid*.) While these timeliness and default rules have exceptions, the petition made "no serious attempt to justify" the defaults. (*Id*. at p. 443.)

"The abusive nature of [the *Reno*] petition [was] by no means an isolated phenomenon." (*Id*. at p. 514.) Such abusive tactics "have become all too common." (*Id*. at p. 443.) The tactics are undertaken to delay for delay's sake (see *id*. at p. 515), a problem not limited to California. (See *ibid*., citing *Commonwealth of Pennsylvania v. Spotz* (2011) 610 Pa. 17, 171 (conc. opn. of Castille, C.J.).) Such tactics are unethical (*Reno*, *supra*, at p. 510) and sanctionable. (*Id*. at p. 512.) They are also poor advocacy, definitely *not* required for effective assistance. (See *Smith v. Murray* (1986) 477 U.S. 527, 536 (winnowing claims "is the hallmark of effective appellate advocacy," even in a capital case).)

Given all that California has invested toward providing quality representation, one might question how and why such abusive, wasteful, unproductive, and unethical tactics became the norm rather than the exception. California provides more generous resources than the typical state. (See *Reno*, 55 Cal.4th at pp. 456-457.) The State Bar established the California Appellate Project - San Francisco (CAP-SF), which acts as an "assisting entity" for appointed capital habeas attorneys. (See Proposal at pp. 2-3.) The Legislature established the Habeas Corpus Resource Center (HCRC) to provide representation directly, to assist with recruiting and selection of qualified private counsel, and to assist private counsel. (See Gov. Code, § 68661.) The Judicial Council provided by rule that specific training from an approved provider was part of the qualification for appointment. (Cal. Rules Court, rule 8.605 (e)(4),(f)(3).) Why was all this not sufficient to build a cadre of capital defense lawyers

with a culture of ethics and competence such that ethical and efficient while thorough representation was the norm and not the exception?

The simple reason is that the foxes gained control of the chicken house. The Legislature created HCRC in a bill that was intended to fix the problem of excessive delay in capital cases, yet it vested the governance of that office in a board elected by the regional appellate projects, organizations where opposition to capital punishment in its entirety is vehement and nearly unanimous. Regrettably but predictably, among the board's first actions was to choose as the first executive director a lawyer who had been chastised by the United States Supreme Court for "abusive delay . . . compounded by last-minute attempts to manipulate the judicial process." (See *Gomez v. United States District Court* (1992) 503 U.S. 653, 653 (*per curiam*).)

Capital defense presents a dilemma in that the system needs capable defense lawyers in order to operate, yet many and perhaps most of the people motivated to do this work full time are viscerally opposed to capital punishment and do not want the system to work. Many see their mission as the destruction of the system.

The abuses described *Reno* and the fact that they were pandemic within the capital defense bar demonstrates that good faith cannot be assumed in the existing capital defense institutions. Surely if the approved training and assisting entities had instructed appointed counsel to refrain from abusive tactics they would never have become the norm. More likely, these entities have been doing exactly the opposite, encouraging what they should have been discouraging.

Attorneys appointed to represent persons who have been convicted of major but noncapital crimes and sentenced to long terms in prison are not typically engaged in a crusade to abolish imprisonment, and their efforts do not delay the execution of the sentence. That is why protracted proceedings to certify the record, quibbling over insignificant imperfections, are nearly unknown. That is why massive petitions with hundreds of claims that are both obviously meritless and clearly defaulted are rare rather than the norm. In this respect, death *should* not be different.

Reform in this area needs to bring in more lawyers who want to provide competent representation in the same manner that they would for a life-sentenced prisoner and not engage in a crusade against capital punishment. The existing system discourages such lawyers, and the proposed rule would do nothing to fix it.

We know anecdotally that well-qualified lawyers seeking appointment after leaving district attorney offices have been rejected for no apparent reason other than not being part of the crusader clique. There are disturbing indications that the entities that are supposed to assist appointed counsel instead create a "hostile work environment" for attorneys with a different viewpoint. CAP-SF has been reported to pressure assigned counsel to make gifts to the clients, thereby reducing the compensation that the defense bar loudly claims is already inadequate.

There are often motions for counsel to withdraw with no public explanation, with the supporting material under seal, and there are anecdotal reports in some cases that a "conflict" with the assisting entity is the reason. Such a withdrawal requires the case to start over with appointment of another attorney, and the withdrawing attorney will likely never take another capital appointment. A "conflict" with an entity appointed only to advise and not control does not appear to be a ground for withdrawal, yet these motions are granted.

Any rule regarding assisting entities should make very clear that the entity is there to assist and not to command. The appointed counsel is counsel of record, is responsible for the case, and must be free to decline advice. While in rare cases it might be necessary for the assisting entity to bring to the attention of the court a matter that it regards as ineffective assistance, that entity must definitely not be allowed to be the judge of what is ineffective.

Proposition 66

Proposition 66 dealt with some of these issues directly. However, the drafters were aware that some of the problems are not susceptible to repair by an initiative, but instead may require change as needs and conditions change. The initiative relies on the Judicial Council to make rules and periodically review them in order to eventually meet the goal of

completing the direct appeal and first habeas corpus proceeding within five years. (See Pen. Code, § 190.6, subd. (d).)

The first and most important direct measure was to move the habeas corpus proceeding to the superior court and direct that court to make the appointment of habeas counsel. (Pen. Code, § 1509, subd. (a); Gov. Code, § 68662.) The model of appointing habeas counsel on a statewide basis is a dismal failure, and Proposition 66 scrapped it. The superior courts can and should recruit and appoint counsel locally from the same pool that takes appointments for serious noncapital criminal cases. The local pool can include the public defender, though the number of cases in which the public defender represented neither the petitioner nor a co-defendant at trial will be limited.

In terms of who can handle these cases, death is not nearly as different as it is cracked up to be. There are, to be sure, some rules that apply in the capital punishment context that are different from noncapital sentencing, but these rules are not difficult to learn. The guilt phase is largely the same. The essential skills needed to handle a habeas corpus petition do not depend on whether it is a capital or noncapital case.

The notion that these cases can only be handled by a select core of elite specialists is a myth that has been promulgated in order to restrict the pool of lawyers in an environment where a shortage of counsel means an extended delay in the case. In an earlier era, when there was no right to habeas corpus counsel in much of the country, the defense bar and the American Bar Association sang a very different tune. Then they proclaimed loudly that any experienced litigator could take these cases with some basic training and consultation with experienced death-penalty counsel. This point was made repeatedly in a special issue of Human Rights, the magazine of the ABA Section of Individual Rights and Responsibilities. (See Quade, From Wall Street to Death Row: Interview with Ronald Tabak, 14 Human Rights (Winter 1987) pp. 21, 62, col. 2 ("Even if you are a practitioner of civil litigation you can learn, as I did, how to do these cases"); Mikva and Godbold, "You Don't Have to Be a Bleeding Heart," same issue, pp. 22, 24, col. 2; Wanted: Pro Bono Counsel for Indigent Death Row Inmates, same issue, p. 29 ("Volunteer attorneys need not have extensive criminal law or postconviction experience").)

What has changed since then is not the nature of the work but the consequences of a shortage. Today, with death row inmates guaranteed habeas corpus counsel by both state and federal law (Gov. Code, § 68662; 18 U.S.C. § 3599, subd. (a)(2)), shortage means delay. To combat this delay, superior courts should be able to recruit and appoint attorneys from the same pool and in the same manner as they would for other major criminal cases.

Proposition 66 thus also contains provisions to expand the available pool of attorneys and particularly to encourage inclusion of those outside the crusader clique. The Judicial Council is expressly directed to "avoid unduly restricting the pool of available lawyers," a requirement violated by the standards proposal. The initiative contemplates continuation of a statewide roster of qualified attorneys, but it unambiguously commands that inclusion is the decision of the Supreme Court, removing that function from HCRC. (See Gov. Code, § 68661, subd. (d).) The appointment proposal violates that provision, as explained below.

The Habeas Corpus Appointment Proposal

Because the proposal proceeds from a misunderstanding of the background and the problem, it goes off in a very wrong direction. Far from obeying the statutory mandate to expedite, it appears to be crafted to obstruct.

Central Control of Appointment Priority

Proposed Rule 8.654, subdivisions (a)-(d) would construct an elaborate process to constrict the superior courts from appointing counsel on the theory that appointing counsel for a newer case causes increased delay in appointing counsel for an older case. The premise of the theory is that the pool of lawyers is statewide, and that the venue is irrelevant to a lawyer's ability and willingness to take the case. The text says that the principle is not meant to be applied rigidly and that the working group recognizes that "availability of counsel may vary regionally." Yet the rule proposed is rigid, and it appears to restrict the superior court of a county from appointing counsel (or at least give it "cover" for not doing so) when it might appoint a local lawyer who would not be able or willing to take a case in another county.

Certainly it is true that the ability of courts to recruit counsel may vary by county, and that newer cases in some counties might receive appointments. The proposal implies that this situation would be inequitable "to the families of the crime victims who have been waiting for a resolution to these cases." I have represented some of these families, and I very much doubt that any would be offended by the appointment of a local lawyer in another county to a newer case when that lawyer would not be available in their county. I also find it curious that the only mention of these families in the entire proposal is in the context of justifying a mechanism for increasing the delay overall. The absence of victim advocates from the Working Group may be a factor in this lack of understanding.

The principle of appointing lawyers for the oldest cases first should operate only by county, at least for appointment of local lawyers. A mechanism for rationing the appointment of lawyers from outside the area could conceivably be appropriate, but the result of such unavailability should be that the court recruits and appoints from the local bar.

Having no statewide rule would be better than the proposed rule. This proposal should be scrapped. If a prioritization rule is desired, the Working Group should start over and draft a much more limited and advisory rule.

Priority and Source of Appointment

Proposed Rule 8.654 (e)(2) would mandate that the superior court offer the appointment to HCRC first. Not a single shred of justification for this astonishing proposal can be found in the background material.

First, use of local counsel is particularly appropriate in habeas corpus proceedings. State habeas corpus is primarily concerned with claims arising on facts outside the record; claims that appear on the record generally can and must be made on direct appeal. (See *In re Dixon* (1953) 41 Cal.2d 756.) Proximity is both valuable and economical for fact-finding legwork and court appearances, and the local knowledge that comes with having practiced law for years in a community is a significant asset. HCRC is in San Francisco. Only 14.8% of California capital judgments come from the nine Bay Area counties, while 68.5% come from the nine counties south of the line that forms the northern boundary of San Bernardino,

Kern, and San Luis Obispo Counties. For most cases, HCRC is a long way from where the action is. The superior court could very well conclude that a local attorney is better positioned to take on a fact-intense case, and that decision ought not be precluded by rule.

Second, though it is rarely stated in public, it is well known among courts, prosecutors, and victim advocates that the institutional defense organizations are often more of the problem than the solution in capital litigation. Pennsylvania Chief Justice Castille's concurrence in *Commonwealth v. Spotz*, *supra*, cited by the California Supreme Court in *Reno*, is one of the few public statements, but his opinion is widely shared. Within California, HCRC is widely regarded on the prosecution side as a failed institution with a deep culture of obstruction.

If HCRC wants priority in appointments it can earn it by demonstrating that it has the ability and the will to handle capital habeas corpus cases expeditiously. Superior courts should have the authority to deal with obstructive lawyers, both individuals and institutions, by not appointing them. Giving HCRC a "right of first refusal" by statewide court rule is a needless restriction on the courts. It is certainly a violation of the spirit and probably a violation of the letter of Government Code section 68662, which now localizes the appointment decision and vests it in the superior court.

Proposed Rule 8.654(e)(2) is unjustified, unwise, and probably illegal. It should be removed from the proposal.

Proposed Rule 8.654(e)(3) would forbid the superior court to appoint an attorney not on the statewide list unless that court has adopted a local rule. This proposal also violates Government Code section 68662. The statute vests the appointment discretion in the superior court, and a court cannot be required to adopt a rule to maintain a discretion already vested in it by statute. The Judicial Council is constitutionally forbidden to adopt rules "inconsistent with statute," (Cal. Const., art. VI, § 6), and this proposal is inconsistent, as well as being bad policy.

One of the reasons that Proposition 66 vests the appointment decision in the superior court is that the judges of that court are familiar with the local lawyers. To put it candidly, they know who the stars are and who the turkeys are. The formal roster-making process is all well and good as an

advisory matter, but it should not prevent a superior court judge from appointing a lawyer whom the judge knows is fully capable of the task.

Proposed Rule 8.654(e)(3) should either be deleted or, if retained, amended to make unmistakably clear that the court has discretion to appoint an attorney not on the statewide roster if the court finds the attorney qualified, and no local rule to that effect is necessary.

The Statewide Roster

Before Proposition 66, Government Code section 68661, subdivision (d) assigned HCRC "[t]o establish and periodically update a roster of attorneys qualified as counsel . . . ." Proposition 66 amended that subdivision to make HCRC's role purely advisory and provided "the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center." Proposed Rule 8.655 is inconsistent with the statute.

The problem with having a capital defense roster assembled by defense organizations or committees dominated by defense lawyers is that attorneys who are not "true believers" in the anti-death-penalty crusade may be "blackballed." The very attorneys who would provide exactly what the system needs — competent yet expeditious representation — are subject to exclusion by those who do not want the system to work.

Having the recommendation done by regional committees rather than HCRC is a good idea, but the committees cannot have the last word. The statute unequivocally vests the final say in the California Supreme Court.

A rule for advisory committees needs to have strong protection against ideological blackballing. While the rule states the committee's job as determining "minimum qualifications," both the present and proposed rules have subjective elements. The rule should expressly forbid rejecting an application on the basis of the applicant's views on capital punishment or on prior experience as a prosecutor. An applicant who is not approved should have the right to a specific statement as to why he was not. There must be a mechanism for review. Consistently with the statute, that mechanism should be a final decision by the California Supreme Court. The court would no doubt routinely approve uncontested decisions and only be called upon to review the dubious and disputed ones.

The committee should have one district attorney member, recommended by the California District Attorneys Association or by the district attorneys of the region collectively, and one representative of the Attorney General's office. While the prosecution should not have a role in the actual appointment of counsel, it does have a legitimate interest in the composition of the pool from which attorneys are selected. This is not a conflict of interest. Having attorneys who will do a competent job is in the best interest of all concerned, as the prosecution is more likely to get the case back again if counsel is found ineffective. Representation on the committee would serve this interest and provide an additional safeguard against blackballing.

The proposal provides in Rule 8.655(d)(6) that a finding of ineffective assistance does not automatically result in removal of an attorney from the panel. We believe that is correct. Given the propensity of some courts to stretch for any reason to overturn a capital sentence, a finding of ineffective assistance may simply be wrong. This is particularly true where a claim of ineffective assistance was considered and rejected by the state courts and subsequently accepted by the federal courts.

However, the rule implies that a committee can unilaterally decide to remove an attorney from the panel. It cannot. The statutory vesting of the decision to include in the Supreme Court implies a similar assignment of the decision to remove.

Along with ineffective assistance, abusive tactics such as those denounced in *In re Reno*, *supra*, and *Gomez v. U.S. District Court*, *supra*, should also be expressly mentioned as grounds for removal.

Assisting Entities

The proposals show no awareness of the reality that the "assisting entities" can be as much of a hindrance as a help. We have been told that the difficulty of dealing with CAP-SF is one of the reasons that some appointed counsel say "never again," thus exacerbating an already critical shortage of attorneys.

The qualifications rule retains the language of present Rule 8.605(b): "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." This is not a qualification

and does not belong in this rule. A rule governing the relationship between appointed counsel and the assisting entity is in order, though, and it requires balance and a recognition of counsel's role as the decision-maker. Such a rule might read like this:

> "Appointed counsel and the assisting counsel or entity shall cooperate with each other. The role of the assisting counsel or entity is to advise and not to control. Appointed counsel remains responsible for case and shall make the decisions regarding representation in the best of his or her professional judgment after considering the advice offered. In the event that conflict between appointed counsel and the assisting counsel or entity becomes detrimental to representation, the court may (1) relieve the assisting counsel or entity if the court determines that appointed counsel can proceed without further assistance; or (2) designate a different counsel or entity to assist. Withdrawal or dismissal of appointed counsel on the ground of such conflict shall not be employed unless the court determines it is necessary to ensure effective representation."

Although it may be beyond the scope of the present rulemaking proceeding, the Judicial Council's monitoring of capital cases (see Pen. Code, § 190.6, subd. (d)) should include a review of how well or how poorly the assisting entities are actually assisting, including collection and review of evaluations of the entities by the appointed counsel. If the dissatisfaction in the reports we have received is widespread (and we have no way of knowing if it is), a change would be in order.

The Qualification Proposal

The statutory mandate for qualifications (see Gov. Code, § 68665, subd. (b)) requires consideration of four factors:

1. Achieving competent representation;

2. Avoiding unduly restricting the available pool of attorneys;

3. Qualifying for Chapter 154 of Title 28 of the U.S. Code; and

4. Not limiting experience requirements to the defense side.

Under criteria 2 and 4, changes from existing standards should all be in the direction of broadening the available pool, and particularly including attorneys who have recently left a prosecuting office, unless there is a compelling reason under criteria 1 or 3 for a more restrictive standard.

The proposal contains one, and only one, defensible increase in restriction. The present California standard for capital habeas attorneys is four years admission to the bar (see present Rule 8.605(e)(1)) while the corresponding federal standard is five years. (See 18 U.S.C. § 3599, subd. (c).) An increase to meet the federal standard does improve California's chance of qualifying for Chapter 154, if only marginally, with little impact on the available pool, and it is warranted. (See Proposed Rule 8.652(c)(1).)

For an increase in restrictiveness to be justified under the more general criterion 1, a compelling showing of need should be required, not just a vague impression. It is worth noting in this regard that even the American Bar Association—certainly no friend of capital punishment—has acknowledged that its earlier emphasis on "quantitative measures of attorney experience—such as years of litigation experience and number of jury trials"—was misguided. (See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 962 (2003).)

That said, Chapter 154 does require "standards of competency" (see 28 U.S.C. § 2265(a)(1)(C)), and the implementing regulations do employ quantitative measures for presumptive adequacy, so it would not be wise to abandon the existing standards. However, we are aware of no evidence that the existing bars are not high enough, and the background discussion in Proposal SP 18-12 does not cite any. Again, we should bear in mind the ABA's conclusion that quantitative measures are really not worth much.

The concerns expressed in the proposal that the one-year limit instead of three justifies higher hurdles is not well founded. Other jurisdictions have had one-year limits for many years, and their quantitative requirements are not typically higher than California's. (See, *e.g.*, 28 U.S.C. § 2255, subd. (f) (collateral review statute of limitation for federal defendants); 18 U.S.C. § 3599, subd. (c) (standards for counsel).) There is also little reason to believe that increased hours of instruction above the

current requirements will produce improved quality. Former capital appellate defense attorneys tell us that the instruction offered is frequently of poor quality and often far too elementary for the experienced attorneys required to attend it.

To the extent that the proposal increases quantitative measures and training requirements beyond the current rule, all such increases should be removed.

One essential element of the Proposition 66 reform for broadening the pool is to require prosecution experience to fully count. Relegating highly experienced former prosecutors to the "back of the bus" of alternative qualification was uncalled for from the very beginning. It is highly doubtful whether the Judicial Council has authority under Government Code section 68665 to require defense-side experience at all.

If we assume for the sake of argument that defense-side experience can be required in some degree, the requirement that counsel's experience include two habeas corpus cases *for the petitioner* in Proposed Rule 8.652(c)(2)(B)(ii) and (C) seems designed to insure that experienced attorneys leaving prosecuting offices will not qualify for some time, directly contrary to the intent of the Proposition 66 reform. An experienced attorney can learn the ropes of a procedure from either side. This restriction must be deleted.

Even worse, the "alternative experience" provision has a stealth provision to exclude recent departees from district attorney offices who could have qualified under the current "alternative" rule. Proposed Rule 8.652(d) incorporates (c)(5). That paragraph, in turn, requires submission of writing samples including "two or more habeas corpus petitions filed by the attorney *as counsel of record for the petitioner* . . . ." While the whole point of "alternative qualifications" under the current rule is to allow appointment without criminal defense experience, and the proposed rule ostensibly is for people who don't meet the (c)(2) requirements, the defense-side experience requirement is treacherously brought in through the back door of the writing sample requirement. "Dirty pool" would be an understatement.

Training

Training can be helpful and may be necessary when learning a new subspecialty of practice, but we cannot assume that training will always be useful. As discussed near the beginning of this comment, it is difficult to believe that the abusive and unethical practices denounced in *In re Reno* could have become widespread if the ethics of practice and the duty of effective assistance (including *Smith v. Murray*, *supra*) had been correctly taught at the required training.

The defense bar likes to be secretive about its collective strategy, but if the power of government is going to be used to mandate attendance at training, then the public interest demands openness to insure that the course is correctly teaching ethics, not "unethics." As a condition of approval, all training providers should be required to admit any member of the bar who pays the fee.

It is deeply disappointing that these proposals do so little to advance the goal that the law requires the Judicial Council to advance. We hope that the Working Group will undertake a complete rewrite and produce a product that complies with the law's direction.

Very truly yours,

Kent S. Scheidegger

KSS:iha

EMBAJADA DE MÉXICO

Washington, D.C.
August 23, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: SP 18-12, Comment from the Government of the United Mexican States

Dear members of the Judicial Council of California,

On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.

The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad.

There are currently 39 Mexican nationals on death row in California. Twenty-two of those do not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply.

[1] *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261.

Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death.

As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex; my government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.

The proposal, SP 18-12, requests specific comments on 12 questions. With the exception of the first two questions, they all address the sufficiency of the proposed requirements for training and experience of attorneys appointed to represent petitioners in state habeas corpus proceedings. Mexico's primary concern about these proposed requirements is that they do not account for the special needs of foreign nationals in death penalty cases.

Representing foreign nationals requires additional skills, experience, and training beyond that necessary for capital habeas corpus representation generally. Indeed, the American Bar Association's widely cited *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* (Rev. ed. 2003) include an entire guideline, Guideline 10.6, specifically addressing "Additional Obligations of Counsel Representing a Foreign National." In addition to working with consulates, attorneys representing Mexican nationals in death penalty habeas corpus proceedings must at a minimum be familiar with relevant treaties and international law issues; have an understanding of the cultural differences that may affect the client and witnesses in their interactions with counsel and the legal system; be experienced in coordinating an extensive investigation in a foreign country; and be familiar with issues that frequently arise in these cases that are comparatively rare in U.S. citizen cases, such as problems with language barriers and interpreters, the location and evaluation of culturally knowledgeable and appropriate experts, and mitigation themes such as exposure to pesticides and immigration-related trauma. Because habeas corpus counsel must evaluate the sufficiency of trial counsel's representation in addition to re-investigating both the guilt-innocence and penalty portions of the case, he or she must understand what competent trial-level representation of a Mexican national entails.

The proposed rules fail to account for these necessary skills and experience. They require no training on cultural issues; indeed, proposed Rule 8.652(c)(4)(C) would allow an attorney who has completed just one death penalty-related habeas corpus proceeding for a U.S. citizen to be appointed on a Mexican national's case with no required training at all. They allow for the appointment of attorneys who have never litigated or even

researched an issue regarding a treaty, such as the Vienna Convention on Consular Relations, the U.S./Mexico Mutual Legal Assistance Treaty,[2] and the bilateral U.S./Mexico Consular Convention. A Mexican national defendant could find himself represented by an attorney who had never before met a person from Mexico, never left the United States, speaks no Spanish and has never worked with an interpreter, and has never attempted to gather or analyze records or interview witnesses in a foreign country. While these omissions would be of concern any time an attorney takes on representation of a foreign national, they are especially worrisome in view of Proposition 66's one-year time limit on preparing and filing the petition. Appointed attorneys will have no time to familiarize themselves with new areas of law, unfamiliar cultural issues, or logistical challenges associated with investigation abroad. An attorney with no training or experience in these areas simply cannot provide effective representation to these individuals under such limitations.

At a minimum, the qualifications for counsel appointed in death penalty habeas corpus proceedings in the cases of foreign nationals must include substantial training and experience in representing such clients. The proposed rules already account for additional requirements in a subset of cases with greater needs; Rule 8.652(e) recognizes that experience conducting trials evidentiary hearings may not be necessary for adequate representation in every case, but may become necessary in certain cases, requiring the involvement of an attorney with such experience. Thus, including requirements for the requisite experience where necessary need not increase the required experience for counsel in every case. It would be quite feasible to account for the needs of this subset of specialized cases without significantly compromising the goal of increasing the pool of available counsel for death penalty habeas corpus cases generally.

Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States.

I avail myself of this opportunity to convey to you the assurances of my esteem and consideration.

[2] Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, S. TREATY DOC. NO. 100-13, eff. May 3, 1991, *27 I.L.M. 443*.

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: August 24, 2018

Re: SP 18-12 - Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

The below comments to SP 18-12 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, with the exception to comments on two provisions, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 12-13 of the Invitation to Comment.

Comments on Specific Provisions:

Proposed Rule 8.601(5) suggests that HCRC may be designated by an appointing court as the "assisting counsel or entity" to "provide appointed counsel with consultation and resource assistance." HCRC's ability to serve as an assisting entity, however, is limited by Government Code section 68661. Specifically, Proposition 66 amended subdivision (g) of section 68661 to limit HCRC to providing "legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law." Proposition 66 struck language from the original statute that permitted HCRC to provide "any other assistance" to appointed counsel "to the extent [the assistance was] not otherwise available." By limiting HCRC's functional mandate in subdivision (g), Proposition 66 has created uncertainty about the level of "consultation and resource assistance" HCRC could provide directly to appointed counsel when designated as an assisting entity.

Proposed Rule 8.652(c)(4) states that an attorney must complete specified training "[w]ithin three years of being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655." Proposed Rule 8.652(d)(3) requires that the training for the "alternate experience" qualification be

completed by the attorney "[w]ithin two years before being included on a panel or appointed by the Supreme Court." To make these rules consistent, and to ensure currency of knowledge in the frequently changing legal and forensic landscape of capital habeas corpus proceedings, the time period in subdivision 8.652(c)(4) should be modified from three years to two years. In addition, subdivision (c)(4) should be modified to make clear that the training requirement must be met by the appointed habeas corpus counsel not only within the specified period prior to inclusion on the statewide panel, but within the specified period *prior to any actual appointment* by a court that selected the habeas counsel from the statewide panel. This suggested modification creates uniformity in the training requirement regardless of whether the appointment is made by a court that selects counsel from the statewide panel, by the Supreme Court, or by a superior court under a local rule. It also ensures that appointed counsel's training is current, in the event counsel is included on the statewide panel but not immediately appointed to a habeas corpus case. Similarly, proposed Rule 8.652(d)(3) should be modified to require that the training for the "alternate experience" qualification be completed by the attorney within two years of both inclusion on the statewide panel and any appointment by a court that selects the attorney from the panel.

Responses to Selected Requests for Specific Comments:

- *Should service as counsel on behalf of any party satisfy the requirement for prior case experience, or should some or all of the experience be as counsel for the defendant/appellant/habeas corpus petitioner?*

The proposed rules do not and should not allow service as counsel on behalf of any party to satisfy the requirement for prior case experience. Representing petitioners in capital habeas corpus proceedings is unique and requires a high degree of skill and technical proficiency, especially regarding the identification, development, and presentation of mitigation evidence. In its 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the American Bar Association emphasized that "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." 31 Hofstra L. Rev. 913, 923 (2002). Just as the defense of ordinary criminal cases is different from capital-case defense, so too is the prosecution of criminal cases – even death penalty cases. Prosecution experience alone should not satisfy the requirement of prior case experience.

- *How many hours of training is appropriate?*

Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense

training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings."

Representation of petitioners in non-capital habeas corpus proceedings may bear little resemblance to such representation in capital proceedings. Non-capital habeas corpus proceedings often involve peripheral issues including parole eligibility and conditions of confinement. Even when related to the bases for the underlying criminal conviction, habeas corpus proceedings in non-capital cases do not deal with penalty phase issues. Thus, training on non-capital habeas corpus proceedings may not enhance an attorney's qualification to represent death row inmates in capital habeas corpus proceedings. Similarly, training in "appellate criminal defense," if that training is non-capital in nature, would not include penalty phase issues, and even if such appellate criminal defense training concerned capital representation, it would not cover development of extra-record facts – the quintessential task of the capital habeas litigator.

For these reasons, the rule should be modified to require "at least 15 hours of training in the representation of petitioners in death penalty habeas corpus proceedings."

- *What minimum combination of past case experience should counsel have before being eligible for appointment in a death penalty-related habeas corpus proceeding?*
- *Should counsel be required to have experience in habeas corpus proceedings, appeals, jury trials, and/or other writ proceedings?*
- *Should counsel seeking appointment in a death penalty-related habeas corpus proceeding have prior case experience relating to a murder charge or conviction?*

As discussed above with respect to training requirements, representation of petitioners in capital habeas corpus proceedings presents unique challenges not inherent in other areas of criminal practice. Non-capital criminal cases – even murder cases – do not involve a penalty phase, and therefore experience in non-capital cases will not prepare an attorney for that critical aspect of capital habeas corpus defense representation. Moreover, representation of defendants in capital in murder trials often does not involve extensive briefing and the understanding of labyrinthine state and federal procedural rules and standards of review required by counsel representing petitioners in capital habeas proceedings. Appellate cases – even in the capital context – do not involve development of extra-record facts, and therefore experience on criminal appeals, even when capital, will not prepare an attorney to do that work in a capital habeas proceeding. Representation of the state in criminal cases – even in capital cases – does not require mitigation investigation, nor does it present issues of client relations present in the representation of criminal defendants, and specifically death row inmates.

To better approximate the skills required for adequate representation of petitioners in capital habeas corpus proceedings, proposed rule 8.652(c)(2)(C) should require habeas corpus case experience in *at least* four serious felony cases, including at least two habeas corpus proceedings involving a murder conviction in which the petition has been filed. In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.

Downs, Benita

From: Invitations
Sent: Friday, August 17, 2018 9:29 AM
To: Invitations
Subject: Invitation to Comment: SP18-12

Proposal: SP18-12
Position: Disagree
Name: Marylou Hillberg
Title: Attorney at Law
Organization:
Comment on Behalf of Org.: No
Address: PO Box 1879
City, State, Zip: Sebastopol CA, 95473
Telephone: 707-575-0393
Email: hillberg@sonic.net
COMMENT:
Comments on Proposed Rule for New Qualifications for Appointment in Capital Habeas Petitions, California Rules of Court, Rule 8.652(c)

As counsel of record on two capital habeas appointments (S221802 & S211187), as well as un-appointed associate counsel for nearly ten years in another, (S168103), my evaluation of the proposed qualifications is that they will lead to grossly under-qualified counsel. Moreover, given the one year time line to file under Prop 66, there simply won't be enough time to climb the steep learning curve required to adequately investigate and prepare a constitutionally adequate habeas petition.

One of the most glaring omissions is that these rules do not even require prior experience in a murder case. That is extremely perplexing to me as most of the habeas work I have done, and what I have read in other cases, involves the impact of mental states and defenses on criminal behaviors. As a criminal defense attorney, one does not really begin to comprehend how the various forms of mental illness and disabilities affect the behaviors of our clients until we must apply them to defense in the varied degrees of homicide. I've handled more than seventy-five murder cases and can count on one hand (probably with fingers left over) how many of these cases were "who dun it"[s]. The issues I've encountered generally involved varied mental states as defenses to the crimes. Most other types of serious crimes, do not require this kind of analysis.

The other comment I have is that I greatly benefited from the assistance of an experienced, and extremely capable lawyer when I was an unappointed associate counsel with him in a case for nearly a decade. Then when I accepted my own capital habeas appointments, I learned just how overwhelming and difficult this work is for a sole practioner. I could not have done an adequate job in these petitions, within the three years of my appointments, without the assistance of CAP.

I think your MCLE requirements are grossly understated; since I started working on capital cases about 15 years ago, I've taken more 500 hours of MCLE, mostly in mental health areas. I do not believe that any attorney, without extensive prior training and experience, can adequately learn these areas AND file a petition within one year.

I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.

I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a

younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.

My remaining concern is that the local appointment and oversight of habeas counsel will be inadequate to ensure competence, given discoveries I have made during investigations in state and federal cases of poor oversight and even, claims of corruption. It has shocked me even though I had "seen it all". I am not sure that these rules are intended to address adequate oversight on a state-wide level as my experience is that the adequacy of trial counsel varies greatly by locale. I hope this does not become true in death penalty cases.

Thank you very much for considering my thoughts.

Sincerely,
Marylou Hillberg,
Attorney at Law

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August 24, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688
invitations@jud.ca.gov

RE: Comments of Federal Defender Heather E. Williams, Eastern District of California regarding *Invitation to Comment SP18-12, Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings*

Dear Judicial Council members:

I write to comment on the proposed *Rules and Forms: Qualification for Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, SP18-12*.

Introduction:

My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates.

Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and vital to the clients we represent that California appoint qualified counsel to represent these persons.

Proposed Rule 8.605(c)(2):

Pursuant to Proposed Rule 8.605(c)(2) concerning the Panel for appointments to represent in their automatic appeal proceedings persons sentenced to death, attorney applicants must have served as counsel of record for either party (the State or a defendant) in a specified number of felony appeals.

We are concerned about the potential conflicts of interest when a Panel applicant previously represented the People of the State of California in felony appeals involving a capital appellant or witnesses involved in the capital appellant's case. Sometimes those conflicts are difficult to ascertain until the lawyer deeply involved in the case and reads the voluminous records. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate experience on behalf of the State of California are precluded from accepting automatic appeal appointments in cases from the county or counties in which they previously defended, for the State of California, criminal judgments on appeal."

This requirement would affect former California Attorney General's Office employees, from the Office which is charged with defending criminal judgments on appeal. While such an attorney may have defended criminal judgments from several California counties, thus disqualifying that person from accepting appointments in those counties, it would not prevent that lawyer from accepting any automatic appeal appointments from other counties. It is unlikely a former deputy attorney general would have defended criminal judgments from each of California's 58 counties.

Proposed Rule 8.652(c)(2):

This Proposed Rule provides the minimum qualifications for attorneys who accept appointment in capital habeas corpus cases in California. Like Proposed Rule 8.605, this Rule allows the committee to consider prosecutorial experience. The qualifying prosecutorial experience may include appeals, habeas corpus proceedings, and felony jury trials. *See* Proposed Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C).

As with Proposed Rule 8.605, we are concerned about the potential conflicts of interest when an applicant previously represented the People of the State of California in felony trials, habeas corpus proceedings or appeals involving a capital habeas petitioner or witnesses involved in the capital habeas petitioner's case. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate, habeas corpus or felony trial experience on behalf of the State of California are precluded from accepting capital habeas cases appointments in cases from the county or counties in which they previously tried felony cases for the State of California and/or defended, for the State of California, criminal judgments on appeal or in habeas corpus proceedings." This provision would affect prosecutors in the Attorney General's office and in the 58 California County district attorney offices.

We have a second concern regarding Proposed Rule 8.652(c)(2) and trial prosecutorial experience. This Rule accepts experience as prosecution trial counsel in habeas

corpus appointments. Representing the State in a trial may or may not provide relevant defendant/petitioner habeas corpus experience. As the Council is aware, a trial prosecutor may have nothing to do in a habeas corpus proceeding.

Once a petitioner files a petition for writ of habeas corpus in the superior court, the court may rule on the petition by issuing an order to show cause, denying the petition, or requesting an informal response. *See* Rule 4.551(a)(4). If the court summarily denies the petition, then the prosecutor never files anything. We suggest the Proposed Rule be modified to state, "A former state or county prosecutor's habeas corpus case experience qualifies under this rule only if the prosecutor filed an informal response or filed a return to an order to show cause."

As with habeas corpus petitions in the superior court, habeas corpus petitions filed in the Court of Appeal or the Supreme Court may be resolved summarily, without involving the prosecutor. *See* Rule 8.385. We recommend a prosecutor's qualifying experience regarding habeas corpus petitions filed in **any** court be limited to those cases where the prosecutor filed an informal response or a return to an order to show cause.

Proposed Rule 8.652(e):

Proposed Rule 8.652(e) directs an attorney appointed as habeas counsel, who does not have experience in trials or evidentiary hearings, must "associate with an attorney who has such experience" if an evidentiary hearing is ordered.

This proposal raises questions: What mechanism or process does appointed counsel use to "associate" with counsel who has trial experience? Is the superior court that appointed habeas counsel required to appoint an associate counsel once it orders an evidentiary hearing? Does associate counsel have to meet Proposed Rule 8.652(c)'s qualifications? Must associate counsel be appointed only from the panel?

We recommend the rule require the superior court appoint associate counsel from the panel.

Thank you for this opportunity.

Very truly yours,

HEATHER E. WILLIAMS
Federal Defender, Eastern District of California

/hew

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Telephone: (510) 267-3300
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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
Sent via email to: invitations@jud.ca.gov

Re: Comments on Item SP18-13, proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings

Comments on Item SP18-12, proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

Dear Members of the Judicial Council:

The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience

We submit the following comments on the proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings, SP18-13.

1. We have deep concerns about the current length of time between the imposition of the judgment of death and the appointment of habeas counsel. Some of the appellants we represent have been waiting over a decade for habeas counsel. In the meantime, evidence is lost, memories fade, witnesses disappear or pass away. Thus, we note the rule provision that prioritizes the older cases, proposed rule 8.654(b), is a step in the right direction.

However, we wonder whether this rule and its "whenever possible" language will assure that the oldest cases get counsel first. We favor a more mandatory, direct rule. The language of 8.654(b) should read "shall", not "should."

2. While delay remains a significant problem, there is also a danger in appointing counsel too soon. New Government Code § 1509 subdivision (b) states that habeas counsel should be offered to defendants "[a]fter the entry of a judgment of death." This suggests that counsel might be appointed soon after entry of judgment. Of course, the prioritization of the older cases should prevent such an occurrence, but, in any event, no habeas counsel appointment should be made until after the record is certified. Habeas counsel, who will presumably – subject perhaps to equitable tolling – be expected to file a petition within a year of appointment, must have access to a complete and accurate record immediately. We favor a rule that specifically states that: "Regardless of any other provision, no appointment of habeas counsel in a death-penalty related case shall be made until after the record has been certified for completeness and accuracy pursuant to California Rules of Court, rule 8.622(b)(2)." This might be added to proposed rule 8.654 as subdivision (f).

3. There is a gaping hole in the proposed rules: the lack of any discussion of funding. Habeas counsel must be compensated. The reasonable expenses of habeas counsel must be funded. The rules do not make any provision for the payment of the attorneys who are supposedly going to receive appointments. It is simply unrealistic to expect any attorney to apply to be on the state-wide panel for habeas appointments without any provisions for when and how payment will be made for services and expenses.

Under current procedures, the California Supreme Court grants habeas counsel up to $ 50,000 in expenses for the preparation of habeas petitions. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, 2-2.1.) This policy has served to assure counsel taking an appointment that the Court anticipates that counsel will incur necessary expenses for investigation, forensic testing, experts, and other tasks. To have no similar provision in these rules creates uncertainty, confusion, and unfairness.

Further, the amended statute (Gov. Code § 68650.5) notes that one of the purposes of the law is to "qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154 of Title 28 of the United States Code." The Chapter 154 regulations specifically require a state system to provide for reasonable compensation for counsel and payment of litigation expenses, including investigators, mitigation specialists, mental health and forensic science experts, and support personnel. (See 28 C.F.R. § 26.22(c), (d).) Yet the proposed rules are, again, completely silent on the question of funding, compensation, and expenses. This is a glaring omission.

At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid.

Additionally, and related, is the question of funding and staff for the committees created by this rule. There is no provision for the funding of the operation of the committees, nor funding for staff and resources. The rule is silent and the omission also glaring.

4. We object to the "local rule" provision of rule 8.654(e)(3) and rule 8.655(e). The local rule provision is a mistake for a number of reasons. First, a local rule will invite inconsistency in the evaluation and selection of counsel. Second, a local rule will subvert the oldest case first proviso, since the local entity might not have cases within the 8.654(d) list of 25. Third, a local rule invites insular, separate decision making that will undercut the quality and consistency of the counsel appointments.

5. The "assisting entity" language of rule 8.654(e)0(3) does not mention any entities. The rule should designate CAP and HCRC as potential assisting entities.

We submit the following comments on the proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, SP18-12.

1. As mentioned in our comments with regard to SP18-13, there is a significant and debilitating omission in these rules: the lack of provisions for the compensation of counsel and the funding of expenses.

2, Proposed rule 8.605(f) seems to be outdated and unnecessary. It appears to contemplate a joint appellate and habeas appointment in the California Supreme Court. Under the new procedures, it is unclear whether this situation would ever occur.

OSPD appreciates the Judicial Council's consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

Sincerely,

/S/

Mary K. McComb
State Public Defender

Item SP18-12 Response Form

TITLE: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

X **Agree** with proposed changes
Agree with proposed changes **only if modified**
Do not agree with proposed changes

Comments:
The Los Angeles Superior Court supports this proposal as written.

PLEASE NOTE:
These comments are from the Los Angeles Superior Court and not from any one person in particular.

ORGANIZATION:	**LOS ANGELES SUPERIOR COURT** **111 N. Hill Street, Los Angeles, CA 90012**
RESPONSE TO:	**Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102**
DEADLINE FOR COMMENT:	**Friday, August 24, 2018**

Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

From: Invitations
To: Invitations
Subject: Invitation to Comment: SP18-12
Date: Friday, August 24, 2018 4:58:49 PM

Proposal: SP18-12
Position: Agree if modified
Name: Kristin Traicoff
Title: Attorney
Organization: Law Office of Kristin Traicoff
Comment on Behalf of Org.: No
Address:
City, State, Zip: Sacramento CA, 95820
Telephone:
Email:
COMMENT:
I have four comments on the proposed rule changes:
1) Proposed rules 8.605(d) and 8.652(d)(1) provide for alternative qualifications for appointment as lead counsel in capital direct appeals and habeas corpus proceedings, respectively, allowing for appointment if the these qualifications are found to have been met. As a preliminary matter, it appears 8.605(d) vests solely in the Supreme Court authority to make this determination and 8.652(d)(1) allows both the Supreme Court and "the committee" to make this determination. It does not appear that there is any basis to give the committee this authority with regards to habeas appointments, but not appellate appointments, and thus I suggest 8.605(d) also include language that gives the committee this authority.

2) Proposed rules 8.605(g)(2) addresses the qualifications for assignment as lead counsel among the attorneys at OSPD. I am perplexed that this rule requires that, should the attorney be qualified under alternative qualifications (proposed rule 8.605(d)), the Supreme Court must remain the entity vested with the authority to determine if the person qualifies as lead counsel. It appears sensible that OSPD could be vested with this authority, given the other statutory and other mechanisms that exist to ensure that that agency--regardless of which attorney is assigned to represent a particular client--is, as a whole, providing effective representation to all clients whom OSPD has been appointed to represent. This is particularly true since and 8.652(h)(2) grants HCRC the authority to determine if an attorney qualifies as lead counsel under 8.652(d); again, the disparate treatment of these two agencies is perplexing and does not seem to be grounded in any material difference between the management capacities of the two agencies. Moreover, as a practical matter, it seems quite unlikely that a line attorney at OSPD would feel comfortable approaching the Supreme Court (or committee, should the rule be amended to grant the committee this authority) to essentially ask for greater work responsibilities at their job. As someone who worked at OSPD, doing so would have made me feel profoundly uncomfortable, as it would have felt as though I was essentially skipping over the internal management structure of the agency to essentially ask for a promotion form the Court. This simply seems unrealistic and I would be surprised if many OSPD attorneys chose to avail themselves of this option.

3) In response to the committee's question of whether filing two habeas corpus petitions in felony cases is too low or too high as an element of required experience for appointment as habeas counsel, I would suggest simply that the rules require that the writing samples the applicant submit be, at least, those two habeas petitions. The fact that someone has filed two habeas petitions does not necessarily mean that those petitions were of the quality that would ensure effective representation of a capitally-sentenced inmate in habeas corpus proceedings.

4) I believe the committee should require that the trainings discussed in the rule be recent, e.g., within the last 2 years. The reason is simply that capital case law is very volatile, in the sense that the US Supreme Court, 9th Circuit, and California Supreme Court frequently (i.e., multiple times per year) issue opinions that alter in some material way the understanding of the procedural or substantive law relevant to capital cases. As someone who has conducted trainings for other death penalty attorneys on legal developments, staying abreast of these developments requires significantly more effort than I have found is generally true in many other areas of the law with which I am personally familiar. An attorney who has an outdated understanding of the legal rules relevant to our work cannot

provide effective representation.