JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 30, 2018

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

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 4.545, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101

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
October 19, 2019

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Executive Summary

To provide procedures for superior courts to determine if an attorney meets the minimum qualifications for counsel in death penalty–related habeas corpus proceedings and to appoint such counsel for indigent persons subject to a judgment of death, the Proposition 66 Rules Working Group proposes amending one rule and adopting four new rules and two new forms. These proposed rules changes are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66. A second report to the Judicial Council presents the working group's recommendations for amendments to related rules governing qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings.

Recommendation

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

1. Amend chapter 3 of division 6 of title 4 of the California Rules of Court to divide the chapter into three new articles:

   - Article 1—General Provisions;
   - Article 2—Noncapital Habeas Corpus Proceedings in the Superior Court; and
   - Article 3—Death Penalty–Related Habeas Corpus Proceedings in the Superior Court;

2. Adopt rule 4.545 to provide definitions of terms for chapter 3 and to incorporate by reference the definitions in rule 8.601, which includes terms relevant to the appointment of counsel in death penalty–related habeas corpus proceedings;

3. Amend rule 4.550 to establish that article 2 governs noncapital habeas corpus proceedings in the superior courts;

4. Adopt rule 4.560 to establish that article 3 governs death penalty–related habeas corpus proceedings in the superior courts;

5. Adopt rule 4.561 to establish procedures by which superior courts appoint qualified counsel to represent indigent persons in death penalty–related habeas corpus proceedings, including by:

   a. Establishing the principle that California courts, whenever possible, should appoint counsel first for those persons subject to the oldest judgments of death within the state;

   b. Providing a mechanism by which the presiding judges of the superior courts will be notified when the judgments of death imposed in their respective courts are among the 25 oldest judgments of death in the state without habeas corpus counsel;

   c. Providing a process for the appointment of one or more attorneys from (1) a statewide panel of qualified counsel, (2) an entity that employs qualified counsel, including the Habeas Corpus Resource Center, the local public defender's office or alternate public defender's office, or (3) if the superior court has adopted a local rule, an attorney that the superior court has determined to be qualified under that local rule;

   d. Requiring the superior courts to use the *Order Appointing Counsel in Death Penalty–Related Habeas Corpus Proceeding* (form HC-101) when appointing counsel; and

   e. Requiring the designation of an assisting entity or counsel to provide assistance to appointed counsel, except in cases in which the Habeas Corpus Resource Center is appointed as counsel;

6. Adopt rule 4.562 to establish procedures for the recruitment of counsel and determination of whether counsel have met the minimum qualifications for appointment in death penalty–related habeas corpus proceedings by:

a. Requiring those superior courts in which a judgment of death has been entered against an indigent person for whom habeas corpus counsel has not been appointed to develop and implement a plan to identify and recruit qualified counsel who may apply to be available for appointment;

b. Providing for each Court of Appeal to establish a death penalty–related habeas corpus committee that will:

   - Assist superior courts in their efforts to recruit qualified attorneys;
   - Accept applications from interested attorneys;
   - Determine if applicants meet the minimum qualifications, as provided in the Rules of Court, to represent indigent persons in death penalty–related habeas corpus proceedings; and
   - Upon the request of a superior court, assist superior courts in matching one or more qualified attorneys from the statewide panel to a specific case;

c. Providing for the membership, appointment, and governance of the committees;

d. Providing for a statewide panel of counsel that includes applicants the committees have determined meet the minimum qualifications;

e. Authorizing superior courts to adopt a local rule establishing local procedures for determining whether attorneys meet the minimum qualifications under proposed rule 8.652(c) to represent indigent persons in death penalty–related habeas corpus proceedings and to appoint such attorneys in those proceedings;

7. Adopt new *Declaration of Counsel re Minimum Qualifications for Appointment in Death Penalty–Related Habeas Corpus Proceedings* (form HC-100) for mandatory use by attorneys who seek a determination that they meet the minimum qualifications and new *Order Appointing Counsel in Death Penalty–Related Habeas Corpus Proceeding* (form HC-101) for mandatory use by superior courts appointing counsel; and

8. 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 new and amended rules and the new forms are attached at pages 31–41.

Relevant Previous Council Action

Before Proposition 66 took effect, the Supreme Court generally was responsible for the appointment of counsel for both direct appeal and state habeas corpus proceedings in capital cases, and no rules of court governed the procedure for these appointments. There has been, therefore, no previous action by the Judicial Council on superior court rules governing the

appointment of death penalty–related habeas corpus counsel by the superior courts; and, until the passage of Proposition 66, no need for such rules.

Since Proposition 66 went into effect, the working group has proposed rule amendments, and new rules and forms governing the preparation of the record on appeal in capital cases, which the Judicial Council adopted at its meeting on September 21, 2018. In addition, this recommendation is being submitted to the council concurrently with the working group's report and recommendation regarding the amendment and adoption of related rules on the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings.[1]

Analysis/Rationale

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 (capital) cases in the California courts, many of which were focused on reducing the time spent on this review. Among other provisions, Proposition 66 effected several changes to the procedures for filing, hearing, and making decisions on death penalty–related habeas corpus petitions. Relevant here is that the act requires trial courts to offer and, unless the offer is rejected, appoint habeas corpus counsel for indigent persons subject to a judgment of death. (Pen. Code, § 1509(b)*;* Gov. Code, § 68662.) In addition, the act 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 on approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs v. Brown* became final ((2017) 3 Cal.5th 808), and the act took effect. Shortly thereafter, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition. 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, including, among other things, those governing the procedures for superior court appointment of counsel for death penalty–related habeas corpus proceedings. Copies of the working group's charge and a roster of the members are attached at pages 28–30.

[1] This report references several rules proposed in that report (*Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings* (November 2018)), including proposed new rules 8.601 and 8.652 and several amended and renumbered rules in title 8, Appellate Rules.

Existing processes for appointing counsel in habeas corpus proceedings

Death penalty–related habeas corpus proceedings

Before the act took effect, the Supreme Court generally was responsible for the appointment of counsel for both the direct appeal and state habeas corpus proceedings in capital cases. The Supreme Court draws on several sources of attorneys when appointing counsel to initiate and pursue habeas corpus proceedings for indigent persons subject to a judgment of death. The first is the Habeas Corpus Resource Center (HCRC), which was established by legislation[2] in 1997.[3] HCRC is authorized by statute to employ up to 34 attorneys to represent indigent persons in death penalty–related habeas corpus proceedings and perform other duties. (Gov. Code, § 68661.)

The second source is the California Appellate Project–San Francisco (CAP-SF). CAP-SF is a nonprofit corporation established by the State Bar of California in 1983. The Supreme Court, acting through the Judicial Council, contracts with CAP-SF for a variety of services related to the review of capital judgments. Although the bulk of those services involves the support of attorneys representing individuals subject to a judgment of death, discussed below, the Supreme Court has also, on occasion, appointed attorneys employed by CAP-SF to represent indigent persons in death penalty–related habeas corpus proceedings.

The third, and currently the largest, source that the Supreme Court draws on for appointed counsel is private attorneys. Private attorneys interested in an appointment to represent an indigent person in a capital case before the Supreme Court apply directly to the court. Applications are reviewed by Supreme Court staff, who make recommendations to the court. The court makes the appointment by means of a brief order.

The only current rule of court that relates to the Supreme Court appointment of counsel for indigent persons in capital cases is California Rules of Court, rule 8.605(b), which provides that the Supreme Court may appoint an attorney "only if it has determined, after reviewing the attorney's experience, writing samples, references, and evaluations . . . that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant." The Supreme Court makes available on its Death Penalty Cases webpage an application form and its policies regarding the compensation of counsel and other matters related to the duties of appointed counsel.[4]

Assisting entities and counsel

In addition to serving, on occasion, as appointed counsel to represent individuals, CAP-SF serves as an "assisting entity" to provide, under contract, a broad range of services related to appointed

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[2] Sen. Bill 513 (Lockyer; Stats. 1997, ch. 869, § 3).

[3] The Office of the State Public Defender, which is also established by statute (Gov. Code, §§ 15400–15425), is primarily appointed to represent defendants in the automatic appeal of a judgment of death, but continues to represent clients in a small number of proceedings in which there had been a dual-appointment (i.e., to represent the same client on the automatic appeal and the habeas corpus petition).

[4] Go to *www.courts.ca.gov/5641.htm*.

counsel in capital habeas corpus proceedings. Specifically relevant here, CAP-SF provides (1) services before counsel is appointed to protect and preserve the record and facilitate the recruitment of counsel; (2) assistance and support for private attorneys appointed to represent petitioners; (3) consultation with the Supreme Court on the qualifications of attorneys who apply for appointment and the suitability of attorneys for appointment to specific cases; and (4) common case services, such as maintaining a brief bank and providing training to appointed counsel. When CAP-SF considers itself unable to carry out some or all of its contractual responsibilities because of a conflict of interest—this most often occurs in cases with codefendants—the Supreme Court "will designate an alternative assisting entity, or an experienced private capital appellate and/or habeas corpus practitioner, as appropriate."[5]

Although the California Rules of Court require appointed counsel to be "willing to cooperate with an assisting counsel or entity" and define the term "assisting counsel or entity" (Cal. Rules of Court, rule 8.605(b) and (c)(5)), no rule of court currently requires the Supreme Court to designate an assisting counsel or entity. In practice, however, CAP-SF or assisting counsel is designated to assist every private attorney appointed by the Supreme Court in a capital habeas corpus proceeding.

Counsel in noncapital habeas corpus proceedings

Under Government Code section 27706, public defenders are required to provide indigent criminal defense "at all stages of the proceedings." If a county has not established a public defender's office, or when the public defender is unable to represent a defendant because of a conflict of interest or is otherwise unavailable to represent a defendant, Penal Code section 987.2 governs. That statute authorizes superior court judges to appoint private counsel for indigent defendants who request representation in certain criminal proceedings (including capital trials)[6] and requires the expense to be paid out of the county general fund, subject to several conditions.[7]

The scope of the public defender's duties arguably includes representing a petitioner in a habeas corpus proceeding. In *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862–863, the Court of Appeal, citing Government Code section 27706, held that the public defender had a duty to represent a petitioner on a writ of habeas corpus if the petitioner had stated a prima facie case or otherwise raised a nonfrivolous claim, and that private counsel cannot be appointed unless the public defender is unavailable under Penal Code section 987.2. Although *Charlton* involved a

[5] Supreme Court of Cal. Memo, *Appendix of Appointed Counsel's Duties* (rev. 2011), p. 3, *www.courts.ca.gov/documents/applica9.pdf*.

[6] Penal Code section 987.2 applies to felony charges and, "when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant," to misdemeanor charges. Infractions are subject to Penal Code section 19.6. (Pen. Code, § 987.2(i).)

[7] Before Proposition 66 passed, at least one study recognized that the act would require counties to shoulder the cost of appointed counsel for indigent persons in death penalty–related habeas corpus proceedings. (Alarcón Advocacy Center, Loyola Law School, *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* (July 20, 2016), p. 61, *http://summaryjudgments.lls.edu/2016/07/california-death-penalty-initiatives.html*.)

noncapital case and is therefore procedurally distinguishable from the proceedings that are the subject of this recommendation, the principles and argument underlying the holding in that case may well apply to death penalty–related habeas corpus proceedings.

Cases awaiting appointment of counsel for death penalty–related habeas corpus proceedings

As of September 5, 2018, almost 750 individuals were on death row in California.[8] Approximately 360 of these individuals are waiting for attorneys to be appointed to represent them in habeas corpus proceedings. Of these, about half have been waiting for over 10 years since their sentences were imposed,[9] and 100 have already completed their automatic appeals. Members of the working group report that approximately 30 individuals have been waiting *over* two decades for attorneys to be appointed. Although there are several explanations for the delay in appointments, a key factor is the "serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case."[10]

The Proposition 66 model for expanding the pool of counsel

Based on information about Proposition 66 in the Voter Information Guide, the proponents of Proposition 66 intended that its passage would reduce the delay in making appointments by expanding "the pool of available lawyers."[11] This expansion may be accomplished by having superior courts, rather than the Supreme Court, make the appointments because the superior courts should be in a better position to recruit attorneys from within their respective local communities. Some believe expansion of the pool may also result from Proposition 66 reducing the amount of time attorneys have to work on habeas corpus petitions from three years[12] to one year.[13] This would presumably allow attorneys to take on more petitions with less of a time commitment then they have had to make in the past.[14]

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[8] California Department of Corrections and Rehabilitation, Death Row Tracking System, Condemned Inmate List, *www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates* (as of September 5, 2018); see *Briggs v. Brown et al.* (2017) 3 Cal.5th 808, 863 (conc. opn. of Liu, J.).

[9] *Briggs v. Brown*, *supra*, at p. 864, citing *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), analysis of Prop. 66 by Legis. Analyst, p. 105.

[10] *In re Morgan* (2010) 50 Cal.4th 932, 937–938.

[11] *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), argument in favor of Proposition 66, p. 108.

[12] Supreme Court of Cal., *Supreme Court Policies Regarding Cases Arising From Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1, *www.courts.ca.gov/documents/PoliciesMar2012.pdf.* ("A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later.")

[13] Pen. Code, § 1509(c), enacted as part of Proposition 66 ("Except as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the Government Code").

[14] Government Code section 68665(b), which was added by Proposition 66, also requires the Supreme Court and the Judicial Council, in adopting rules of court related to the qualifications of counsel, to consider, among other factors, "the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment."

Although the working group is unable to predict the long-term success of these efforts to expand the pool of available attorneys,[15] it considers it unlikely that the pool will be expanded immediately. Among other reasons, the working group notes that Proposition 66 provided no additional funding source for the appointment of habeas corpus counsel. In addition, the requirement that petitions be filed within one year from the date of appointment, combined with the proposition's limits on successive habeas corpus petitions,[16] may be a strong disincentive for qualified counsel to accept appointment. Some attorneys have expressed the view that one year is too short a time in which to competently investigate potential issues and prepare a habeas corpus petition in a capital case. These concerns may be especially acute if an attorney is new to the area of practice. Overall, even with the adoption of these proposed rules and forms, the working group considers it unlikely that counsel will be immediately available for all the approximately 360 individuals waiting for habeas corpus counsel to be appointed.

Goal and guiding principles of the recommendation

Proposition 66 vests superior courts, for the first time, with primary responsibility for offering to appoint and then—subject to the necessary findings—appointing counsel for indigent persons in death penalty–related habeas corpus proceedings. (Pen. Code, § 1509(b)*;* Gov. Code, § 68662.) The recommendation is intended to help fulfill the Judicial Council's rule-making obligations under Proposition 66 by proposing new rules and forms designed to help (1) support superior courts in recruiting potential counsel and determining whether they meet the minimum qualifications for appointment in death penalty–related habeas corpus proceedings (i.e., screening or vetting attorneys); and (2) facilitate the superior courts' exercise of their new responsibility for appointing counsel in death penalty–related habeas corpus proceedings in an orderly and fair way. Before summarizing the details of the recommendation, two guiding principles are discussed.

Guiding principle 1: Local control with regional and statewide support

The working group's proposal is intended to balance two interests that exist in some tension. On the one hand, Proposition 66 clearly requires superior courts to appoint counsel for death penalty–related habeas corpus proceedings. On the other hand, the superior courts have expressed concern about their ability to take on this new responsibility without some level of statewide help and guidance, at least initially. The proposal is intended to balance these interests by designing a procedural framework for recruiting and screening potential counsel that includes elements of local responsibility coupled with elements of regional and statewide coordination and assistance. The proposal also allows individual superior courts to opt out of some of these

[15] Justice Liu, joined by three other justices in his concurring opinion, raised doubt about the likelihood of Proposition 66 increasing the pool of available attorneys or expediting the appointment process. (*Briggs v. Brown, supra,* at pp. 866–869, discussing appointment of counsel for direct appeals and habeas corpus petitions in capital cases.)

[16] A "successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence . . . that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." (Pen. Code, § 1509(d).)

elements. The intent is that the rules will provide support for the superior courts' recruitment, screening, and appointment of potential counsel—not control of these efforts.

Guiding principle 2: Prioritization of oldest judgments

Given the existing shortage of qualified counsel willing and able to serve as habeas corpus counsel,[17] not every person subject to a judgment of death will have counsel appointed immediately following adoption of the rules. It is, therefore, important to put in place a structure that allows for the orderly appointment of counsel, as they become available. The working group concluded that the least inequitable solution would be to appoint counsel first for those individuals who are subject to the oldest judgments of death. The reasoning underlying this principle is that those individuals who have only recently been sentenced to death should not obtain counsel while those who have waited decades are required to wait even longer. This reasoning applies equally to the families of the crime victims who have been waiting for a resolution to these cases. The principle is not intended to be applied rigidly. The working group recognizes that the availability of counsel may vary regionally and depend on the specific facts of a case.

Proposed rules and forms

Division of chapter 3 into three new articles

Currently, the set of rules governing noncapital habeas corpus proceedings in the superior courts is in chapter 3 (Habeas Corpus) of division 6 (Postconviction, Postrelease, and Writs) of title 4 (Criminal Rules) of the California Rules of Court. The working group concluded that the current rules would not provide sufficient procedures to address death penalty–related habeas corpus proceedings and, as discussed more fully below, recommends new rules to address these proceedings. The working group determined, however, that all rules related to habeas corpus proceedings conducted in the superior courts should be grouped together for the convenience of rule users.[18] The working group therefore recommends that chapter 3 be divided into three articles, as follows.

- Article 1 (General Provisions) would include a new rule 4.545 that includes the definitions currently in chapter 3 in rule 4.550 and would, in a new paragraph (7), incorporate by reference the definitions in proposed rule 8.601, which includes terms relevant to counsel in death penalty–related habeas corpus proceedings.

- Article 2 (Noncapital Habeas Corpus Proceedings in the Superior Court) would amend rule 4.550 (Application of Article) to clarify that article 2 applies to non-capital habeas corpus proceedings in the superior courts, and would include existing rules 4.551 and 4.552, which govern such proceedings, without any changes or renumbering.

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[17] *In re Morgan*, *supra*, 50 Cal.4th at pp. 937–938.

[18] Initially, the working group proposed to include these rules in title 8 (Appellate Rules), and circulated drafts of proposed rules 4.561 and 4.562 as rules 8.654 and 8.655, respectively. Later, the working group concluded these two rules did not belong with the rules related to proceedings in the appellate courts and recommends instead that the rules be included in title 4 (Criminal Rules), as outlined in this section of the report.

- Article 3 (Death Penalty–Related Habeas Corpus Proceedings in the Superior Court) would include new rule 4.560, which clarifies that article 3 governs procedures for death penalty–related habeas corpus proceedings in the superior courts, and two new rules (4.561 and 4.562), which are discussed at greater length below.

Mechanism for prioritizing the oldest judgments

Proposed new rule 4.561(b) would provide:

> In the interest of equity, both to the families of victims and to persons sentenced to death, California courts, whenever possible, should appoint death penalty–related habeas corpus counsel first for those persons subject to the oldest judgments of death.

This provision is aspirational and deliberately qualifies the prioritization based on the age of the judgment with the clause "whenever possible" to allow it to be applied with flexibility and in recognition that making appointments may be more difficult in some cases than in others. The prioritization of older judgments should not prevent appointments from being made when qualified counsel are available and willing to accept appointments.

Proposed rule 4.561(c)–(d) would establish the mechanism for providing superior courts with the information needed to implement the recommended prioritization statewide. Under the recommendation, HCRC would compile and maintain a statewide list of persons subject to a judgment of death, organized by the date the judgment was entered by the sentencing court. HCRC would then identify the 25 oldest judgments of death for which habeas corpus counsel have not been appointed and advise the presiding judge of the courts in which such judgments are pending. Once counsel have been appointed (or is otherwise not required)[19] for 20 of these judgments, HCRC would identify the next 20 oldest judgments and send out notices to the presiding judges of the courts in which those judgments are pending. HCRC would continue sending out notices every time another 20 appointments have been made. The rule is intended to give enough direction that HCRC's role in this procedure would be entirely ministerial and require no discretion. Nonetheless, the efforts of HCRC as a state entity would be crucial in facilitating the smooth transition to superior court appointment of habeas corpus counsel.

In the absence of these notices, superior courts would lack the information they need regarding the status of judgments pending in their respective courts in relation to the status of judgments pending and appointments being made in other courts within the state. The recommendation does not interfere with the superior courts' statutory authority to appoint counsel, but allows for an orderly process to have the limited number of qualified counsel appointed first for those persons who are subject to the oldest judgments in the state, regardless of the county in which their sentence was entered.

[19] Counsel would not be required if, for example, an appellant prevailed in the automatic appeal of the case.

The reason for having the new batch of notices go out after 20 appointments have been made, rather than waiting for the full 25, is to provide flexibility. Some cases are going to be more difficult to find counsel for than others. The overall progress of appointments statewide should not be slowed because of delays in making appointments in a small group of the cases.[20]

Appointment procedure

After receiving information that a judgment entered in its court is one of the oldest in the state without counsel, the presiding judge would be required to identify the appropriate judge within the court to make an appointment and notify that judge that the judgment is among the oldest in the state for which a habeas corpus counsel appointment has not been made.[21] If the court has made the findings required by Government Code section 68662, the judge may then seek out available counsel who can be appointed for the individual subject to that judgment.

The court would appoint an attorney or attorneys from the statewide panel of counsel compiled under proposed rule 4.562(d)(4), or an entity that employs qualified attorneys including HCRC, the local public defender's office, or alternate public defender's office. If the court has adopted a local rule under proposed rule 4.562(g), the court may appoint an attorney or attorneys determined to be qualified under the court's procedures. If the court is appointing counsel other than an attorney employed by HCRC, it would be required to designate an assisting entity or counsel to provide assistance and support to the appointed counsel.

Proposed rule 4.561 would require the use of proposed *Order Appointing Counsel in Death Penalty–Related Habeas Corpus Proceeding* (form HC-101) when making an appointment. The form is modeled after *Order Appointing Counsel in Capital Case* (form CR-190), which is already used by superior court judges for the appointment of counsel for death penalty trials. Proposed form HC-101 would require the court to designate whether the attorney is appointed as lead or assisting counsel. The form also provides a place to designate an assisting entity or counsel. The proposed rule requires that a copy of the order be sent to HCRC, among others, so that it can update the list of judgments for which habeas corpus counsel have not been appointed.

If counsel is available for appointment to a case for which a petition is pending in the Supreme Court, the judge would be required to provide written notice to the Supreme Court that it has counsel available for appointment. The rule does not set a deadline for or require the Supreme

[20] Proposition 66 imposes on the Judicial Council a continuing responsibility to monitor the timeliness of capital cases and authorizes it to amend rules of court and standards, as necessary. (Pen. Code, § 190.6(d) ["The Judicial Council shall continuously monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary . . . ."].) Once the proposed rules are implemented, if the Judicial Council determines that sending notices in batches of 20 is impeding appointments, it can amend the rule to change the number to trigger a new batch or adopt a new procedure, as appropriate.

[21] Prop. 66 directs that a habeas corpus petition be assigned to the same judge who imposed the sentence, but recognizes that the judge may not always be available or that there may be good cause to assign the petition to another judge in the court. (Pen. Code, § 1509(a) ["A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge."].)

Court to act and does not prohibit the superior court from making an appointment or compel it to do so.

Recruitment and screening of counsel

Proposed rule 4.562 would make superior courts responsible for developing and implementing a plan to identify and recruit qualified habeas corpus counsel who can be appointed for indigent persons subject to a judgment of death. This responsibility is consistent with the statutory authority for superior courts to offer to appoint and to appoint counsel after entry of judgment, which was enacted as part of Proposition 66. (Pen. Code, § 1509(b); Gov. Code, § 68662.)

The proposed rule would require the establishment of regional habeas corpus panel committees, one in each appellate district to assist the superior courts with recruitment and screening of potential counsel. The committees are modeled in part on committees that vet attorneys and recommend them for inclusion on capital habeas corpus panels in the federal courts (e.g., in the Central District of California[22] and the Eastern District of California[23]).

Under the proposal, the committees would be required to:

- Support superior court efforts to recruit applicants;
- Review applications of attorneys who want to serve as habeas corpus counsel;
- Determine if the applicants meet the minimum qualifications established by the Rules of Court;
- Contribute names of attorneys who meet the minimum qualifications to a statewide panel of counsel available for appointment by superior courts;
- On request, assist superior courts in matching counsel to cases that require appointments; and
- Reevaluate attorneys' inclusion on the statewide panel in light of disciplinary action or a finding that counsel have provided ineffective assistance.

Each committee would be chaired by an appellate justice appointed by the administrative presiding justice of the relevant appellate district and would include three superior court judges appointed by the administrative presiding justice from among those nominated by the superior courts within the appellate district. Each committee would also include at least three attorney members appointed by the administrative presiding justice from among attorneys nominated by the various entities identified in the rule, at least two of whom would be required to have experience representing a petitioner in a death penalty–related habeas corpus proceeding. The chair and members would serve for staggered terms of three years and be subject to removal or replacement by the administrative presiding justices. Following consultation with the presiding

[22] See U.S.D.C., C.D.Cal., General Order 13-14-Establishing a Capital Habeas Corpus Attorney Panel (filed Nov. 6, 2013), *www.cacd.uscourts.gov/sites/default/files/general-orders/GO-13-14.pdf*; *Procedures for the Capital Habeas Attorney Panel for the Central District of California* (rev. Feb. 11, 2014), *www.cacd.uscourts.gov/sites/default/files/documents/Procedures-for-the-Capital-Habeas-Attorney-Panel-updated-2.11.2014.pdf.*

[23] U.S.D.C., E.D.Cal., Local Rule 191(b) (eff. Apr. 1, 2017), *www.caed.uscourts.gov/caednew/assets/File/EDCA%20Local%20Rules%20Effective%204-1-2017.pdf.*

judges of the superior courts within their respective appellate districts, administrative presiding justices of two or more Courts of Appeal could elect to operate a single committee to collectively fulfill the committee responsibilities for the superior courts in their appellate districts.

Each committee would be required to accept applications only from attorneys whose principal place of business is in the appellate district. (Attorneys whose principal place of business is located outside California would be accepted only by the committee formed by the First Appellate District.) This requirement is intended to give applicants a specific committee to which to submit their applications and avoid overloading one or two committees with a disproportionate number of the applications. It serves only an administrative purpose because all attorneys determined to meet the minimum qualifications would be included on a statewide panel, and superior court judges could appoint any attorney on the panel, regardless of which committee determined that the attorney met the minimum qualifications.

Proposed rule 4.562 would also allow superior courts to adopt a local rule authorizing the judges of the court to appoint qualified counsel who are not members of the statewide panel. The requirement that this be authorized by local rule is intended to confirm that the leadership within the court has an opportunity to consider the benefits and burdens of a local approach on the court as a whole and to establish uniform procedures for that court. The local rule would be required to establish procedures for ensuring that attorneys meet the minimum qualifications under proposed rule 8.652(c). The superior court would have to make the rule available for public comment before its adoption. (Cal. Rules of Court, rule 10.613(g).) Doing so would ensure that the local community and justice partners (1) are aware of the court's decision to screen attorneys and (2) would have an opportunity to comment on the procedures the court proposes to adopt.

Whether an attorney is applying to a regional committee for inclusion on a statewide panel, or to a superior court that has elected by local rule to authorize judges of the court to appoint qualified counsel who are not members of the statewide panel, the attorney would be required to submit the application using *Declaration of Counsel re Minimum Qualifications for Appointment for Death Penalty–Related Habeas Corpus Proceedings* (form HC-100). The form is modeled after *Declaration of Counsel for Appointment in Capital Case* (form CR-191), which is used to apply to serve as trial counsel in a capital case in the superior courts. However, proposed form HC-100 tracks the qualifications for death penalty–related habeas corpus counsel found in proposed rule 8.652, which is being recommended for adoption concurrently with this proposal. It is intended to collect only the information and written materials necessary to determine if an attorney meets the minimum qualifications. It is not intended to collect information that a judge may want to use in attempting to match a qualified attorney to a particular case (e.g., what kinds of cases an attorney will accept appointment to, or in what geographic locations).

Policy implications

Two of the most significant policy implications are discussed at length under "Guiding principle 1" and "Guiding principle 2," above. Specifically, the working group intends the proposed rules to (1) address how pending matters can be prioritized until the shortage of qualified counsel eases; and (2) provide assistance and support to the superior courts as they take

on new responsibilities for recruiting, vetting, and matching counsel in death penalty–related habeas corpus proceedings.

One policy implication that is not addressed elsewhere is the involvement of the Courts of Appeal in the superior court process for recruiting, screening, and matching counsel. Proposition 66 requires the Courts of Appeal to review superior court decisions in death penalty–related habeas corpus proceedings. (Pen. Code, § 1509.1.) The Courts of Appeal therefore have a vested interest in assisting the superior courts in assuring that the rules of court on qualifications are applied consistently and that the pool of available attorneys is capable of high-quality work on death penalty–related habeas corpus proceedings. Such assistance should assure appropriate representation for petitioners and result in fewer decisions in these matters requiring review by the Courts of Appeal.

An issue that arose during many of the working group's discussions was the absence of funding for appointed counsel, assisting counsel or entities, and new superior court responsibilities associated with recruiting, vetting, and matching counsel, as well as the increased workload on the superior courts of hearing the petitions. Similarly, no funding was provided for the Courts of Appeal, on whom Proposition 66 imposed the additional caseload of reviewing superior court decisions on death penalty–related habeas corpus petitions. These very same issues were also raised by those who submitted comments on the proposed rules. Although the question of funding is outside the scope of the working group's charge, the uncertainty about funding had an impact on the working group's proposal. For example, because it is unclear whether counties or the state will be paying for counsel, the rules could not be more specific about who would be serving as counsel, under what standards counsel should be paid, and whether some of these decisions should be made locally or at the state level. As the source, distribution, and amount of funding become known, adjustments to the rules may become appropriate or necessary.

Many other aspects of the proposal raise policy implications, and these are addressed in the discussion of particular topics in the section titled "Comments," below.

Comments

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

Nineteen individuals and organizations submitted comments on this proposal, including two Courts of Appeal, one administrative presiding justice, the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, two superior courts, 11 individuals or organizations that represent criminal defendants, one lawyers' association, one victims' rights organization, and one foreign country. Two commenters

[24] The invitation to comment is available on the Judicial Council's website at *www.courts.ca.gov/documents/SP18-13.pdf*.

indicated that they agreed with the proposal, two indicated that they agreed with the proposal if amended, one 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 specific aspects of the proposal, along with the working group responses, are in the comment chart attached at pages 42–162. The chart begins with a list of the 19 individuals and entities that submitted comments, followed by 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 at pages 163–256. 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.

Prioritization of oldest judgments of death

Many of the commenters supported prioritizing the oldest judgments statewide for appointing counsel whenever possible. Only one commenter objected to the principle and suggested that proposed rule 4.561(b) be revised so that the prioritization of the oldest judgments be determined within each county and not statewide. Two commenters suggested that the rule be revised so that counsel could not be appointed unless the case had also already reached another milestone—one commenter suggested certification of the record on appeal, the other suggested the completion of briefing on the automatic appeal. One of these two commenters also suggested that the rule be mandatory, with the phrase "whenever possible" deleted and the word "should" changed to "shall."

The working group considered these suggestions and concluded that the proposed language that circulated for public comment was balanced and appropriate. The working group declined to revise the rules to require courts to appoint counsel in order of the age of judgment without exception. The working group recognized that the availability of counsel may vary regionally and may depend on the specific facts of a case, and for that reason intended that the rule provide flexibility to courts. Without flexibility, there is a danger that difficulty in appointing counsel for one individual, either because of a location or the nature of the crime or some other reason, could hold up the appointment of many other individuals for whom counsel would be available. Allowing such a delay would be inconsistent with the Proposition 66 mandate that the Judicial Council adopt rules that "expedite the processing of capital appeals and state habeas corpus review." The working group also declined to revise the rules to provide that each court should appoint counsel to the oldest judgment pending within the county, rather than looking at the statewide perspective. Such an approach would likely result in counsel being appointed for someone recently sentenced to death in one county while someone sentenced to death in another county 20 years earlier continued to wait for counsel. The working group considered that possibility inequitable and inconsistent with a court system that is intended to provide equal access to justice statewide, regardless of the county in which the proceeding takes place.

Notices regarding oldest judgments of death

Most commenters agreed with the proposal that HCRC (1) maintain a list of individuals subject to a judgment of death; (2) advise the superior courts of the 25 oldest judgments in the state; and (3) every time 20 appointments are made, follow up with notice of the next 20 oldest judgments. One commenter argued that attempting to make appointments for 25 or even 20 individuals at a time was overly ambitious given the challenges posed by making such appointments. Although the working group agrees that appointing the first 20 counsel may take some time, it was also of the view that there is little risk in courts collectively attempting to make appointments for more individuals rather than fewer. Indeed, an ambitious goal is consistent with Proposition 66's stated aim to resolve death penalty–related habeas corpus proceedings more expeditiously.

Another commenter suggested that it would be helpful to include in the rules a mechanism for superior courts to advise HCRC and others if the court did not need to make an appointment. The working group agreed with this suggestion and revised proposed rule 4.561(d)(5) to include a provision that states: "The court must also send notice to the Habeas Corpus Resource Center, the clerk/executive officer of the Supreme Court, the Attorney General, and the district attorney if, for any reason, the court determines that it does not need to make an appointment."

Petitions pending in the Supreme Court

Many of the oldest judgments without habeas corpus counsel have habeas corpus petitions pending before the Supreme Court.[25] The working group considered excluding such cases from those considered for prioritization under proposed rule 4.651(c)–(d). Members of the working group were split on whether a superior court had authority to appoint counsel for an individual subject to a sentence of death if a petition on behalf of that individual was pending in the Supreme Court. Members also question whether, even if a superior court does have authority to make an appointment in these circumstances, it would be a good idea for a court to do so. The proposal that circulated for public comment took no clear position. Instead, it encouraged communication between superior courts and the Supreme Court when a superior court had counsel available for appointment when a petition is already pending in the Supreme Court without counsel. The circulated rule required the superior court to give notice to the Supreme Court, but did not require the Supreme Court to respond and did not explicitly authorize or prohibit the superior court from making an appointment.[26] The invitation to comment asked whether the proposed rule should be revised to specify a time within which the superior court had to wait to hear from the Supreme Court before it could appoint counsel.

Like the members of the working group, commenters were divided. Many were of the opinion that a superior court should not be able to appoint counsel if a petition is pending in the Supreme Court. Others thought that if the Supreme Court received notice from the superior court that

[25] Many of these are the petitions typically referred to as "*Morgan* petitions" or "shell petitions." (*In re Morgan*, *supra*, 50 Cal.4th at p. 941.)

[26] The provision was circulated as proposed rule 8.654(d)(4); as revised, it is now found in proposed rule 4.561(d)(4).

counsel was available for appointment, 60 days was long enough for the Supreme Court to communicate its views to the superior court. These commenters suggested that if the Supreme Court had not taken action within that time period, the superior court should be free to appoint counsel.

By a close vote of ten to eight, the working group decided not to modify the proposal to provide a deadline by which the Supreme Court would have to act before a superior court may appoint counsel. The rule recommended by the working group requires the superior court to give notice to the Supreme Court, but does not include a 60-day provision and remains deliberately silent on the authority of the superior court to make an appointment. Members who voted for the proposed language anticipate that the notice would be sufficient to facilitate communication between the superior court and Supreme Court and that the authority of the superior court to make an appointment in that case, one way or the other, would become clear to the superior court in a reasonable amount of time. Members who voted against the proposed language expressed concern that superior courts would be reluctant to make appointments when a petition was pending in the Supreme Court unless the rule more clearly provided authority for superior courts to make such appointments.

In reviewing the comments they received, the members of the working group noted an ambiguity in the draft language that had been circulated. Specifically, the draft had included a clause stating that the superior court would have to send a notice to the Supreme Court "before making the appointment." The intent had been—and remains—that the notice would have to be sent to the Supreme Court *before* any appointment is made (and not *after*). A majority of the working group concluded, however, that inclusion of the clause might be construed not just as a temporal direction, but as implicitly authorizing the superior court to make an appointment. The working group therefore also voted to delete this clause to remove the possibility that the rule could be construed as independent authority for superior courts to make appointments when a petition is pending before the Supreme Court.

Appointment of public defenders

As discussed above, there is legal authority suggesting that counties are under a statutory obligation to provide indigent persons with counsel in habeas corpus proceedings,[27] and that a court may appoint private counsel only if a public defender is unavailable.[28]

The majority of the working group considered it unlikely that public defenders would be available for appointment in death penalty–related habeas corpus proceedings. Most defendants in capital cases are represented by public defenders during the trial proceedings, and most habeas corpus petitions in capital cases assert ineffective assistance of trial counsel. As a result, most

[27] Government Code section 27706; *Charlton v. Superior Court*, *supra,* 93 Cal.App.3d at pp. 862–863 [predating enactment of Proposition 66 and holding in a noncapital case that the public defender had a duty to represent a petitioner on a writ of habeas corpus if the petitioner had stated a prima facie case or otherwise raised a nonfrivolous claim].)

[28] Penal Code section 987.2.

attorneys in a public defender's office would have to decline appointments as habeas corpus counsel because of a conflict of interest. A minority of the working group members argued that, although a public defender's office is likely to decline an appointment in most cases for that reason, it is still worthwhile for the court to attempt to appoint the public defender or an alternate public defender, so that each case could be considered individually and, where possible, an appointment accepted. Based on the majority's view, the proposed rule on appointment was circulated without reference to the appointment of a public defender.[29] The invitation to comment also asked whether the rule should require that a superior court first attempt to appoint a public defender before appointing private counsel so that the working group might have more information before making a recomendation.

Almost all comments that addressed the question opposed recommending a rule that required a superior court to first attempt to appoint a public defender. In reviewing these comments and after further discussion, the working group agreed to modify the text of the rule to allow for, but not require, the appointment of a public defender or an alternate public defender. Specifically, the rule allows the superior court to appoint private counsel from the statewide panel or an entity that employs qualified counsel, including HCRC, a public defender's office, or an alternate public defender. The rule also allows a court that has adopted a local rule under proposed rule 4.562(g) to appoint an attorney or attorneys determined to be qualified under the court's procedures.

The advantage of the proposed rule is that it gives superior courts greater flexibility than the language that was circulated for public comment, and does not exclude any reasonable possibility. Thus, if a public defender is qualified and there is no conflict of interest, the rule allows the court to appoint that attorney, which is consistent with the goal of Proposition 66 to increase the pool of available attorneys. In addition, the working group recognizes that as the superior courts and counties take on the new responsibilities required by Prop. 66, new options may become available. A county, for example, may find establishing a separate, free-standing death penalty–related habeas corpus office to staff these proceedings more efficient than relying on private counsel or the statewide panel. One member noted that some states have regional offices of counsel devoted to habeas corpus representation and that some counties might consider this model. The proposed less restrictive rule would allow superior courts and counties to explore these possibilities and innovate in an effort to increase the pool of available attorneys. The working group notes that some superior courts may consider adopting a local rule of court to implement a uniform, local policy on appointment of counsel, depending on the situation within the county.

[29] The relevant provisions were circulated as proposed rule 8.654(e)(2), (3); the substantially revised provisions are now found in proposed rule 4.561(e)(2).

Number of attorneys appointed

The proposed rules as circulated required the appointment of "an attorney or attorneys."[30] Several commenters argued that the rule should be revised to require superior courts to appoint a minimum of two attorneys for each individual subject to a judgment of death, some of these commenters noting that this is a requirement in the *2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, section 4.1(A)(1).[31] Others argued that it should be at the discretion of the court and based on the individual needs of the case or the request of counsel. Although some on the working group agreed with the commenters who proposed that the rule require a minimum of two attorneys, the working group decided to recommend that the rule leave to the discretion of the appointing court to determine if more than one attorney need be appointed. This approach is consistent with current Supreme Court practice and is supported by a separate provision in the rules that requires that an assisting entity or counsel be designated for every non-HCRC attorney appointed. (That provision is discussed at greater length in the section below.) Thus, no appointed attorney would be working in isolation but should always have the support and assistance of another attorney with expertise in death penalty–related habeas corpus proceedings.

Assisting entities and counsel and the California Appellate Project–San Francisco

As circulated, the proposed rules required the superior court to designate an assisting entity or counsel at the same time that it appointed counsel, but the rule did not require the designation of a particular assisting entity or counsel.[32] The invitation to comment asked commenters whether the rule should require designation of an assisting entity or counsel and, if so, whether the rule should designate a specific entity.

With only one exception, those commenters who responded to the questions fully supported a rule that required a superior court to designate an assisting counsel or entity at the same time habeas corpus counsel is appointed. Several commenters noted that the need for such assistance is especially acute because Proposition 66 reduced from three years to one year the time in which to prepare and file the initial petition and limited the scope of subsequent petitions and because of a possible influx of new attorneys handling petitions for the first time. The one commenter who expressed doubt about the proposal stated that what was really needed was a rule governing the relationship between appointed counsel and the assisting entity and recognizing appointed counsel's role as a decisionmaker. The same commenter also proposed that the Judicial Council review how well or how poorly the designated assisting entities are performing.[33] Many of the

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[30] This provision was circulated as proposed rule 8.654(e)(1), (3) and is now found in proposed rule 4.561(e)(1), (2).

[31] See *www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/2003-guideline-4-1.html*.

[32] This provision was circulated as proposed rule 8.654(e)(3) and is now found in proposed rule 4.561(e)(2).

[33] The working group was able to pursue neither of these suggestions due to the limited time imposed by Proposition 66 to adopt an initial set of rules. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggestions would not be minor substantive changes and thus

commenters who supported a rule requiring designation of an assisting counsel or entity argued that the rule should specify CAP-SF as the default assisting entity unless there was a reason, such as a conflict of interest, that prevented CAP-SF from taking on this duty. These commenters noted that CAP-SF currently serves this function for counsel appointed by the Supreme Court and is the only entity with the staff and experience to perform this function.

A substantial majority of 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. A rule of court that requires a superior court to use the services of CAP-SF would, however, effectively mandate the court's use of a specific private contractor. (CAP-SF is a nonprofit corporation, not a governmental entity. The Judicial Council, on behalf of the Supreme Court, at present enters into an annual contract with CAP-SF to provide services in connection with the review of capital cases.) 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 contractor. This is doubly true where it remains unclear who will fund these services—the counties or the state. For that reason, the proposed rule does not name a specific entity.

A small minority of the working group supported revising the rule to recommend designating an assisting entity or counsel, but not to make it mandatory. This minority argued that even though all counsel appointed by the Supreme Court are currently supported by an assisting entity (CAP-SF) or counsel, the practice is not required by rule or statute, but is discretionary and contractual. These members objected to imposing a new legal obligation on appointing courts. A substantial majority of the working group considered the role of an assisting counsel or entity to be so important, however, that the working group is recommending a rule that requires designation of an assisting entity or counsel (though not a particular entity). In addition, the members who supported a rule requiring designation of assisting counsel noted that the minimum qualifications for appointed counsel in proposed rule 8.652 are based on the assumption that an assisting entity or counsel would be assigned for every appointed attorney not employed by HCRC. Were an assisting entity or counsel not required, these members argued, the minimum qualifications for appointed attorneys would have to be reconsidered and likely made more rigorous to prevent the possibility of less experienced appointed attorneys representing a petitioner without the aid of an experienced assisting entity or counsel.

Regional committees

Most commenters supported the formation of regional committees to assist superior courts with recruiting, screening, and matching counsel to individuals subject to a sentence of death.

Composition of the regional committees.[34] The working group received numerous comments on the composition of the committees, including the following:

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would need to be circulated for public comment. The working group will refer these suggestions, and proposals from other commenters, to the appropriate Judicial Council advisory body for consideration at a later date.

[34] This provision was circulated as proposed rule 8.655(c) and is now found in proposed rule 4.562(c).

- Many commenters suggested that at least two of the three attorney members should have experience representing a petitioner in a death penalty–related habeas corpus proceeding. This is consistent with the working group's view of the purpose of including these members on the committee. Many judicial members will not have experience in death penalty–related habeas corpus proceedings and will be relying on the experience and expertise of the attorneys to assist them in the committee duties of recruiting, vetting, and matching habeas corpus counsel to individuals subject to a sentence of death. The working group therefore revised the proposed rule to require at least two of the three attorney members have such expertise.

- One commenter suggested that the committees would be "dominated by defense organizations." To the contrary, the membership of the committees has been designed so that the majority of the voting members of the committee would be judges, not attorneys—the appellate justice serving as chair and three superior court judges. These four judicial members would always outnumber the three voting attorney members. The same commenter suggested that each committee should include one prosecutor as a member. The working group declined to make this proposed revision, noting that the proposed rules would allow for the appointment of a prosecutor to one of the three attorney positions, if the administrative presiding justice elects to do so. In addition, many members of the working group believe that those attorneys with experience representing petitioners in death penalty–related habeas corpus proceedings are in a better position to screen attorneys for that job than would be those attorneys with prosecution experience.

- By contrast, another commenter suggested that judges should not be members of the committees. The working group declined to make this proposed revision. By statute, the appointment of counsel for indigent individuals in death penalty–related habeas corpus proceedings is an exclusively judicial function. (Pen. Code, § 1509(b), Gov. Code, § 68662.) Many members of the working group (though not all) consider the determination whether an attorney meets the minimum qualifications, by extension, to require substantial judicial involvement. For that reason, the recommendation includes judges as members of the committee and as chair. The same commenter suggested, in the alternative, that the rule could state a preference for judicial members who have experience representing petitioners in death penalty–related habeas corpus proceedings. The working group declined to make this proposed revision too. Although the commenter suggested only that a preference be stated for judges who represented capital habeas petitioners in the past, that pool is extremely small, and the working group is reluctant to discourage the many able judges without such experience from participating in these committees. The intent is that the judges would bring their judicial expertise and local knowledge to the committee, but would in many cases have to rely on the attorney members for their expertise and knowledge of capital habeas corpus proceedings.

Governance and Management of the Regional Committees.[35] The working group also received many comments on the portions of the proposed rules related to the management and governance of the regional committees, many of which resulted in the working group revising the proposed rules, including as follows:

- The draft rules as circulated included three judges on the committee "as agreed on by the presiding judges of the superior courts located in the appellate district." Several commenters suggested that the proposed rule provide instead for the administrative presiding justice of each Court of Appeal to appoint the three judges from among those *nominated* by the presiding judges. The working group agreed that this proposal was more efficient and revised the rule accordingly.

- The draft rules as circulated allowed the judicial officers on the committee to agree on three attorney members drawn from six different categories. Several commenters suggested that the proposed rule provide instead for the administrative presiding justice of each Court of Appeal to appoint the three attorney members from among those *nominated* by the entities in the six different categories. The working group agreed this was more efficient and revised the rule accordingly.

- Two commenters suggested that the Chief Justice could play a role in appointing members of the committees. The working group declined this proposal because it would be contrary to the intent underlying Proposition 66, which shifts responsibility for death penalty–related habeas corpus proceedings *away* from the Supreme Court, not involve it more intimately.

- One commenter suggested that each committee be given the authority to establish the procedures under which it removed and replaced members. The working group appreciated the suggestion that authority for removing or replacing members should be addressed. However, the working group declined the proposed revision as inconsistent with the authority that the proposed rule would vest in the administrative presiding justice to appoint members of committees. Instead, the working group revised the rule to clarify that the administrative presiding justice would have the authority to remove or replace the chair or members of the committee.

Duties of the regional committees.[36] Some commenters thought it was sufficient that the regional committees take on the duties of assisting superior courts in recruiting, vetting, and matching counsel. Other commenters, however, suggested that the committees should take on additional duties. The proposed duties included offering training and education for appointed attorneys, evaluating appointed counsel on an ongoing basis rather than just when an attorney applies for a renewed term, and vetting and compiling a list of assisting counsel. Given that the committees are only beginning to take on this work, and because the currently proposed duties would pose

[35] This provision was circulated as proposed rule 8.655(c) and is now found in proposed rule 4.562(c).

[36] This provision was circulated as proposed rule 8.655(d) and is now found in proposed rule 4.562(d).

challenges enough with the limited resources available, the working group did not make any of the proposed revisions. The working group did, however, add a comment *encouraging* courts and committees to support activities to expand the pool of attorneys that are qualified to represent petitioners in death penalty–related habeas corpus proceedings, including by providing mentoring and training programs and encouraging the use of supervised counsel.

Authority of regional committees to contract responsibilities to an assisting entity. Several commenters were of the view that the proposed rules should be revised to authorize regional committees to contract with an assisting entity to perform administrative duties required of the regional committee, similar to the way that rule 8.300(e) currently authorizes the Courts of Appeal to contract with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed in that rule. One commenter, however, objected that the committees should not be able to delegate their duties.

Many members of the working group supported this revision. Several have had positive experiences for many years with the five district appellate projects that have provided such services to the Courts of Appeal with respect to assigned counsel for criminal appeals and dependency proceedings. Other members of the working group opposed the proposal because they were of the view that there should be greater judicial oversight of the recruitment and vetting processes and that this oversight could not be accomplished as effectively if the committees were authorized to delegate their administrative duties to an assisting entity. Because of the split among its members, the working group did not revise the proposed rules to allow for a delegation of committee duties.

Panels of qualified counsel

Local panels of qualified attorneys.[37] Many commenters were of the view that the individual superior courts should be allowed to appoint only counsel who have been vetted by a regional committee and included on the statewide panel. These commenters expressed a variety of concerns, including the need for qualification standards to be applied uniformly and consistently statewide, and the potential that local qualification could result in favoritism and a greater risk of conflicts of interest. Other commenters were of the view that it was important to allow courts to have the ability to set up their own panels and that allowing for such panels would further the objectives of Proposition 66 to localize and expand the pool of qualified counsel available for appointment. Because the working group was also split on this issue, no change was made to the proposed rule; individual superior courts would have the ability, by adopting a local rule, to set up procedures for assuring that attorneys meet the minimum qualifications for appointed counsel under rule 8.652(c).

One commenter asserted that requiring a superior court to adopt a local rule of court before it could appoint an attorney from a local panel (as would be required by proposed rules 4.561(e)(2) and 4.562(g)) "violates Government Code section 68662. The statute vests the appointment

[37] This provision was circulated as proposed rule 8.655(g) and is now found in proposed rule 4.562(g).

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."

The working group is of the view that adoption of the proposed rules is well within the scope of the Judicial Council's authority as established by case law because those rules conflict with neither the express language of Proposition 66 nor its underlying intent.

> The California Constitution gives the Judicial Council authority to "adopt rules for court administration, practice and procedure," but it specifies that "[t]he rules adopted shall not be inconsistent with statute." (Cal. Const., art. VI, § 6, subd. (d).) Thus, the Judicial Council "may not adopt rules that are inconsistent with the governing statutes." [Citation omitted.] In this context, a rule is inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent. [Citations omitted.]

(*In re Alonzo J.* (2014) 58 Cal.4th 924, 937.)

In *Butterfield v. Butterfield* (1934) 1 Cal.2d 227, the Supreme Court upheld a rule requiring a memorandum of points and authorities in support of a motion for change of venue, even though the statute on change of venue did not mention this requirement. The court stated that "the mere fact that the rule goes beyond the statutory provision does not make it inconsistent therewith. . . . [¶] . . . [T]he rule . . . is a reasonable provision in furtherance of the statutory purpose." (*Id.* at p. 228.) Similarly, the Supreme Court upheld a rule that set a 60-day time limit for a defendant to file a statement of grounds for appeal from a guilty plea, even though the statute that required the written statement did not set a time limit. (*People v. Mendez* (1999) 19 Cal.4th 1084.) The court explained:

> [The statute] is altogether silent on such procedural matters as how and when a defendant may take an appeal. Its silence cannot reasonably be understood as a statement that the defendant may take an appeal how and when he pleases.

(*Id.* at p. 1101.)

The proposed rules are in line with these cases in that they establish procedures that are not in statute, but are consistent with the intent underlying the relevant statutes.

The commenter is correct that Government Code section 68662 vests authority for appointing counsel in the superior courts,[38] but that authority is not absolute. A superior court may not

[38] Government Code section 68662 provides in relevant part:

appoint any attorney. Rather, the superior court may appoint only those attorneys who meet the minimum qualifications that the Judicial Council and the Supreme Court set by rules of court that they are required to adopt under Government Code section 68665. Government Code section 68665, as amended by Proposition 66, requires the Judicial Council, along with the Supreme Court, to adopt rules of court that assure competent representation of individuals subject to a sentence of death, among other principles.[39] The Judicial Council therefore has a vested interest in seeing to it that the rules it and the Supreme Court adopt are applied correctly and consistently statewide if they are to "achieve competent representation."

No statute provides, however, who is responsible for determining whether an individual attorney meets these qualifications or by what process. Proposed rules 4.561(e)(3) and 4.562(g) provide two processes (one regional, one local) for determining whether an attorney meets these qualifications before a superior court can appoint such an attorney to represent an individual in a death penalty–related habeas corpus proceeding. Although the proposed rules may be viewed as going beyond Proposition 66, because they do not conflict with its express language and because they further one purpose of Proposition 66 (i.e., to promote "competent representation"), the Judicial Council has the authority to adopt them.

Statewide panels of qualified counsel.[40] Two commenters objected to the regional committees compiling a statewide panel of qualified counsel on the ground that such a list would be inconsistent with the roster of qualified counsel identified in Government Code section 68661. That section had previously authorized HCRC to establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings, but was amended by Proposition 66 to require that HCRC "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

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> The superior court that imposed the sentence shall offer to appoint counsel to represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in proceedings pursuant to Section 1509 of the Penal Code upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

[39] Government Code section 68665 provides:

> (a) The 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, and they shall reevaluate the standards as needed to ensure that they meet the criteria in subdivision (b).
>
> (b) In establishing and reevaluating the standards, the Judicial Council and the Supreme Court shall consider the qualifications needed 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. Experience requirements shall not be limited to defense experience.

[40] This provision was circulated as proposed rule 8.655(d)(4)(A) and is now found in proposed rule 4.562(d)(4)(A).

final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center."[41]

The working group takes the position that the statewide panel that would be authorized by proposed rule 4.562(d)(4)(A) does not conflict with the express language of Government Code section 68661 and is consistent with the intent of Proposition 66 to expand the pool of available counsel and will thereby further the processing of state habeas corpus review.[42] The provision authorizing HCRC to recommend counsel for a statewide roster is not written in a way that makes it an exclusive list. The statute does not refer to "the" roster, but to "a" roster.

Requiring the Supreme Court to review the counsel recommended by HCRC is consistent with another change Proposition 66 made to give the Supreme Court greater control over HCRC, e.g., the amendment to Government Code section 68664(b) that shifts from a five member board to the Supreme Court responsibility for selecting the executive director of HCRC.[43] Requiring the Supreme Court to approve all attorneys before they can be added to a single statewide list of counsel would be inconsistent with Proposition 66, which has removed death penalty–related proceedings from the Supreme Court and insisted that the appointment procedure be localized in an effort to increase the pool of available attorneys. In contrast, allowing multiple statewide, regional, or local lists is more likely to result in expansion of the pool of available counsel than having one list controlled by the same entity, the Supreme Court, that has been responsible for making these appointments in the past.

Alternatives considered

The working group considered many alternatives to the proposal it is recommending. Most have been addressed above in the section titled "Comments." The primary alternative the working group considered that is not discussed above is the possibility of recommending that no rule need be adopted. Arguably, the direction in Proposition 66 to appoint counsel "[a]fter the entry of a judgment of death in the trial court" is sufficient direction to the superior courts. (Pen. Code, § 1509(b).)

The benefit of adopting no rules would be to leave to the discretion of each sentencing judge the timing of when to appoint counsel. Alternatively, in the absence of a state rule of court, individual courts could adopt local rules to govern the practice among all the judges within that superior court. This option would allow each trial court or judge to determine the preferred timing and method for appointing counsel, and would allow the trial court to manage the flow of death penalty–related habeas corpus petitions that are filed in that court or before that judge.

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[41] *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016) text of Prop. 66, § 14, p. 216.

[42] In addition, 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.

[43] *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016) text of Prop. 66, § 17, p. 217.

Arguably, the trial court may consider that its experience with a specific case puts it in a unique position to determine the best time to appoint habeas corpus counsel.

The disadvantage of this approach is that it could easily lead to inequities for petitioners and the families of victims. When a petitioner was assigned counsel would depend on which judge or court sentenced the petitioner. Without a prioritization of the oldest judgments, there is some risk that the appointment could trigger the one-year time frame to file the petition before the record on appeal has even been prepared, possibly foreclosing habeas corpus counsel's ability to properly investigate and raise claims dependent on the appellate record or arising during the direct appeal. Similarly, the superior courts articulated a need for support and guidance on recruiting, screening, and matching counsel.

Overall, the working group concluded that the disadvantages of not adopting rules were far outweighed by the potential advantages.

Fiscal and Operational Impacts

These recommended new and amended rules and new forms relating to the appointment of counsel are likely to require some initial training for judicial officers and court staff. There are likely to be no savings for the superior courts or Courts of Appeal, but more likely increased costs associated with the new caseload required by Proposition 66, as discussed in more detail under "Policy Implications." One superior court indicated that it would need 18 months to implement the new rules, although another expressed the view that 90 days should suffice.[44]

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 28
2. Roster of Proposition 66 Rules Working Group, at pages 29–30
3. Cal. Rules of Court, rules 4.545, 4.550, 4.560, 4.561, and 4.562, at pages 31–38
4. Forms HC-100, and HC-101, at pages 39–41
5. Chart of comments, at pages 42–162
6. Copies of comments received, at pages 163–256
7. Link A: Ballot description and arguments for and against Prop. 66, and text of Prop. 66, *November 2016 Official Voter Information Guide* (pp. 104–109 and 212–218 of the linked document, respectively)

[44] The invitation to comment assumed a January 1, 2019, effective date and asked whether one month was sufficient time for implementation. Since circulation of the draft rules, the proposal has changed so that the effective date would be April 25, 2019, allowing five months for implementation.

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

Hon. Dennis M. Perluss, Chair
Presiding Justice of the Court of Appeal
Second Appellate District
Division Seven

Ms. Elaine A. Alexander
Executive Director
Appellate Defenders, Inc.
San Diego

Hon. Richard T. Fields
Associate Justice of the Court of Appeal
Fourth Appellate District
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Mr. Clifford Gardner
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Mr. Michael J. Hersek
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Court of Appeal
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State Public Defender
Office of State Public Defender
Sacramento

Mr. Jorge Navarrete
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California Supreme Court

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Chief of Capital Habeas Unit
Federal Public Defender's Office
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Proposition 66 Rules Working Group

As of February 5, 2018

Ms. Anabel Romero
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Mr. Steven Rosenberg, JD
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California Supreme Court
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Hon. William C. Ryan
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Mr. Joseph Schlesinger
Executive Director
California Appellate Project
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Hon. John S. Somers
Judge of the Superior Court of California,
County of Kern

Ms. Aimee Vierra
Deputy Public Defender
Riverside County Public Defender
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Ms. Heather Anderson
Supervising Attorney
Legal Services
Judicial Council of California

Mr. Michael Giden
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Criminal Justice Services
Judicial Council of California

Rules 4.545, 4.560, 4.561, and 4.562 of the California Rules of Court are adopted and rule 4.550 is amended, effective April 25, 2019, to read:

Title 4. Criminal Rules

Division 6. Postconviction, Postrelease, and Writs

Chapter 3. Habeas Corpus

Article 1. General Provisions

Rule 4.545. Definitions

In this chapter, the following definitions apply:

(1) A "petition for writ of habeas corpus" is the petitioner's initial filing that commences a proceeding.

(2) An "order to show cause" is an order directing the respondent to file a return. The order to show cause is issued if the petitioner has made a prima facie showing that he or she is entitled to relief; it does not grant the relief requested. An order to show cause may also be referred to as "granting the writ."

(3) The "return" is the respondent's statement of reasons that the court should not grant the relief requested by the petitioner.

(4) The "denial" is the petitioner's pleading in response to the return. The denial may be also referred to as the "traverse."

(5) An "evidentiary hearing" is a hearing held by the trial court to resolve contested factual issues.

(6) An "order on writ of habeas corpus" is the court's order granting or denying the relief sought by the petitioner.

(7) The definitions in rule 8.601 also apply to this chapter.

Article 2. Noncapital Habeas Corpus Proceedings in the Superior Court

Rule 4.550. Habeas corpus application ~~and definitions~~

~~**(a) Application**~~

This ~~chapter~~ article applies to habeas corpus proceedings in the superior court under Penal Code section 1473 et seq. or any other provision of law authorizing relief from

unlawful confinement or unlawful conditions of confinement, except for death penalty–related habeas corpus proceedings, which are governed by rule 4.560 et seq.

~~**(b) Definitions**~~

~~In this chapter, the following definitions apply:~~

~~(1) A "petition for writ of habeas corpus" is the petitioner's initial filing that commences a proceeding.~~

~~(2) An "order to show cause" is an order directing the respondent to file a return. The order to show cause is issued if the petitioner has made a prima facie showing that he or she is entitled to relief; it does not grant the relief requested. An order to show cause may also be referred to as "granting the writ."~~

~~(3) The "return" is the respondent's statement of reasons that the court should not grant the relief requested by the petitioner.~~

~~(4) The "denial" is the petitioner's pleading in response to the return. The denial may be also referred to as the "traverse."~~

~~(5) An "evidentiary hearing" is a hearing held by the trial court to resolve contested factual issues.~~

~~(6) An "order on writ of habeas corpus" is the court's order granting or denying the relief sought by the petitioner.~~

* * *

Article 3. Death Penalty–Related Habeas Corpus Proceedings in the Superior Court

Rule 4.560. Application of article

This article governs procedures for death penalty–related habeas corpus proceedings in the superior courts.

Rule 4.561. Superior court appointment of counsel in death penalty–related habeas corpus proceedings

(a) Purpose

This rule, in conjunction with rule 4.562, establishes a mechanism for superior courts to appoint qualified counsel to represent indigent persons in death penalty–related habeas corpus proceedings. This rule governs the appointment of counsel by superior courts only, including when the Supreme Court or a Court of Appeal has transferred a habeas corpus petition without having appointed counsel for the petitioner. It does not govern the appointment of counsel by the Supreme Court or a Court of Appeal.

(b) Prioritization of oldest judgments

In the interest of equity, both to the families of victims and to persons sentenced to death, California courts, whenever possible, should appoint death penalty–related habeas corpus counsel first for those persons subject to the oldest judgments of death.

(c) List of persons subject to a judgment of death

The Habeas Corpus Resource Center must maintain a list of persons subject to a judgment of death, organized by the date the judgment was entered by the sentencing court. The list must indicate whether death penalty–related habeas corpus counsel has been appointed for each person and, if so, the date of the appointment. The list must also indicate for each person whether a petition is pending in the Supreme Court.

(d) Notice of oldest judgments without counsel

(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.

(3) The presiding judge must identify the appropriate judge within the court to make an appointment and notify the judge that the case is among the oldest cases in which habeas corpus appointments are to be made.

(4) If qualified counsel is available for appointment to a case for which a petition is pending in the Supreme Court, the judge must provide written notice to the Supreme Court that counsel is available for appointment.

(5) On entry of an order appointing death penalty–related habeas corpus counsel, the appointing court must promptly send a copy of the appointment order to the Habeas Corpus Resource Center, which must update the list to reflect that counsel was appointed, and to the clerk/executive officer of the Supreme Court, the Attorney General, and the district attorney. The court must also send notice to the Habeas Corpus Resource Center, clerk/executive officer of the Supreme Court, Attorney General, and district attorney if, for any reason, the court determines that it does not need to make an appointment.

(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.

(7) The presiding judge of a superior court may designate another judge within the court to carry out his or her duties in this subdivision.

(e) Appointment of counsel

(1) After the court receives a notice under subdivision (d)(2) and has made the findings required by Government Code section 68662, the appropriate judge must appoint a qualified attorney or attorneys to represent the person in death penalty–related habeas corpus proceedings.

(2) The superior court must appoint an attorney or attorneys from the statewide panel of counsel compiled under rule 4.562(d)(4); an entity that employs qualified attorneys, including the Habeas Corpus Resource Center, the local public defender's office, or alternate public defender's office; or if the court has adopted a local rule under 4.562(g), an attorney determined to be qualified under that court's local rules. The court must at this time also designate an assisting entity or counsel, unless the appointed counsel is employed by the Habeas Corpus Resource Center.

(3) When the court appoints counsel to represent a person in a death penalty–related habeas corpus proceeding under this subdivision, the court must complete and enter an *Order Appointing Counsel in Death Penalty–Related Habeas Corpus Proceeding* (form HC-101).

Rule 4.562 Recruitment and determination of qualifications of attorneys for appointment in death penalty–related habeas corpus proceedings

(a) Purpose

This rule provides for a panel of attorneys from which superior courts may appoint counsel in death penalty–related habeas corpus proceedings.

(b) Regional habeas corpus panel committees

Each Court of Appeal must establish a death penalty–related habeas corpus panel committee as provided in this rule.

(c) Composition of regional habeas corpus panel committees

(1) The administrative presiding justice of the Court of Appeal appoints the members of each committee. Each committee must be composed of:

(A) One justice of the Court of Appeal to serve as the chair of the committee;

(B) A total of three judges from among those nominated by the presiding judges of the superior courts located within the appellate district; and

(C) A total of three attorneys from among those nominated by the entities in the six categories below. At least two of those appointed must have experience representing a petitioner in a death penalty–related habeas corpus proceeding.

(i) An attorney nominated by the Habeas Corpus Resource Center;

(ii) An attorney nominated by the California Appellate Project–San Francisco;

(iii) An attorney nominated by the appellate project with which the Court of Appeal contracts;

(iv) An attorney nominated by any of the federal public defenders' offices of the federal districts in which the participating courts are located;

(v) An attorney nominated by any of the public defenders' offices in a county where the participating courts are located; and

(vi) An attorney nominated by any entity not listed in this subparagraph, if the administrative presiding justice requests such a nomination.

(2) Each committee may also include advisory members, as authorized by the administrative presiding justice.

(3) The term of the chair and committee members is three years. Terms are staggered so that an approximately equal number of each committee's members changes annually. The administrative presiding justice has the discretion to remove or replace a chair or committee member for any reason.

(4) Except as otherwise provided in this rule, each committee is authorized to establish the procedures under which it is governed.

(d) Regional habeas corpus panel committee responsibilities

The committee has the following responsibilities:

(1) *Support superior court efforts to recruit applicants*

Each committee must assist the participating superior courts in their efforts to recruit attorneys to represent indigent petitioners in death penalty–related habeas corpus proceedings in the superior courts.

(2) *Accept applications*

Each committee must accept applications from attorneys who seek to be included on the panel of attorneys qualified for appointment in death penalty–related habeas corpus proceedings in the superior courts.

(A) The application must be on a *Declaration of Counsel re Minimum Qualifications for Appointment for Death Penalty–Related Habeas Corpus Proceedings* (form HC-100).

(B) Except as provided in (C), each committee must accept applications from attorneys whose principal place of business is within the appellate district and from only those attorneys.

(C) In addition to accepting applications from attorneys whose principal place of business is in its district, the First Appellate District committee must also accept applications from attorneys whose principal place of business is outside the state.

(3) *Review qualifications*

Each committee must review the applications it receives and determine whether the applicant meets the minimum qualifications stated in this division to represent persons in death penalty–related habeas corpus proceedings in the superior courts.

(4) *Provide names of qualified counsel for statewide panel*

(A) If a committee determines by a majority vote that an attorney is qualified to represent persons in death penalty–related habeas corpus proceedings in the superior court, it must include the name of the attorney on a statewide panel of qualified attorneys.

(B) Committees will provide to the Habeas Corpus Resource Center the names of attorneys who the committees determine meet the minimum qualifications. The Habeas Corpus Resource Center must consolidate the names into a single statewide panel, update the names on the panel at least quarterly, and make the most current panel available to superior courts on its website.

(C) 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.

(D) Inclusion on the statewide panel does not entitle an attorney to appointment by a superior court, nor does it compel an attorney to accept an appointment.

(5) *Match qualified attorneys to cases*

Each 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, if the court requests such assistance.

(6) *Remove attorneys 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.

(e) Consolidated habeas corpus panel committees

The administrative presiding justices of two or more Courts of Appeal may elect, following consultation with the presiding judges of the superior courts within their respective appellate districts, to operate a single committee to collectively fulfill the committee responsibilities for the superior courts in their appellate districts.

(f) Recruitment of qualified attorneys

The superior courts in which a judgment of death has been entered against an indigent person for whom habeas corpus counsel has not been appointed must develop and implement a plan to identify and recruit qualified counsel who may apply to be appointed.

(g) Local rule

A superior court may, by adopting a local rule, authorize appointment of qualified attorneys who are not members of the statewide panel. The local rule must establish procedures for submission and review of a *Declaration of Counsel re Minimum Qualifications for Appointment in Death Penalty–Related Habeas Corpus Proceedings* (form HC-100) and require attorneys to meet the minimum qualifications under rule 8.652(c).

Advisory Committee Comment

Subdivisions (d) and (f). In addition to the responsibilities identified in subdivisions (d) and (f), courts and regional committees are encouraged to support activities to expand the pool of attorneys that are qualified to represent petitioners in death penalty–related habeas corpus proceedings. Examples of such activities include providing mentoring and training programs and encouraging the use of supervised counsel.

NAME: STATE BAR NO.:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: MOBILE NO.:
E-MAIL ADDRESS:

DECLARATION OF COUNSEL RE MINIMUM QUALIFICATIONS FOR APPOINTMENT IN DEATH PENALTY–RELATED HABEAS CORPUS PROCEEDINGS

1. I request that *(check one)*

   a. ☐ the Court of Appeal, Appellate District regional habeas corpus panel committee determine that I meet the minimum qualifications for appointment for death penalty–related habeas corpus proceedings in a superior court and that I be included on the statewide panel of qualified attorneys.

   b. ☐ the Superior Court of County determine that I meet the minimum qualifications for appointment for death penalty–related habeas corpus proceedings in that court and that I be included on the panel of qualified attorneys for that court. (Applicable only in superior courts that have adopted a local rule of court authorizing a local panel.)

2. I meet the experience and training requirements in rule 8.652, as follows *(please check a or b)*:

   a. ☐ I meet the minimum qualifications stated in rule 8.652(c)(1)–(2).

      (1) I have engaged in the active practice of law in California for at least five years.

      (2) I have served as *(please check one of the following and attach a list of the case(s)—including a case name, case number, and court—that satisfy the checked criterion)*

         (a) ☐ counsel of record for a person 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) ☐ supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed *and* counsel of record 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. Attached are the attestations and recommendations of lead or associate counsel in the two cases in which I was supervised counsel.

         (c) ☐ 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.

      (3) I have satisfied the training requirement in rule 8.652(c)(4), as follows *(please check one or more)*:

         (a) ☐ In the last three years, I have completed hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, hours of which address death penalty habeas corpus proceedings. Attached are the dates and descriptions of the trainings.

         (b) ☐ In the last three years, I have served as an instructor in an appellate criminal defense or habeas corpus defense training. The training is approved for hours of Minimum Continuing Legal Education credit by the State Bar of California. I request that my instruction constitute compliance with hours of the training requirement. The training materials are attached.

         (c) ☐ I have represented a petitioner in a death penalty–related habeas corpus proceeding and request that this representation constitute compliance with hours of the training requirement. The petition, docket, and decision on the case are attached.

Form Adopted for Mandatory Use
Judicial Council of California
HC-100 [New April 25, 2019]

Cal. Rules of Court, rule 4.562
www.courts.ca.gov

NAME:	STATE BAR NUMBER:

2. b. ☐ I have at least five years of experience substantially equivalent to that of an attorney qualified under rule 8.652(c)(1)–(2). Attached is a description of my experience. In the last two years, I have 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 involved death penalty habeas corpus proceedings. Attached are the dates and descriptions of my trainings. I understand that this experience does not qualify me for appointment under rule 4.562(g) by a superior court under local rule.

3. I am familiar with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings.

4. Attached are three writing samples, including *(please check one or more)*

   a. ☐ one or more filed petitions where I served as lead counsel of record for petitioner in a death penalty–related habeas corpus proceeding.

   b. ☐ portion(s) of habeas corpus petition(s) prepared by me in my capacity as associate or supervised counsel for petitioner in a death penalty–related habeas corpus proceeding.

   c. ☐ two or more filed habeas corpus petitions involving a serious felony in cases where I served as counsel of record for petitioner.

5. The following two attorneys are familiar with my qualifications and performance and recommend me for appointment as counsel for a person in a death penalty–related habeas corpus proceeding:

	Name of Attorney	Address	Phone	Email
a.				
b.				

6. Trial experience *(please check one)*

   a. ☐ I have experience in conducting trials or evidentiary hearings.

   b. ☐ I do not have experience in conducting trials or evidentiary hearings, and agree to associate with an attorney who has such experience if an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding in which I have been appointed to represent the petitioner.

7. Membership on a panel eligible for appointments to represent indigent appellants in the Court of Appeal *(please check one)*

   a. ☐ I am not a member of an appellate district panel.

   b. ☐ I am a member of the following appellate district panels:

8. Previous application, if applicable

   a. ☐ I am a member of the statewide panel of attorneys provided for in rule 8.655. I am renewing my application for inclusion on the panel for another six-year term.

   b. ☐ I previously applied for inclusion on the statewide panel of attorneys provided for in rule 8.655 but was not accepted. The date of the previous application was: .

   c. ☐ I previously applied for appointment under rule 8.655(g), by a superior court under a local rule (please state date of the application, the name of the court, and whether the application was accepted or denied):

9. Attached is a copy of my current resume.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **10-22-2018** **Not approved by the Judicial Council**
In re _____ on Habeas Corpus (NAME OF PETITIONER)	
ORDER APPOINTING COUNSEL IN DEATH PENALTY–RELATED HABEAS CORPUS PROCEEDING	CASE NUMBER:

1. On *(date):* the court appointed *(attorney):* as counsel to represent *(petitioner):* in the above-entitled case.

2. The court finds counsel qualified for appointment in this matter
   a. ☐ as lead counsel under rule 8.652(c) of the California Rules of Court.
   b. ☐ as associate counsel under rule 8.652(c) of the California Rules of Court.
   c. ☐ as *(specify either lead or associate):* counsel under rule 8.652(d) of the California Rules of Court. The basis for finding counsel qualified under this section is:

3. The court designates as assisting entity or counsel the following:

Date:

JUDGE OF THE SUPERIOR COURT

Form Adopted for Mandatory Use
Judicial Council of California
HC-101 [New April 25, 2019]

Cal. Rules of Court, rule 4.561(e)
www.courts.ca.gov

SP18-13

Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

All comments are verbatim unless indicated by an asterisk (*). References to rule numbers as circulated have been replaced [in brackets] with the rule numbers used in the current draft of the rule accompanying this comment chart for the reader's ease of reference.

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. * * * 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, Inc. (CADC) By Kyle Gee, Chair CADC Government Relations Committee	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.	

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

SP18-13

Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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	Oakland, California		CADC has one observation relevant to the proposed rules regarding "Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings." See comments on specific provision below.	See response to specific comment below.
3.	California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	NI	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. * * *	Penal Code section 190.6(d), as enacted by Proposition 66 (the act), requires the Judicial Council to adopt "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review" within 18 months of the effective date of the act. The act took effect on October 25, 2017, when the Supreme Court issued its decision in *Briggs v. Brown et al.* (2017) 3 Cal.5th 808. The Judicial Council must therefore adopt *initial* rules of court on or before April 25, 2019. The working group concluded that some rules, including rules governing the superior court appointment of habeas corpus counsel should be adopted before April 25, 2019, so that courts and attorneys handling death penalty–related habeas corpus proceedings in the superior courts would have guidance at the earliest date possible to allow them to begin preparing for the new responsibilities and procedures imposed by

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			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.	Proposition 66. Under these circumstances the working group provided the greatest opportunity possible for public review and comment on this proposal. The working group recognizes that Proposition 66 did not address the issue of how the new responsibilities and procedures would be funded. Although the lack of this information does present challenges, it does not relieve the Judicial Council of its statutory responsibility to adopt initial rules of court. The working group emphasizes that these rules of court represent an *initial* set of rules. As a matter of the policy, any person or organization may at any time submit to the Judicial Council a request for a new or amended rule of court, form, or standard of judicial administration. With respect to this particular set of rules, Proposition 66 specifically imposed on the Judicial Council 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 . . . ." Although the working group recommends that the Judicial Council adopt these rules at its November 2018 meeting to become effective April 25, 2019, it anticipates

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			See comments on specific provisions below.	there will be opportunities in the future to revisit and amend these rules as the Judicial Council finds necessary or appropriate. See responses to specific comments below.
4.	California Attorneys for Criminal Justice 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. * * * CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In	

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			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 Litigation Section Committee on Appellate Courts 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. See comments on specific provisions below.	See responses to specific comments below.
6.	California Public Defenders Association by Robin Lipetzky, President Sacramento, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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7.	Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	NI	The Second Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty-related habeas corpus proceedings. In response to the working group's request for informal feedback from the Administrative Presiding Justices Advisory Committee, the Second District offers the following responses to the working group's specific questions. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
8.	Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	NI	The Fourth Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty–related habeas corpus proceedings. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
9.	Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and 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	

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			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. * * * 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. See comments on specific provisions below. [The commenter provided extensive comments, not all of which addressed specific provisions of the proposal and those portions of the comment therefore are not included in this chart. A complete copy of the commenter's letter is attached for the Judicial Council's and the public's reference.]	See responses to specific comments below.

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10.	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. 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	

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			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 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. 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.	With respect to the August 24, 2018 deadline for comments, please refer to the response to CAP-SF above.

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			[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.
11.	Hon. Mary J. Greenwood, Administrative Presiding Justice, Court of Appeal, Sixth Appellate District	NI	I thank the Proposition 66 Rules Working Group for their work on the proposed rules concerning appointment of counsel in death penalty-related habeas corpus proceedings. I join in the comments made by my colleague Justice McConnell on behalf of the Fourth District with the following additional comments. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.

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12.	Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	NI	The below comments to SP 18-13 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, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 13-15 of the Invitation to Comment. See comments on specific provisions below.	See responses to specific comments below.
13.	Marylou Hillberg, Attorney at Law Sebastopol, California	N	[From Ms. Hillberg,'s comments on Proposal SP18-12:] 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. See comment on a specific provision below.	See response to specific comments below.

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14.	Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee) by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	NI	Thanks for all your hard work on this very onerous and complicated process. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
15.	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 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. See comments on specific provisions below.	See responses to specific comments below.

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16.	Office of the State Public Defender by Mary K. 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.
17.	Kristin Traicoff, Law Offices of Kristin Traicoff Sacramento, California	AM	After reading these proposed rules, I remain confused as to how, if at all, they are intended to intersect with the current SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH (hereafter, "Policies"). In some regards, the proposed rules appear to supplant the Policies but in some respects (notably in describing the funding mechanisms), the proposed rules appear to imply (though I may be incorrect in this interpretation) that the Policies will remain in effect even when the Superior Court has assumed responsibility of appointment of counsel. As a solo practitioner who is currently appointed on a capital appeal and who contemplates requesting appointment on a capital habeas, I rely greatly on the detail provided in the Policies concerning numerous practical aspects of my appointment. Foremost	*The Supreme Court Polices Regarding Cases Arising from Judgments of Death* apply when the Supreme Court appoints counsel and pays counsel in capital cases. The polices therefore would not apply to counsel appointed by a superior court in death penalty–related habeas corpus proceedings, which are the proceedings governed by the rules in this proposal. The working group notes that this is only one of five proposals it is recommending to the Judicial Council. The working group anticipates recommending a proposal on the procedures for death penalty–related habeas corpus proceedings in the superior courts that may address some of the areas addressed in the Supreme Court's policies (e.g., filing deadlines.) However, as discussed more fully in the body of the report, it is not clear whether it will be the judicial branch or counties that have responsibility for the costs

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			among these are the funding guarantees and the detailed policies describing how funding is obtained. I simply could not operate my business without such certainty, and I have declined to represent capitally-sentenced inmates in other jurisdictions where the funding provisions are unclear. I believe the proposed rules need to make explicit to what extent, if at all, they intend to incorporate the Policies. I urge the Committee strongly to retain the Policies notwithstanding the proposed rule amendments, as the Policies provide a great deal of practical, detailed information governing counsel's appointments, which are simply wholly absent from the proposed rules and, without which, it is difficult to imagine a system of appointment functioning effectively.	of appointed counsel. Given this, the working group's view was that it is premature to determine whether a rule that contains provisions regarding compensation similar to those found in the Supreme Court's polices would be appropriate.
18.	Superior Court of Los Angeles County	A	These comments are from the Los Angeles Superior Court and not from any one person in particular. See comments on specific provisions below.	The working group notes the commenter's general support for these rules. See responses to specific comments below.

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19.	Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	A	It is difficult to anticipate how smoothly the appointment process will work out in practice, nevertheless, it appears the proposed rules are generally well thought out and do a good job of balancing the various concerns in play. See comments on specific provisions below.	The working group notes the commenter's general support for these rules. See responses to specific comments below.

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Whenever possible, counsel should be appointed first for those inmates with the oldest judgments.	The working group notes the commenter's support for this provision in the rule.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	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.	The working group notes the commenter's support for this provision in the rule.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We agree that the oldest cases should generally be given priority. The only question is whether the oldest judgment where the appeal has been completely filed should take precedence over an older judgment where the appeal has not been filed. Our sense is that appellate counsel is often able to flag some issues for habeas counsel, which helps habeas counsel proceed more efficiently, so it may be prudent to prioritize cases where the appellant's briefs have been completed. In addition, if an appeal has been filed on a "newer" case, that may be because the record in the newer case is not as long or complicated as compared to an older case where the appeal briefs have not been filed. Consequently, it may be easier to litigate these "newer" cases before the more complicated older case.	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. 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. The working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
		In addition, briefing has been completed on the automatic appeal for a substantial number of the oldest cases, so the concern raised by the commenter is unlikely to occur within the next several years and possibly not for many years.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes.	The working group notes the commenter's support for this provision in the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes.	The working group notes the commenter's support for this provision in the rule.
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Proposed Rule [4.561], 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	Given the existing shortage of qualified counsel willing and able to serve as habeas corpus counsel, not every person subject to a judgment of death will have counsel appointed immediately following adoption of the rules. The intent underlying this proposal is to put in place a structure that allows for the orderly appointment of counsel, as they become available. The working group concluded that the least inequitable solution would be to appoint counsel first for those individuals who are subject to the oldest judgments of death. The reasoning underlying this principle is that those individuals who

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
	(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.	have only recently been sentenced to death should not obtain counsel while those who have waited decades are required to wait even longer. This reasoning applies equally to the families of the crime victims who have been waiting for a resolution to these cases. The proposed rule is intended to provide a principle under which the limited pool of counsel can be appointed in an equitable way across the state. The rule provides a mechanism that prioritizes judgments, but does not prevent a superior court that has counsel available from appointing that counsel. Under the proposal, all superior courts that have entered a judgment of death are required to develop and implement a plan to identify and recruit qualified counsel. (Proposed rule 4.562(f).)

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	The proposal, SP 18-13, requests specific comments on two categories of questions: prioritization and appointment, and regional committees and vetting of attorney qualifications. Regarding prioritization and appointment, Mexico generally agrees that courts should prioritize appointment of counsel for the oldest judgments of death. Problems that occur with the passage of time, such as the inability to locate witnesses and the loss or destruction of records, can be especially challenging in the cases of Mexican nationals. In these cases, significant evidence is always located in Mexico, where record-keeping is much less consistent and standardized than in the United States and where the location of witnesses can be significantly more challenging. Especially in poor rural areas, where many of the defendants are from, witnesses cannot be located via property ownership records, cell phones, credit cards, vehicle registration, and other common methods used in the United States; investigators must rely instead on local residents' knowledge and memory, which inevitably deteriorates over time. Mexicans under sentence of death in California without habeas counsel include individuals with death judgments more than 20 years old. These cases where the risk of lost evidence is greatest should be prioritized over newer cases. These risks exist regardless of whether a petition is pending before the Supreme Court.	The working group notes the commenter's support for this provision in the rule.

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
Habeas Corpus Resource Center, by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes, the rules should require that courts prioritize appointment of habeas corpus counsel for the oldest death judgments. Currently, thirty-nine persons sentenced to death have waited over twenty years for appointment of habeas counsel and the necessary funding to pursue post-conviction relief. Thirteen different California counties entered the death judgments against these persons, including Los Angeles County (nine judgments), Orange County (five judgments), Riverside (five judgments), and San Bernardino (four judgments). In light of the large number of individuals waiting many years for the appointment of habeas counsel, fairness and equity – for both the persons sentenced to death and the families of crime victims waiting for resolution of these cases – demand that California courts prioritize the oldest death judgments for appointment of counsel. The appointment of habeas counsel to newly death-sentenced persons may result in legal challenges to the appointment process and cause further delays in the appointment of counsel and progress of habeas corpus cases.	The working group notes the commenter's support for this provision in the rule.
Joint Rules Subcommittee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes, courts should prioritize appointments of counsel for the oldest judgments. Allowing flexibility makes sense, but there does not seem to be another equitable way to do it.	The working group notes the commenter's support for this provision in the rule.

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the Federal Defender, Eastern District of California, by Heather E. Williams, Federal Defender Sacramento, California	We agree with the recommendation to prioritize appointing death penalty-related habeas corpus counsel first for those persons subject to the oldest death judgments. According to the Executive Summary, 360 persons await capital habeas counsel appointments. Of these, about half have been waiting over ten years since sentenced to death. *Briggs v. Brown*, 3 Cal.5th 808, 864 (2017) (Liu, J., concurring). Twenty-five persons whose cases originated in Eastern District counties have been waiting over ten years for habeas corpus counsel appointments. Of those, two have been waiting for habeas corpus counsel appointment since 1996 – 22 years. I cannot overstate how difficult it is to investigate and prepare a federal habeas petition in a case over a decade old. Witnesses are lost to death or faded memory. Documents are lost or destroyed. *See People v. Morales*, 2 Cal.5th 523, 531 (2017) (delay in appointing death penalty-related habeas corpus counsel may result in loss of documents or evidence). The client's memory fades so he is unable to relate facts about the trial, the circumstances surrounding his charges, or his family, friends and childhood. Because the risk that critical evidence and information will be lost in the passage of time, we agree the rule should prioritize appointing death penalty-related habeas corpus counsel to those individuals who have waited the longest.	The working group notes the commenter's support for this provision in the rule and appreciates this input.

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	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 [4.561](b), is a step in the right direction.	The working group appreciates this input.
	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 [4.561](b) should read "shall", not "should."	Based on the other comments received, the working group declined to make this suggested change. The working group recognizes that making appointments can be more difficult in some cases than in others. There is a risk that if there are serious impediments to making appointments in one or two cases, a rigid prioritization of older judgments could prevent appointments from being made when qualified counsel are available and willing to accept appointments.
	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	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
	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 [4.561] as subdivision (f).	for the working group to consider, develop, and circulate another proposal. Therefore the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Superior Court of Los Angeles County	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes, the courts should prioritize appointment of counsel for the oldest judgments of death.	The working group notes the commenter's support for this provision in the rule.

Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	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	The working group declined to make this suggested change. The working group recognizes there will be challenges in making these appointments. There appears to be little risk, however, in starting with a larger number of judgments than with a smaller number. In the event that the effort to make 25 appointments initially, and 20 appointments in each batch thereafter, does create an impediment to making appointments, the Judicial Council may consider whether making fewer

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Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	appointments at a time would improve the process and may amend the rule accordingly. The working group notes that many other commenters support an initial effort to make 25 appointments.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Proposed Rule [4.561](c)-(d) requires 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.	Penal Code section 190.6(d) requires the Judicial Council to "adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." This proposal is intended to partially satisfy that mandate. The proposed rules do not "dictate the distribution of cases," but introduce a mechanism by which superior courts will have the information they need to know where the judgments pending in their courts fit among the approximately 360 judgments awaiting appointment of counsel. The mechanism is overseen by HCRC and allows courts to appoint counsel first for those judgments of death in the state that have been awaiting counsel for the longest period of time.

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Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	[I]t 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 working group believes its proposal is consistent with the commenter's suggestion. The proposal does not infringe on the superior courts' statutory authority to make appointments as and when they deem appropriate. The proposed process is designed to encourage superior courts to prioritize the oldest judgments first, but it is necessary to give superior courts the information on where the judgments entered in their respective courts fit into the statewide caseload. The notices sent out as batches of 20 appointments are made would provide the updates the commenter proposes. The working group appreciates this input.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the first group of judgments for which HCRC sends out notice include 25 judgments or a different number?*** The question appears to assume that HCRC is the only current statewide body that can perform statewide functions regarding capital cases. That is not true. The California Appellate Project—San Francisco (CAP-SF) also has the capability to perform statewide functions in capital litigation. It is suggested below that the management of the panel, and the function of matching counsel to cases, be recognized as a statewide function to be performed by CAP-SF.	The working group declined to make this suggested change. HCRC is part of the judicial branch of the State of California and the duties described in proposed rule 4.561(d) are consistent with HCRC's statutory duties. (Gov. Code, § 68661.) The working group agrees that CAP-SF is qualified to serve the functions described in proposed rule 4.561(d). CAP-SF is a non-profit corporation that provides services to the Supreme Court in connection with capital cases pursuant to an annual contract. The function described in proposed rule

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Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		4.561(d) is not necessarily within the scope of that contract.
	Assuming that HCRC should perform this function, 25 death judgments in the first group is acceptable.	The working group notes the commenter's support for this provision in the rule.
	Should the number of judgments for which HCRC sends out subsequent notice include 20 judgments or a different number? 20 judgments is acceptable.	The working group notes the commenter's support for this provision in the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the first group of judgments for which HCRC sends out notice include 25 judgments or a different number?*** Twenty-five judgments is an appropriate number for the first batch of notices to the superior courts.	The working group notes the commenter's support for this provision in the rule.
	Should the number of judgments for which HCRC sends out subsequent notice include 20 judgments or a different number? The Fourth District agrees with the proposed number of 20 judgments for subsequent notices because that number allows for a cushion of flexibility to accommodate cases for which it may be difficult to find counsel.	The working group notes the commenter's support for this provision in the rule.

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Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should the first group of judgments for which HCRC sends out notice include 25 judgments or a different number?*** 25 judgments is an arbitrary number, but as good as any, especially since another 20 will be right behind it. Most judgments will come out of just a few counties anyway.	The working group notes the commenter's support for this provision in the rule.
Superior Court of Los Angeles County	***Should the number of judgments for which HCRC sends out subsequent notices include 20 judgments or a different number?*** It appears, based on the number of inmates awaiting habeas counsel, that notices for 20 judgments at a time are appropriate, so as not to inundate trial courts.	The working group notes the commenter's support for this provision in the rule.
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	We are concerned about the language of proposed rule [4.561](d)(6) regarding the Habeas Corpus Resource Center's receipt of "information indicating that an appointment is for any reason not required." Though this provision may have drafted with pro-per parties in mind, there could be other circumstances where appointment may not be required or appropriate – like with an inmate who has become incapacitated. We suggest the rule include a mechanism whereby either the HCRC or the trial court can decide that, notwithstanding the age of the case, the particular inmate should be removed from the list.	The provision was intended to address situations in which the individual subject to a judgment of death prevails on automatic appeal or dies of causes other than execution by the state before habeas counsel is appointed. HCRC would be in a position to know of these circumstances. The commenter raises a circumstance that the working group did not discuss. Based on this comment, however, the working group has revised rule 4.561(d)(5) to require notice to HCRC and others if the court concludes that an appointment is not necessary for any reason.

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We submit that superior court judges should not be authorized to appoint counsel on any case after advising the Supreme Court that counsel is available for appointment. That would usurp the authority of the Supreme Court, who may be carefully evaluating the wisdom of appointing the "available" counsel. Ultimately, the Supreme Court will review the superior court's ruling on the habeas petition—either on a petition for review by the defendant or the appeal from a habeas grant by the prosecution—and should be entitled to have confidence in the quality of counsel who is appointed to represent the defendant/petitioner, lest the Supreme Court (and lower courts) be saddled with additional layers of proceedings challenging the effectiveness of habeas counsel. (See, e.g., *Trevino v. Thaler* (2013) 569 U.S. __ [133 S.Ct. 1911]; *Martinez v. Ryan* (2012) 566 U.S. 1.) * * * Insert "qualified" so it begins "If **qualified** counsel * * * ."	The working group declined to make this suggested change. The working group did not reach a consensus on whether superior courts have the authority to appoint counsel when a death penalty–related petition is pending in the Supreme Court without counsel. The proposal would be sufficient to facilitate communication between the superior court and Supreme Court and should therefore prevent any conflicts between the Supreme Court and the superior court that the commenter anticipates are possible. In response to this comment, the working group has modified the language of rule 8.65(d)(4) to clarify that the superior court's obligation to notify the Supreme Court is triggered only when qualified counsel is available.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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)	Please see the response to the California Public Defenders Association above. The working group appreciates this input.

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?*** The question is inapplicable to petitions filed in the first instance with the superior court. As to those petitions, Proposition 66 requires the superior court to appoint counsel (Pen. Code, § 1509, subd. (b); Gov. Code, § 68662), and the Supreme Court would accordingly play no role in those appointments. With respect to the *Morgan* petitions that were previously filed with (and are now pending before) the Supreme Court, we recommend a special rule that empowers the superior court to appoint counsel for a habeas petition to be re-filed or transferred to the superior court.	The working group understands the commenter to be stating that a superior court should not be authorized to appoint counsel while it is pending before the Supreme Court. Please see the response to the California Public Defenders Association above.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?*** Yes. To avoid potential confusion and delays, the rule should include a provision that the superior court is authorized	The working group appreciates this suggestion but declined to make the proposed change because many

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
	to appoint counsel if the Supreme Court has not acted in 60 days.	members of the working group are of the view that the superior court does not have the authority to make an appointment while a petition is pending in the Supreme Court and were concerned that including the 60 day deadline would establish independent legal authority in conflict with that conclusion. The working group elected to retain language that was silent on the question of the superior court's authority but that would facilitate communication between the superior court and Supreme Court and give the Supreme Court an opportunity to act or otherwise give direction to the superior court.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a petition is pending before the Supreme Court from those that do not have a petition pending before the Supreme Court?*** The rule should not distinguish or exclude cases in which a habeas corpus petition is pending before the California Supreme Court for the purpose of appointment prioritization. Priority for appointment should be given to the oldest judgments regardless of whether there is a petition pending. The Supreme Court and the superior courts should work in concert to ensure that qualified counsel is appointed to the oldest cases first. Although amended Government Code section 68662 provides that the superior courts shall offer and appoint habeas counsel, that provision provides no express timeframe for making appointments. Nor does it preclude the fair and just prioritization of all existing cases in which defendants have	The working group appreciates this input.

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
	waited decades for the promised appointment of habeas corpus counsel. The amended statute contemplates such a coordinated approach by the Supreme Court and superior courts; amended section 68661(d) requires that the Supreme Court continue to be involved in the qualification and appointment of habeas counsel in that it requires the Court to make a final determination of attorneys to be included on the state-wide roster of counsel qualified to accept an appointment in a state habeas corpus proceeding. In addition, the superior court should not be permitted to appoint habeas counsel to a habeas case that has already been initiated in the Supreme Court without the assent of that Court. The Supreme Court retains the inherent judicial power to appoint counsel in habeas corpus cases before it. *See In re Anderson*, 69 Cal.2d 613, 632-34 (1968); *see also Briggs v. Brown*, 3 Cal.5th 808, 848-54 (2017) (discussing the inherent power of a court to administer its proceedings). Given the longstanding shortage of qualified habeas counsel, and the fact that the automatic appeals of death-sentenced persons who have not been provided habeas counsel will continue to progress (and be rejected), persons whose appeals conclude before their habeas petition has been filed will continue to file initial petitions in the California Supreme Court under *In re Morgan*, 50 Cal.4th 932 (2010). With the assistance of HCRC, the Supreme Court and the superior courts should track the persons in need of habeas counsel and appoint counsel to the oldest judgments whenever possible.	The proposal does not address the roster described in Government Section 68661(d). Please see the response to the California Attorneys for Criminal Justice in the section on rule 4.562(a), (b) – Regional Committees below. Please see the response to the California Public Defenders Association above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
	For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a Morgan petition is pending before the Supreme Court (as opposed to a petition filed by counsel, but for which there is not currently an attorney as a result of, for example, death or withdrawal of the attorney)? No, priority should be given to cases based on the oldest judgment regardless of whether a full-counseled habeas petition is pending, a Morgan petition is pending, or no habeas petition has been filed. ***Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long? Would 60 days be appropriate?*** No. As noted above, a superior court should not appoint counsel to a habeas case initiated in the California Supreme Court. The Supreme Court must affirmatively relinquish its jurisdiction and inherent judicial power to appoint counsel in habeas cases initiated in the Supreme Court before a superior court judge can appoint habeas counsel.	The working group notes the support for this provision in the rule. Please see the response to the California Public Defenders Association above.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan	***Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?*** Yes, the superior court judge should be authorized to appoint counsel if the Supreme Court has not acted. 60 days should be	Please see the response to the Court of Appeal, Fourth Appellate District above.

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SP18-13

Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(d)(4) (circulated as rule 8.654(d)(4)) – Appointment of Counsel: Petitions Pending in the Supreme Court		
Commenter	**Comment**	**Proposed Working Group Response**
Presiding Judge, Superior Court of Riverside County	enough time for the Supreme Court to respond to the Superior Court. The point of the proposition is to speed up the processing of the appeals and the Supreme Court should not have an indeterminate time to respond.	
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	***Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?*** Yes, and 60 days seems appropriate.	Please see the response to the Court of Appeal, Fourth Appellate District above.

Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**3. At an absolute minimum, two counsel should be appointed in each case; individual cases may require more** The need for multiple counsel at each stage of a capital case is well accepted, given both the magnitude of the task and what is at stake. (See, e.g., *Keenan v. Superior Court* (1982) 31 Cal.3d 424; ABA Guidelines, § 4.A.1.) Two is an absolute minimum. More may be necessary, given that the new statute requires the same amount of work to be done in one-third of the time. The rule could appropriately borrow the phrasing of the ABA Guideline: "no fewer than two attorneys."	The working group declined to make this suggested change. Under the Supreme Court's current practice, the court usually appoints only one attorney for a petitioner in a death penalty–related habeas corpus proceeding. Occasionally the court appoints associate counsel along with the lead attorney, but that is typically done when the attorneys seek such an appointment. Although the appointment of associate attorneys will allow for the training of younger attorneys that may help develop a larger pool of attorneys that can be appointed, requiring the appointment of two attorneys could also result in fewer appointments being made if the superior courts are not able to recruit a sufficient number of attorneys. In

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
		balance, the working group thought it best to leave to the discretion of the individual superior court judge who will be familiar with the needs in the specific proceeding to determine how many attorneys should be appointed. In addition, because the rule will require designation of an assisting entity or counsel, the appointed attorney will not be working in isolation, but will have an experienced attorney or attorneys providing support and assistance.
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	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. [1] Complex cases are generally those with multiple defendants, multiple victims, multiple crime scenes, extensive expert testimony or significant forensic or mental health issues. * * *	Please see the response to the comment of Robert D. Bacon above.
	A modification is necessary to harmonize [rule 4.561(e)(3)] with proposed Rule [4.562](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	The working group declined to make this suggested change. The intent underlying proposed rule 4.562(d)(5) is that a regional committee will obligated to provide a superior court assistance with matching counsel to a case only if the court requested such assistance. The working

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	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 declined 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 [4.562](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." [See also comment under "Funding," below.]	group modified rule 4.562(d)(5) to clarify that assistance must be provided if requested by a superior court.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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.	Please see the response to the comment of Robert D. Bacon above.

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	There should be a minimum of two lawyers appointed. If the case is complex or the record lengthy there should be more than two. Experience has demonstrated that it takes years for a complete habeas petition to be filed from a death sentence. Under Proposition 66, that time period is compressed into an absolute deadline of one year. A typical record in a death penalty case exceeds 10,000 pages, and it is not uncommon for the record to exceed 25,000 pages. In addition to reviewing the entire trial record, habeas counsel must review the entire appellate record. And on top of all of that, habeas counsel must investigate the case anew, particularly with respect to the defendant's social history and mental health, in order to evaluate potential issues of ineffective assistance of counsel. All of this takes time, which is why experience has shown that it takes years for a complete habeas petition to be filed. There are only so many hours in one year, and one attorney simply cannot perform the thousands of hours of work required to produce a constitutionally sufficient habeas petition in one year. The only hope for achieving compliance with the one-year deadline is to appoint at least two lawyers on each habeas petition, with provision for additional counsel based on the particular circumstances of the individual case.	Please see the response to the comment of Robert D. Bacon above.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*** No, this is not necessary. Initially, only one lawyer should be appointed. This lawyer may later request the appointment of another counsel to furnish needed assistance.	The working group appreciates this input.

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*** The Fourth District does not take a position on this question.	No response required.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Proposed Rule [4.561](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.	The working group modified the proposal to allow superior courts to appoint counsel from any entity that employs qualified attorneys, including HCRC, a local public defender, or alternate public defender. The proposal was also revised to be silent on whether superior courts must first attempt to appoint such an entity before it turns to private counsel.

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Commenter	**Comment**	**Proposed Working Group Response**
	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 [4.561](e)(2) is unjustified, unwise, and probably illegal. It should be removed from the proposal. * * * Proposed Rule [4.561](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	Proposed rules 4.561(e)(3) and 4.562(g) do not interfere in any way with the statutory power of a superior court to appoint counsel. Government Code section 68665(a) requires the Supreme Court and the Judicial Council to adopt "binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Government

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	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.	Code section 68662 does not authorize a superior court judge to appoint counsel who do not meet these qualifications. No statute provides, however, who is responsible for determining whether an individual attorney meets these qualifications. Proposed rules 4.561(e)(3) and 4.562(g) provide two processes (one regional, one local) for determining whether an attorney meets these qualifications before a superior court can appoint such an attorney to represent an individual in a death penalty–related habeas corpus proceeding. Because statute does not dictate any process, the Judicial Council has the authority to adopt these rules.
	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.	Although the superior courts may be familiar with the qualifications of individual attorneys to try cases, the superior courts have no experience at this time with an attorney's ability to represent an individual on a death penalty–related habeas corpus petition. These rules are intended to assure that the superior courts appoint those attorneys who meet the minimum qualifications provided by the California Rules of Court adopted by the Supreme Court and the Judicial Council under Government Code section 68665

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	Proposed Rule [4.561](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 working group declined to make this suggested change for the reasons stated above.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Mexico's primary concern about the appointment of counsel is that, as currently drafted, the proposal does not account for the fact that certain cases-specifically, the cases of foreign nationals-will have specialized needs requiring the appointment of counsel with additional qualifications, as discussed in Mexico's comments on SP 18-12. To ensure that qualified counsel is appointed for each defendant, the roster of attorneys should be structured to include a sub-category of attorneys who are qualified by additional required training and experience to accept foreign national cases. Counsel should only be appointed to represent a foreign national if he or she has been determined to possess these additional qualifications. Including this specialized designation in the records of available attorneys would greatly assist in locating and appointing counsel who are qualified to represent particular defendants, especially because such attorneys are comparatively rare and are likely spread around the state. The proposed rules, while appearing to recognize that certain cases will have specific needs apart from simply meeting the minimum qualifications,[2] create a much less formal system, whereby regional committees could, if asked, help superior courts match available counsel to particular cases, without any	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. The working group declined to add specific additional qualifications for counsel eligible to represent foreign nationals for the reasons explained in the working group's concurrently submitted report to the Judicial Council regarding the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings.

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	guidelines or requirements for this process. This proposal is not sufficient to ensure effective representation for all defendants. It neither requires that superior courts solicit such input nor guarantees that counsel so "matched" will actually be qualified to undertake the representation. Mexico fears that under the current proposal, counsel could be "matched" to a Mexican national case because he or she speaks some Spanish, even if he or she lacks fluency, knows nothing about Mexican culture, and has no experience whatsoever in representing foreign nationals. Or a local attorney could be appointed who meets the bare minimum qualifications for a death penalty habeas appointment, without even attempting to identify an attorney who could actually provide effective representation in that particular specialized case. Importantly, the rules must not rely on the optional provision of informal advice, rendered without articulated standards, to ensure that counsel appointed to represent a foreign national is qualified to provide effective representation. They must do more than simply hope or assume appointments will be made only when an attorney fully qualified for a particular case is located; they must provide for the assessment of the specific necessary qualifications, and limit appointments in foreign national cases to attorneys so qualified. This necessity informs Mexico's answers to several of the specific questions put forth in the proposal. [Comments on specific items found below.]	

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	[2] For instance, the proposal recognizes that "making appointments may be more difficult in some cases than in others," p. 6, and explains that a committee may "assist in identifying an attorney on the panel who is suitable for the appointment," pp. 7-8.	
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*** Yes, the proposed rules should require the appointment of no fewer than two qualified habeas counsel to each death-sentenced person, in accordance with the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1 – except when a qualified entity (e.g., the Habeas Corpus Resource Center or the California Appellate Project) is appointed as habeas counsel. In addition, the shortened one-year timeframe for the filing of an initial habeas petition under Penal Code section 1509(c) demands the appointment of at least two habeas counsel. A single attorney will not be able to complete the extensive work required to file a professionally adequate habeas petition in one year and effectively represent his or her client in the habeas proceeding.	Please see the response to the comment of Robert D. Bacon above.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee),	***Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*** No- the rules should not include a proposal as to how many attorneys should be appointed to initiate a petition. Each set of	The working group appreciates this input.

SP18-13

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Commenter	**Comment**	**Proposed Working Group Response**
by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	facts will vary widely. An attorney could request additional help if he/she thinks it necessary.	
Office of the Federal Defender, Eastern District of California, by Heather E. Williams, Federal Defender Sacramento, California	This proposed rule directs the sentencing court to appoint "a qualified attorney or attorneys to represent the person in death penalty-related habeas corpus proceedings." This Proposed Rule envisions there will be cases for assigning only one attorney. We recommend the rule provide for appointing two attorneys in all death penalty-related habeas corpus proceedings. Penal Code Section 1509(c), enacted as part of Proposition 66, creates a one-year statute of limitations for filing death penalty-related habeas corpus petitions. Prior to Proposition 66, no statute of limitations existed. A death penalty-related habeas corpus petition was considered timely filed when it was filed within three years of habeas corpus counsel appointment. *Supreme Court of Cal., Supreme Court Policies Regarding Cases Arising from Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1. This means an attorney accepting a death penalty-related habeas corpus petition appointment must complete three years' work now in one year. To compensate for the two-year loss, the Rule must appoint to every death-sentenced person two lawyers for death penalty-related habeas corpus proceedings to try to complete three year's work into one year.	Please see the response to the comment of Robert D. Bacon above.

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Commenter	**Comment**	**Proposed Working Group Response**
	The second reason to require superior courts to appoint two attorneys for each death penalty-related habeas corpus proceeding is to expand the eligible attorney pool. There will be attorneys who apply for the panel who are not qualified to serve as lead counsel yet can serve as associate counsel. See Proposed Rule 8.601(2), (3). By appointing less experienced lawyers as associate counsel, the Panel will provide those lawyers experience, so they may eventually accept lead counsel appointments.	

Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**4. The public defender should not be the default habeas counsel** The majority of the working group has the better of this argument: It would be a "futile step" to offer the appointment to the county public defender first, and the rules should not require this. Except possibly in Los Angeles, the county public defender agency is not likely to be large enough to support a critical mass of habeas-qualified attorneys and the necessary infrastructure for habeas representation, while still performing all the rest of its statutory duties. Even one habeas appointment would likely require a significant increase in the public defender agency's budget, a factor that is beyond the direct	The working group appreciates this input. There was a minority view on the working group that, although the public defender will rarely be able to accept an appointment due to a conflict of interest, the proposed rule should not exclude the possibility. Given the historic shortage of counsel, if revising the proposed rule means an appointment for even one individual who has been waiting to counsel, it will be worthwhile. The working group therefore modified the proposal to allow superior courts to appoint counsel from any entity that employs qualified attorneys, including HCRC, a local public defender, or alternate public defender. The

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	control of the appointing court. If the public defender represented the client at trial or was conflicted from doing so, they will be conflicted on habeas. There is a significant likelihood of conflicts in other cases also. Capital habeas cases frequently present systemic issues concerning a county's procedures for appointing and compensating trial counsel and experts, and the like. (See, e.g., *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069; *Proctor v. Ayers* (E.D. Cal.) 2007 WL 1449720 at *49-*54.) The public defender agency may well have an institutional interest in these issues that is not the same as the interest of the habeas client. The agency's staff attorneys may well be material fact witnesses on these habeas claims. Proposed Rule [4.561](e)(2) sets forth a more workable alternative: designation of HCRC as the default habeas counsel. HCRC has many of the characteristics of a public defender agency, but without the concerns described in the two previous paragraphs. The rationale of the statutes giving preference to the public defender would be served by deeming HCRC to be the "public defender" for capital habeas purposes. The Judicial Council should consider recommending that the Legislature repeal the statutory ceiling on the number of attorneys at HCRC and appropriate funds to significantly enlarge that agency, a recommendation which was also made by the Commission on the Fair Administration of Justice. If the Legislature does so, HCRC could then represent a larger number of clients in its role as presumptive or default state	proposal was also revised to be silent on whether superior courts must first attempt to appoint such an entity before it turns to private counsel.

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	habeas counsel. This would produce substantial if not literal compliance with the statutes arguably expressing a preference for the "public defender."	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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.	Please see the response to Robert D. Bacon above.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We agree that the rule should not impose any requirement to appoint the public defender. The public defender should not be appointed under any circumstances. First, the public defender will almost always have a conflict of interest. If the public defender represented the defendant/petitioner at trial, she has an inherent conflict in evaluating, investigating and litigating issues concerning the ineffective assistance of counsel, a claim which must at least be investigated in any capital habeas proceeding. If the public defender did not represent the defendant/petitioner at trial, that was either because of a conflict of interest or the defendant retained private counsel. In the former situation, the conflict will continue throughout the litigation, including the habeas proceedings. Thus, unless the defendant had retained counsel at trial, there will always be a conflict of interest that prevents the public defender from representing the defendant in the capital habeas proceedings. Second, county public defenders are trained to represent individuals in the trial courts, not the appellate courts or in post- conviction habeas proceedings.	Please see the response to Robert D. Bacon above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	Realistically, county public defenders will never have the necessary training and qualifications to represent a condemned prisoner in a capital habeas proceeding, and do not have the budget to fund the investigation and litigation of a capital habeas proceeding. Appointing the public defender will be an idle act that will only take precious time off of the one-year deadline in which to file the habeas petition.	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should judges be required [to] request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** No. Local public defenders are usually disqualified by conflict considerations.	Please see the response to Robert D. Bacon above.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should judges be required [to] request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** The Fourth District does not take a position on this question.	No response required.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	As detailed in Mexico's comments on the companion proposal, SP 18-12, the representation of foreign nationals is a specialized type of representation, requiring specific skills and experience not necessary for capital habeas cases generally. A rule requiring the attempted appointment of a public defender could result in the required appointment of a public defender without the necessary specialized skills and experience over an	Please see the response to Robert D. Bacon above..

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	available private attorney who would be much better qualified to handle the particular case.	
Hon. Mary J. Greenwood, Administrative Presiding Justice, Court of Appeal, Sixth Appellate District	***Should judges be required [to] request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** No. I agree with the majority of the working group that the rule should not impose such a requirement. As Administrative Presiding Justice of the Sixth District Court of Appeal, I take no position on the lawful interpretation of Government Code section 27706 or Charlton v. Superior Court (1979) 93 Cal.App.3d 858. I do offer the following based on my experience as the Chief Defender of the Santa Clara County Public Defender Office from 2005 to 2012, where I administered both the Public Defender and Alternate Defender Office. In practice, capital defendants at the trial level are almost invariably represented by the Public Defender or, if the Public Defender declares a conflict, its ethically walled ancillary office, such as the Alternate Defender. Competent post trial habeas and appellate review requires an evaluation of the performance of trial counsel. As a result, the Public Defender and its ancillary offices would be required to declare a conflict in all but the very exceptional case. The only potential mechanism for appointment of the Public	Please see the response to Robert D. Bacon above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	Defender in capital habeas cases would be through the establishment of a separate, ethically walled office for habeas appointments under the Public Defender's administration. Even under these circumstances, the likelihood of conflicts discovered after appointment would be high – evidence related to capital defendants often includes the use of informants and other jail house witnesses whose testimony cross pollinates in multiple cases. Such delayed discovery of conflicts within the institutional office would disqualify all the attorneys in the organization, and would occasion significant delays inconsistent with the underlying intent of Proposition 66. Additionally, an institutional office would be far more expensive than the appointment of private counsel. Public defender offices provide high quality defense at a low cost, but the fiscal benefit is dependent on a high case volume. Ancillary ethically walled institutional offices that provide salary and benefits to attorneys become less cost effective when the lawyers represent very few clients, as would be the case in capital habeas representation. Public Defender Offices in major urban areas often have one cost effective ancillary Alternate Defender Office, but default to private attorney panel appointments if neither office can legally accept representation of a defendant. Because of the likelihood of delay inherent in identifying legal conflicts, and because of the high cost associated with the appointment of the Public Defender, the appointment of private attorneys, less burdened by the issues of legal conflicts, is the	

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
	more appropriate mechanism in these habeas proceedings.	
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** No. In cases where the public defender represented the defendant at trial, the public defender must not accept the habeas corpus appointment. Similarly, where the public defender declared a conflict prior to the trial, neither the public defender nor alternative defender will be normally available. It makes little sense to include a rule that requires a court to routinely conduct an act that will rarely, if ever, lead to the appointment of unconflicted counsel.	Please see the response to Robert D. Bacon above.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should judges be required [to] request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** Judges should be required to request the Public Defender if it makes sense to do so. In other words, they would not be appointed if they represented the defendant at trial because of the likelihood of "incompetent counsel" claims. However, there may be times where a private counsel represented the defendant at trial. If so, appointing the PD would make sense. The court should screen the case to see if appointing the PD would be appropriate.	The working group has revised the proposal consistent with this comment. Please see the response to Robert D. Bacon above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender		
Commenter	**Comment**	**Proposed Working Group Response**
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	***Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** No, in light of the fact that the public defender will most often have a conflict of interest.	Please see the response to Robert D. Bacon above.
Superior Court of Los Angeles County	***Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*** No. Judges should not be required to request that a public defender or alternate public defender accept representation prior to appointing private counsel.	Please see the response to Robert D. Bacon above.

Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	An assisting entity will be even more essential than it has been in the past, given the compressed time for preparation of the petition and the likelihood that more lawyers will be appointed who have not previously litigated capital habeas cases. Capital habeas lawyers learn from each other every day; they could not do otherwise, given the magnitude of the task and the limited time and resources available. An assisting entity facilitates that sharing of knowledge and experience.	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. A rule of court that requires a superior court to utilize the services of CAP-SF would, however, 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

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	If CAP-SF is not the assisting entity for appointed habeas counsel, one or more new agencies very similar to CAP-SF will have to be created to fulfill that function. The state would be money ahead expanding CAP-SF and identifying it in the rules as the assisting entity for all cases in which it is not conflicted, rather than creating new administrative structures to replicate what CAP-SF already does well.[6] CAP-SF is funded through a contract with the Judicial Council rather than a direct statutory appropriation. The adequacy of CAP-SF's funding to assist all attorneys with pending habeas cases is therefore more within the control of the Judicial Council than are most of the other funding issues raised but not resolved by the proposed rules. CAP-SF is already mentioned by name in several other rules: 8.600, 8.605, 8.619, 8.622, 8.625, and 8.630. Naming CAP-SF in the rules as the default assisting entity would not set an unwise precedent; it would continue current practice. [6] Disclosure: I receive payment from CAP-SF for contractual resource, consulting, and training services in support of the assistance that their employed staff gives to appointed capital appellate and habeas counsel. The comments in this letter are my own and do not purport to speak for CAP-SF. Also, in my role as appointed capital counsel myself, I benefit greatly from the assistance that CAP-SF provides to me. That was true when I started, and it is true today when I have 28 years of capital habeas experience.	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 contractor. This is doubly true where it remains unclear who will fund these services—the counties or the state.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco 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. [From CAP-SF's comments on Proposal SP18-12:] 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	Please see the response to the comment of Robert D. Bacon above. Proposed rule 4.561(e)(3) (circulated as proposed rule 8.654(e)(3)) requires a superior court to designate an assisting entity or counsel when appointing counsel other than HCRC.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	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).	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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.	Please see the response to the comment of Robert D. Bacon above.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee agrees with proposed Rule [4.561](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.	The working group notes the commenter's support for this provision in the rule.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	The superior courts should be required to designate an entity to assist and support private counsel appointed to represent the defendant on habeas. However, in order to assure the competency of counsel and adherence to standards of representation, the entity must be a statewide agency, such as the California Appellate Project San Francisco (CAP) or Habeas Corpus Resource Center (HCRC), and must have sufficient staffing to enable them to provide such assistance.	With respect to the suggestion that a rule specify CAP-SF as the default assisting entity, please see the response to the comment of Robert D. Bacon above.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Yes, definitely. There is only one entity qualified and staffed to render assistance in capital habeas proceedings and that is CAP-SF. The superior courts should be made aware of this. Until and unless alternate resources are developed, the rule should refer to CAP-SF as the assisting entity.	Please see the response to the comment of Robert D. Bacon above.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	Should the proposal designate a specific assisting entity (e.g., CAP-SF)? Yes. It is to be kept in mind that the superior courts will be looking for guidance and assistance and that it cannot be assumed that every superior court judge in California will be familiar with CAP-SF and the fact that CAP-SF, other than the lawyer appointed when CAP-SF has a conflict, is the only entity that is staffed and qualified to render assistance in capital habeas petitions.	Please see the response to the comment of Robert D. Bacon above.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Yes, definitely. There is only one entity qualified and staffed to render assistance in capital habeas proceedings and that is CAP-SF. The superior courts should be made aware of this. Until and unless alternate resources are developed, the rule should refer to CAP-SF as the assisting entity. ***Should the proposal designate a specific assisting entity (e.g., CAP-SF)?*** Yes. It is to be kept in mind that the superior courts will be looking for guidance and assistance and that it cannot be assumed that every superior court judge in California will be familiar with CAP-SF and the fact that CAP-SF, other than the lawyer appointed when CAP-SF has a conflict, is the only entity that is staffed and qualified to render assistance in capital habeas petitions.	Please see the response to the comment of Robert D. Bacon above. Please see the response to the comment of Robert D. Bacon above.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	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.	A majority of the working group took the position that courts must designate an assisting entity or counsel, and the comments show strong support for a rule that requires designation of an assisting entity or counsel. The presumption underlying the qualification of counsel rules that the working group proposes in the accompanying report to the Judicial Council is premised on the assumption that appointed private attorneys will receive assistance and support from an assisting entity or counsel. Were the rules not to require the use of assisting entities or counsel, the minimum qualifications for counsel would have to be raised. Raising the qualifications for counsel would reduce the number of attorneys who meet the qualifications and would be inconsistent with Proposition 66 to the extent the proposition is intended to increase the pool of available, qualified attorneys.
	* * * 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	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this

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Commenter	**Comment**	**Proposed Working Group Response**
	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.	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 this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Yes, superior courts should be required to designate an assisting entity or counsel for private appointed counsel. Historically, the assistance provided by an assisting entity or counsel has been vital to ensuring that private counsel have access to appropriate training, resources, and expert advice	The working group appreciates this input.

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Commenter	**Comment**	**Proposed Working Group Response**
	throughout their representation of death-sentenced persons. ***Should the proposal designate a specific assisting entity (e.g., CAP-SF)?*** Yes, the proposed rules should designate the California Appellate Project – San Francisco (CAP-SF) as the default assisting entity because of its decades-long experience providing assistance to private counsel in habeas cases. Designating HCRC as the default assisting entity would be problematic for at least three reasons: First, HCRC enabling legislation (Gov't Code § 68661) makes it unclear as to whether HCRC may perform the full breadth of duties expected of an assisting entity; second, in contrast to CAP-SF, HCRC provides direct representation to condemned inmates and adding this responsibility to HCRC attorneys would reduce the number of cases in which HCRC would be able to provide direct representation; third, unlike CAP-SF, HCRC has only very minimal experience providing such assistance to private counsel.	Please see the response to the comment of Robert D. Bacon above.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Superior Courts should be designating an entity to assist and support private counsel. The obvious problem, as with every part of this proposal, is what agency is going to pay for such an entity. ***Should the proposal designate a specific assisting entity (e.g., CAP-SF)?***	The working group appreciates this input.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	The proposal should not designate a specific assisting entity unless the State intends to fund such an entity. It would then make sense not to re-invent the wheel and use CAP-SF, which already has the experience.	The working group appreciates this input and notes that there is no information on how assisting entities or counsel will be funded.
Office of the Federal Defender, Eastern District of California, by Heather E. Williams, Federal Defender Sacramento, California	A sentencing court must designate an assisting entity or counsel when that court appoints death penalty-related habeas corpus proceeding counsel. We recommend the rule direct superior courts to appoint the California Appellate Project – San Francisco (CAP-SF) in the first instance, then, only if CAP-SF has a conflict of interest, look to appoint other entities. Currently, no entity exists able and qualified to serve as an assisting entity other than CAP-SF. If the rule does not specify CAP-SF, it must state the assisting entity has statewide capital habeas corpus procedure experience and knowledge. The Habeas Corpus Resource Center (HCRC) conceivably could provide such assisting entity support. However, Proposed Rule [4.561](e)(2) requires superior courts first determine whether HCRC can accept **counsel** appointment before considering other counsel. This Rule makes HCRC the default choice as **counsel** in death penalty-related habeas corpus proceedings. HCRC is limited by statute to 34 attorneys. Gov. Code § 68661(a). Implementing Proposed Rule [4.561](e)(2) will result in HCRC's appointment in many death penalty-related habeas corpus proceedings. Those 34 attorneys should not also be tasked with serving as the **assisting entity** to private counsel except in extraordinary circumstances, such as a CAP-	Please see the response to the comment of Robert D. Bacon above.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	SF conflict of interest. The Office of the State Public Defender (OSPD) likewise should not be appointed as assisting entity absent extraordinary circumstances. OSPD's mission is to represent death-sentenced persons in their automatic appeals. Gov. Code § 15421(a). Its expertise is in appeals, not death penalty-related habeas corpus proceedings.	
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	The "assisting entity" language of rule [4.561](e)(3) does not mention any entities. The rule should designate CAP and HCRC as potential assisting entities.	With respect to the suggestion that a rule specify CAP-SF as the default assisting entity, please see the response to the comment of Robert D. Bacon above.

Rule 4.561(d) (circulated as rule 8.654(d)) – Form Order for Appointing Counsel (HC-101)		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the proposal require use of a mandatory form for a superior court to appoint counsel?*** Yes. ***Does the form provide the fields necessary for a superior court to appoint counsel?*** Yes.	The working group notes the commenter's support for this provision in the rule. The working group notes the commenter's support for the form.

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

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.561(d) (circulated as rule 8.654(d)) – Form Order for Appointing Counsel (HC-101)		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposal require use of a mandatory form for a superior court to appoint counsel?*** Yes. ***Does the form provide the fields necessary for a superior court to appoint counsel?*** Yes.	The working group notes the commenter's support for this provision in the rule. The working group notes the commenter's support for the form.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Moreover, the proposed forms are not sufficient because they do not solicit the information necessary to determine if an attorney is qualified to represent foreign nationals or require, for appointment in such cases, that a court find counsel is qualified to represent a foreign national.	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. The working group declined to add specific additional qualifications for counsel eligible to represent foreign nationals for the reasons explained in the working group's concurrently submitted report to the Judicial Council regarding the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings. For these same reasons, the working group declined to revise form HC-100 to solicit information necessary to determine if an attorney is qualified to represent foreign nationals. The purpose of the form is to elicit the information necessary for a regional committee or court to determine whether an attorney meets the minimum qualifications for appointed counsel found in proposed rule 8.652(c). In the process

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Rule 4.561(d) (circulated as rule 8.654(d)) – Form Order for Appointing Counsel (HC-101)		
Commenter	**Comment**	**Proposed Working Group Response**
		by which counsel is matched to a particular case, the court or regional committee may elicit information necessary to assure that particular attorney has the experience or knowledge necessary to represent a foreign national.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should the proposal require use of a mandatory form for a superior court to appoint counsel?*** Yes, there should be a mandatory form for appointment. That way, counsel will know what to supply to the committee and multiple requests for further information will not have to be sent. ***Does the form provide the fields necessary for a superior court to appoint counsel?*** The form looks good and seems to have the required fields.	The working group notes the commenter's support for this provision in the rule. The working group notes the commenter's support for the form.

Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**2. Regional qualification committees are a reasonable means of accomplishing the rule's objectives; some of the specific rules about the committees can be improved** Regional qualification committees are a reasonable means of implementing both the Supreme Court's and HCRC's duty to maintain a statewide roster of qualified counsel (Govt. Code, §	The working group notes the commenter's support for this provision in the rule. Responses to comments on specific provisions are provided below.

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	68661, subd. (d))[2] and the superior court's duty to appoint counsel (§ 68662). That said, some revisions to the proposed rules would strengthen the process and provide greater protection for the independence of habeas counsel. [2]Unexplained section references are to the Government Code.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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. * * * 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	Government Code section 68661(d) governs a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases that is maintained by HCRC with the approval of the Supreme Court. The statute does not preclude other judicial branch entities from maintaining their own lists of qualified attorneys for use by the superior courts and there is no provision in Proposition 66 that requires a superior court to draw counsel from the Government Code section 68661(d) roster. Under the proposal, the regional committees would provide support for determining whether attorneys meet the minimum qualifications to serve as counsel in a death penalty–related habeas corpus proceeding. This does not represent a delegation of the Supreme Court's

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	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. * * * 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.	responsibilities to approve HCRC recommendations to a Government Code section 68661(d) roster. The proposal does not provide for any superior court or regional committee to include attorneys on the Supreme Court's roster and does not govern attorneys appointed by the Supreme Court in capital cases. The proposal provides a method for determining the minimum qualifications of attorneys to be appointed by superior courts to serve as counsel in death penalty–related habeas corpus proceedings in the superior courts.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee agrees with the proposal to form regional vetting committees	The working group appreciates this input.

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*** Yes. However, ... [See comments below in Rule 4.562(d) – Regional Committees: Responsibilities and Duties, Generally.]	The working group notes the commenter's support for this provision in the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*** Yes. However, please see the comments below to proposed rule [4.562] concerning the composition and appointment of members to the regional committees.	The working group notes the commenter's support for this provision in the rule.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*** Yes, regional panel committees should be formed to vet attorneys for inclusion on a statewide panel of qualified attorneys from which superior courts may appoint habeas counsel. Similar panel committees of subject-matter experts are used successfully by federal courts in California to recruit and vet counsel for appointment in federal capital habeas cases. The regional panel committees should be able to more effectively recruit counsel from their geographic areas than a centralized statewide vetting authority. The regional panel committees also will distribute the burden for vetting potential habeas counsel.	The working group notes the commenter's support for this provision in the rule.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	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 [4.562] is inconsistent with the statute.	Government Code section 68661(d) governs a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases that is maintained by HCRC with the approval of the Supreme Court. The statute does not preclude other judicial branch entities from maintaining their own lists of qualified attorneys for use by the superior courts and there is no provision in Proposition 66 that requires a superior court to draw counsel from the Government Code section 68661(d) roster. For these reasons the proposal is not inconsistent with Government Code section 68661(d).
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	Regional committees could assist or slow the process down. Many courts, such as San Bernardino and Riverside, will be fighting for the same limited set of attorneys. However, a regional committee may be able to assist in widening the pool of available counsel. As long as the Superior Court is not limited to the counsel approved by the committee, having a committee should do more good than harm.	The working group appreciates this input.
Superior Court of Los Angeles County	***Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty–related habeas corpus counsel?*** Yes. The Los Angeles Superior Court is in favor of the regional committee approach to the vetting of counsel for habeas petitions.	The working group notes the commenter's support for this provision in the rule.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	If the inclusion of judges as members of the regional committees is felt necessary, perhaps the rules or commentary could express a preference for those judges who, while practicing law, represented capital habeas petitioners. . . . The Council asks what minimum number of the attorney members of the regional committee need have capital habeas experience. If there are three attorney members, I would suggest that at least two of them have such experience. An attorney without capital habeas experience may have familiarity with many candidate attorneys in the district and be a useful participant in the process alongside the members who are themselves capital habeas counsel; all attorneys without an active capital practice need not be categorically excluded from the committees.	The working group declined to make this suggested change. Although the commenter suggests only that a preference be stated for judges who represented capital habeas petitioners in the past, that pool is extremely small and the working group is reluctant to discourage the many able judges without such experience from participating in these committees. The intent is that the judges will bring their judicial expertise and local knowledge to the committee, but will in many cases have to rely on the attorney members for their experience and knowledge of capital habeas corpus proceedings. Based on this comment and suggestions received from other commenters the working group has revised the proposal to require that at least two of the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	CAP-SF opposes Section (c)(l)(C) of this rule unless minor but significant modifications are made. The language of subsection (c)(l)(C) defining the participation	The working group declined to make this suggested

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	change. Several categories may involve multiple nominations (e.g., the Federal and local public defenders) and rather than adding further details to the rule, it may be more effective to allow the administrative presiding justices the discretion to exercise their judgment in the particular local circumstances.
	If subsection (c)(l)(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	Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that at least two of the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	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)(l)(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)(l)(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 clearly state as much. If that is not the intent the subsection should be further defined so the intent is clear. CAP-SF objects to the vagueness of [rule 4.562(c)(2)]. 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	Based on the commenter's suggestion, the working group has revised proposed rule 4.562(c)(1)(C)(vi) to clarify that the administrative presiding justice may invite an entity other than the five identified in the subparagraph to nominate an attorney. The working group declined to make this suggested change. An advisory member is one that does not have a vote. The purpose of the provision was to expand the membership of the committee at the discretion of the administrative presiding justice without changing the voting composition of the committees provided in proposed rule 4.562(c)(1). As noted in the

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	accompanying report and below in response to the comment of the Criminal Justice Legal Foundation, the committees were designed so that judicial members would have a majority of the votes, a composition that would be altered were advisory members given a vote.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee . . . believes that at least two of the attorney members should have death penalty–related habeas corpus experience.	Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that at least two of the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.
California Public Defenders Association, Sacramento by Robin Lipetzky, President	At least two members of each committee should have significant capital habeas experience as defense counsel. Given that the purpose of the committees is to ensure that the appointed counsel are qualified and able to provide the effective assistance of counsel required by the Sixth Amendment (see, *Trevino*, *supra*, 133 S.Ct. 1911; *Martinez*, *supra*, 566 U.S. 1), it is essential that the committee members must be able to identify counsel who are qualified and will be able to competently represent the defendant/petitioner in the habeas proceedings from the death sentence. Capital habeas litigation is unique compared to any other litigation. Counsel who is experienced in such litigation is in the best position to evaluate whether an applicant is qualified and will	Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that tat least two of the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	provide competent representation in a capital habeas proceeding within the strict deadlines of Proposition 66. Therefore, a majority of the regional committee must have that experience. If the regional committee consists of three members, that means two must have significant capital habeas experience as defense counsel. . . . Regarding the composition of attorney members of the regional committee, while the feeder groups identified in Rule [4.562](c) are reasonable, it is critical that no more than one member should be from the local public defender office or local bar combined. The purpose of the Rule is to identify counsel who is qualified to represent a defendant/petitioner in a capital habeas proceeding, not a trial. No attorney in a county public defender office is likely to have any substantial experience in complex habeas litigation, much less capital habeas litigation. Nor is there any assurance under the proposed rule that the "attorney designated by another entity" (Rule [4.562](c)(l)(C)(vi)) will have any such experience. Thus, neither is in a position to have the requisite knowledge or experience to be able to identify whether an applicant is qualified and able to provide competent representation in a capital habeas proceeding. By contrast, the feeder groups identified in subparagraphs (i) through (iv) of Rule [4.562](c)(l)(C) are likely to have such experience and knowledge, especially if the Rule is amended to require that at least two of the three attorney members must have substantial experience as defense counsel in capital habeas litigation.	

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	Finally, we recommend that the attorney members of the regional committee must be selected from the attorneys nominated by the attorney groups. Alternatively, if the Rule were to be amended to allow the chair "to select the attorney groups from which it wants to draw members and let the groups designate an attorney" (Invitation, page 14), the Rule should require the chair select at least two of the attorney groups identified in subparagraphs (i) through (iv), and further require that at least two of the three attorney members must have substantial experience as defense counsel in capital habeas litigation. . . .	The working group appreciates this suggestion and based on this comment and others has revised the rule to provide that the attorneys should be drawn from those *nominated* by the entities.
	Change "as agreed on" to "from those judges nominated" so that the sentence reads: "A total of three judges <u>from those nominated by</u> the presiding judges of the superior courts located within the appellate district; . . . ." . . .	Based on this comment and the suggestions of other commenters, the working group has revised the rule to provide that the administrative presiding justice will appoint three superior court judges from among those nominated by the superior courts in the district.
	For the reasons explained above, at least two of the three attorney members should be from the groups identified in subparagraphs (i) through (iv), with no more than one attorney member from those identified in subparagraphs (v) through (vi). Thus, we recommend that this subdivision be modified to read: "(C) A total of three attorneys drawn from the following categories, as selected by the judicial officers on the committee [insert <u>chair of the committee</u>], <u>provided that at least two of the attorney members are from the groups identified in subparagraphs (i) through (iv), with no more than one attorney</u>	The working group declined to make the second part of this suggestion. If the rule requires two of the three attorneys appointed to the committee to have experience representing a petitioner in a death penalty–related habeas corpus proceeding, there seems little need to restrict the number of attorneys who are drawn from the categories in subparagraphs (v) and (vi). Indeed, attorneys drawn from the categories in subparagraphs (v) and (vi) may also have the desired experience representing petitioners.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	member from those identified in subparagraphs (v) through (vi), and at least two of the attorney members have substantial experience as defense counsel in capital habeas litigation:"	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should it be mandatory that the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience?*** No. This kind of specific background is too rare to become an absolute qualification for membership on the committee. ***Should committees be composed of a membership different than specified in the proposal?*** No. However, we agree with the Fourth District's suggestion that the three superior court judges be "nominated" by the superior courts within the District rather than "agreed upon" by them.	Based on the other comments received, the working group has revised the proposed rule to require that at least two of the attorney members have this experience. The working group's intent is that the attorney members will be able to share their experience representing petitioners with the rest of the committee, experience that will be highly relevant to determining if the attorneys applying to be included on the statewide panel meet the minimum qualifications for counsel. The working group appreciates this input and has revised the rule to make the suggested change.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should it be mandatory that the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience?*** Yes. However, in some regions it likely will not be possible to recruit and maintain three attorney committee members with	Based on this comment and suggestions received from other commenters, the working group has revised the

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	death penalty– related habeas corpus experience. To ensure that the regional committees have the benefits of relevant death penalty–related habeas corpus experience without being overly restrictive, the rule should require that at least one attorney member have that experience.	proposal to require that at least two the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.
	Should committees be composed of a membership different than specified in the proposal? No. However, please see the comments below concerning proposed rule [4.562].	The working group appreciates this input.
	[Comments relevant to rule 4.562(c)(1), (2) follow here.]	
	This subdivision states that each Court of Appeal must establish a death penalty–related habeas corpus committee. However, the rule does not specify who appoints the committee members. Accordingly, the Fourth District proposes that the subdivision should further provide that members of the committee shall be appointed by the Administrative Presiding Justice of the appellate district.	The working group appreciates this suggestion and has revised the rule to provide that the administrative presiding justice of the appellate district will be responsible for making appointments to the regional committee.
	This subdivision provides that each regional habeas corpus panel committee shall include a total of three superior court judges "as agreed upon by the superior courts located within the appellate district." (Italics added.) This rule may be problematic for appellate districts with numerous superior courts. Accordingly, the Fourth District suggests revising the subdivision to replace "agreed upon" with "nominated."	The working group appreciates this suggestion and has revised the rule to provide that the administrative presiding justice will appoint three superior court judges from among those nominated by the superior courts in the district.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	These subdivisions pertain to selection of the attorney members of each regional habeas corpus panel committee and provide that the judicial officers of the committee should select attorneys from: (i) the Habeas Corpus Resource Center; (ii) the California Appellate Project – San Francisco; (iii) the appellate project with which the Court of Appeal contracts; (iv) the Federal Public Defenders' Offices of the Federal Districts in which the participating courts are located; and (v) the public defender's office in a county where the participating courts are located. The judicial officers of the regional committees are not in the best position to select members from the above groups without guidance because the judicial officers likely will not be familiar with the attorneys from the various groups. Accordingly, the Fourth District proposes that the five groups identified above should each nominate attorney candidates from their own group to serve on the committees. The nominations should be made to the administrative presiding justice of the district who would make the selections.	The working group appreciates this suggestion and has revised the rule to provide that the attorneys should appointed by the administrative presiding justice from among those nominated by the entities in the categories identified in proposed rule 4.562(c)(1)(C). Note that in the case of the fourth and fifth categories there may be multiple nominations, as there may be multiple Federal Public Defenders' Offices and will be multiple public defender offices within each of the appellate districts.
Criminal Justice Legal Foundation, Sacramento by Kent S. Scheidegger, Legal Director and General Counsel	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. . . .	As proposed, the committee will not be "dominated by defense organizations." The majority of the voting members of the committee will be judges, not attorneys—the appellate justice serving as chair, and three superior court judges. There will only be three voting attorney members.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	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 working group declined to make the suggested change. Although the majority of the members of the committee will be judges, and will have experience with local counsel, not all will have experience with death penalty–related habeas corpus proceedings. As the committee will be vetting the qualifications of attorneys desiring to represent petitioners—not the People, the working group concluded that the judges on the committee would benefit from the expertise of those attorneys who have provided such representation. The rule does give the administrative presiding justice the discretion to invite nominations from either the California District Attorneys Association, any local district attorneys' office, the Office of the Attorney General, or any other entity not identified in the rule if the administrative presiding justice considers such experience relevant or helpful to the committee as either a voting or advisory member. (Proposed Cal. Rules of Court, rule 4.562(c)(1)(C)(vi) and (c)(2).)
Habeas Corpus Resource Center, San Francisco by Michael J. Hersek, Interim Executive Director	***Should it be mandatory that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience? If yes, how many of the three?*** Yes, it is necessary that the attorneys on the regional panel committees have subject- matter expertise in order to properly vet and evaluate the panel applicants. The federal court committees include such attorneys. All of the required attorney members of the committees should have experience	Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that at least two the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	representing death-sentenced persons in habeas corpus proceedings. If the chair of a regional committee deems it necessary that the panel include a member without subject-matter expertise, the chair may appoint that individual as an advisory member.	proceedings.
Joint Rules Subcommittee, by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should it be mandatory that the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience?*** It should not be mandatory that attorneys on the committee have death penalty related experience. In some areas, you would probably have no qualified attorneys. However, they should have felony experience in appellate work. Again, different regions should be able to tailor their rules. ***Should committees be composed of a membership different than specified in the proposal?*** The proposed membership makes sense.	Based on the other comments received, and because the working group intends that these attorney members should bring to the committee experience representing petitioners in death penalty–related habeas corpus proceedings to assist the judicial members, the working group has revised the proposed rule to require that at least two of the attorney members have this experience. The working group notes the commenter's support for this provision in the rule.
Office of the Federal Defender, Eastern District of California by Heather E. Williams, Federal Defender	This Rule should specify that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience. My duties as Federal Defender include serving or designating someone from my Office to serve on the Eastern District Selection Board, which vets attorneys for federal capital habeas	Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that at least two the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	corpus case appointment. E.D. Local Rule 191(c). The Selection Board consists of five attorneys experienced in capital trial, appellate and/or habeas representation. From my experience with the Selection Board, I know how important it is that the people vetting attorneys for capital habeas cases themselves have capital habeas experience. First, capital cases are different from other felony cases. *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) ("[D]eath is a punishment different from all other sanctions . . . ."). Unlike in a felony case, in a capital case, the attorney must investigate and present a defense against the charges and a guilty verdict while simultaneously must investigate and present a case in mitigation in case there is a guilty verdict. *See Florida v. Nixon*, 543 U.S. 175, 190-191 (2004) (a capital trial's two-phase structure must inform counsel's strategic calculus). Moreover, the attorney must present a coordinated defense, so the trial defense is consistent with the penalty phase life sentence evidence and arguments. An attorney presenting a death penalty-related habeas corpus petition must understand how capital cases are different and be able to devise strategies maximizing the chance of vacating the judgment. Second, habeas corpus is different from both trial and appellate proceedings: First, work on a capital habeas corpus petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses	

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both. *In re Morgan*, 50 Cal.4th 932, 938 (2010). In addition to the specialized skill set needed, death penalty-related habeas corpus proceedings counsel must master the labyrinthine habeas corpus rules, which are designed to make it difficult for a petitioner to prevail. *See In re Gallego*, 18 Cal.4th 825, 842 (1998) (Brown, J., concurring and dissenting) (describing procedural rules governing habeas corpus as "a Byzantine system of procedural hurdles, each riddled with exceptions and fact-intensive qualifications"). "'Habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.'" *In re Reno*, 55 Cal.4th 428, 450 (2012), quoting *People v. Gonzalez*, 51 Cal.3d 1179, 1260 (1990). "If a criminal defendant has unsuccessfully tested the state's evidence at trial and appeal and wishes to mount a further, collateral attack, 'all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.'" *Reno*, 55 Cal.4th at 451, quoting *People v. Duvall*, 9 Cal.4th 464, 474 (1995), quoting *Gonzalez*, 51 Cal.3d at 1260. An attorney representing a petitioner in death penalty-related habeas corpus proceedings must understand the law governing capital cases and the procedural rules governing the habeas	

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	corpus remedy. Attorneys representing persons in death penalty-related habeas corpus proceedings in California state courts must also be familiar with the rules governing federal habeas corpus proceedings, lest an error made in state court prevents the petitioner from obtaining federal review of her death judgment. See *Martinez v. Ryan* 566 U.S. 1 (2012) (recognizing that state habeas counsel's error could preclude federal review of petitioner's claims); *Coleman v. Thomspon*, 501 U.S. 722, 753-754 (1991) (same). > [Q]uality legal representation is necessary in capital habeas corpus proceedings in light of "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." [citation]. An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because "the complexity of our jurisprudence in this area . . .makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Murray v. Giarratano*, 492 U.S. 1, 14, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (Kennedy, J., joined by O'Connor, J., concurring in judgment); *see also id.*, at 28 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("This Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").	

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (citation omitted). The state court is the "principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). If petitioner's counsel does not conduct a thorough investigation and raise claims in accordance with state procedural rules, the petitioner will lose any chance of vindicating her constitutional rights in state or federal court. Because the stakes are so high, the committees must be staffed with attorneys experienced in state and federal capital habeas corpus litigation. Finally, the committees are charged with assisting superior courts in matching qualified counsel with persons who need death penalty-related habeas corpus counsel. See Proposed Rule [4.562](d)(5). To be effective in that role, committee membership must include attorneys familiar with the cases, the clients, **and** the attorney applicants. Requiring committee members to also have capital habeas experience will help ensure the committee can recommend counsel appropriate for a particular case.	

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule [4.562](c)(1)(C) should be amended to provide that judges not be involved in the selection of attorney members of the regional committees. Perhaps the executive directors of HCRC, CAP-SF, and the district appellate projects could appoint the attorney members.	The working group declined to make this suggested change. By statute, the appointment of counsel for indigent individuals in death penalty–related habeas corpus proceedings is an exclusively judicial function. (Pen. Code, § 1509(b), Gov. Code, § 68662.) Many members of the working group consider the determination of whether an attorney meets the minimum qualifications, by extension, to require substantial judicial involvement. For that reason, the proposal includes judges as members of the committee.
	The same rule should be amended to provide that if "another entity" is involved in the selection of attorney members, it may not be an entity with any prosecutorial functions.	The working group declined to make this suggested change. The proposal would leave to the discretion of the administrative presiding justice what additional expertise the committee may need in that particular appellate district.
	Rule [4.562](d)(4)(A) should be amended to provide that no attorney may be determined to be qualified based on the votes of judges alone, without the support of at least one attorney member of the committee.	The working group declined to make this suggested change. Consistent with the view that the appointment and qualification of appointed counsel is primarily a judicial function, the proposal would allow the committee to include an attorney on the statewide panel without a vote from the attorney members of the panel. As a practical matter, however, members of the working group consider it unlikely that all four judicial members

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
		would vote as a block against the recommendation and expertise of the attorney members of the committee.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We believe the rule should specify who is responsible for appointing members of the committee, and that person should either be the Chief Justice or the Presiding Justice of the court of appeal for that region. Consequently, the Rule should be amended to provide that the superior courts may nominate judges to be appointed to the three positions for superior court judges, rather than "agreed upon" by the presiding judges of the superior courts. There should also be a process for taking applications to join the regional committees. Further, we agree that the term for each committee member should be set at three years, and the terms of the various committee members should be staggered.	The working group appreciates this input. Based on this comment and suggestions received from other commenters the working group has revised the rule to provide that the administrative presiding justice of the appellate district would be responsible for making appointments to the regional committee and that the administrative presiding justice would appoint three superior court judges from among those nominated by the superior courts in the district. The working group defers to the administrative presiding justices and the respective committees as to the process for obtaining nominations for membership on the regional committees.
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	Section (c)(3) states "When a member is unable to complete a term, a replacement will serve out the existing term." Similar to [4.562](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.	Under the revised proposal, the administrative presiding justices would be responsible for selecting members of the regional committee, and this would include any replacement members.

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	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.	Based on this comment and suggestions received from other commenters, the working group has revised the rule to provide that the administrative presiding justice of the appellate district would be responsible for making appointments to the regional committee The working group appreciates this input and notes that nothing in the rule would prevent an administrative presiding justice from reappointing a chair or member of the committee to additional terms.
Court of Appeal, Second Appellate District By Hon. Elwood Lui Administrative Presiding Justice	***Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? And if so, is a three-year term appropriate?*** Yes to both questions. ***Should the committees be managed or governed in a way different from what is specified in the proposal?*** No.	The working group notes the commenter's support for this provision in the rule. The working group notes the commenter's support for this provision in the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? And if so, is a three-year term appropriate?*** Yes, three-year terms are appropriate ***Should the committees be managed or governed in a way different from what is specified in the proposal?*** Please see the comments below concerning proposed rule	The working group notes the commenter's support for this provision in the rule.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
	[4.562]. [Comments relevant to rule 4.562(c)(3), (4) follow here.] This subdivision provides that except as otherwise provided in the rule, each committee is authorized to establish the procedures under which it is governed. As proposed, the rule does not specify how committees can remove and replace members who fail to meet their committee obligations or are otherwise detrimental to the committees' purposes. Accordingly, the Fourth District proposes that the subdivision be revised to include the following underlined language: "Except as provided in this rule, each committee is authorized to establish the procedures under which it is governed, including procedures for removal and replacement of members."	The working group appreciates this suggestion. However, having revised proposed rule 4.562 so that the administrative presiding justice would be responsible for appointing members, the working group has concluded it would be appropriate to revise the proposal so that the administrative presiding justice would also have authority to remove and replace the chair and members. The working group has therefore revised rule to clarify the administrative presiding justice's authority to remove and replace the chair and members.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the proposed rule specify who is responsible for appointing members of the committee? If yes, should it be the chair of the committee?*** Yes. Given Government Code section 68661(d)'s requirement that the Supreme Court be the final arbiter of who may be included on a roster of attorneys qualified to accept capital habeas corpus appointments, it makes sense that the Chief Justice or her designee work in concert with each committee chair to appoint the committee members.	The working group declined to make this change as suggested by the commenter. Instead, based on the suggestions received from other commenters, the working group has revised the proposed rule so that the administrative presiding justice of each district would appoint the members of the committee. In addition, there would be no reason to involve the Chief Justice in the process as the committees are not working on the roster described in Government Code section 68661(d).

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
	Should the proposed rule require that the attorney members be selected from among those nominated by the attorney groups? Or should the proposed rule require the chair to select the attorney groups from which it wants to draw members and let the groups designate an attorney? The chair of the regional committee should select the attorney groups from which it will draw members and let the groups designate an attorney for membership on the committee.	The working group declined to make this change as suggested by the commenter. Instead, based on the suggestions received from other commenters, the administrative presiding judge would make appointments from among those attorneys nominated by the various groups identified in the rule.
	Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? If yes, is a three-year term appropriate? Yes. Given that the Chief Justice and Chair should work in concert to determine the members of the committee (see above), it makes sense to include in the rule a three-year term as a default, along with language that makes it clear that members serve at the pleasure of the Chief Justice and the committee Chair.	The working group appreciates this input. As noted above, the proposal is that the administrative presiding justice of each court of appeal would appoint the members of the regional committees for their respective districts.
	Should the rule require committees to provide for procedures for the removal and replacement of its own members? A rule seems unnecessary. Just as the Chief Justice and Chair should work in concert to determine the members of the committee (see above), in the event that a committee member is unwilling or unable to fulfill their responsibility, the Chief Justice and Chair can simply remove the nonfunctioning	The working group appreciates this input. Based on the suggestion of another commenter, the working group has revised the rule to clarify that the administrative presiding justice would have the authority to remove and replaces members of the committee.

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
	member.	
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? And if so, is a three-year term appropriate?*** The Proposed rule should NOT specify a three year term. The community of judges and attorneys competent and interested in being on such a committee is quite small. ***Should the committees be managed or governed in a way different from what is specified in the proposal?*** Each committee should make its own rules based on the culture and availability in a particular region.	The working group appreciates this input. However, based on the comments received from other commenters, the working group recommendation will include a provision that would provide for a three-year term, although in light of the concern expressed here, it should be noted that nothing in the rule prevents an administrative presiding justice from reappointing the chair or members for additional terms. The working group notes the commenter's support of this provision in the rule.
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	***Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees?*** Yes; and a three-year term appropriate so long as membership can be renewed as appropriate. Membership should be staggered so that not all members leave the panel at the same time.	The working group notes the commenter's support of this provision in the rule.

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
	Should the rule require committees to provide for procedures for the removal and replacement of its own members? Yes.	Based on the suggestion of another commenter, the working group has revised the rule to clarify that the administrative presiding justice would have the authority to remove and replace members of the committee.

Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	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.	The working group appreciates both of these suggestions. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested changes would not be minor substantive changes and therefore would need to be circulated for public comment. 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 this suggestion be considered by the appropriate Judicial Council advisory body at a later time.

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	[From CAP-SF's comments on Proposal SP18-12:] 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.	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should regional committees take on duties different from those specified in the proposal?*** Yes. The maintenance of the panel, which should include the continuing education and training of persons on the panel, as well as the function of matching attorneys to cases, should be shifted to CAP-SF.	The working group declined to make this suggested change. The current proposal does not provide for the regional committees to provide either continuing education or training of individuals on the statewide panel, so these functions cannot be shifted to CAP-SF as proposed. These are functions that are already performed by CAP-SF, but it is unclear whether they would be performed by CAP-SF for attorneys appointed by superior courts. As noted earlier, CAP-SF provides services and support to attorneys appointed by the Supreme Court pursuant to a contract. The scope of that contract does not necessarily include support for attorneys appointed by the superior courts.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should regional committees take on duties different from those specified in the proposal?*** No.	The working group notes the commenter's support for this provision in the rule.

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

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	This subdivision provides: "In addition to accepting applications from attorneys whose principal place of business is in its District the committee for the *superior courts* in the First Appellate District must also accept applications from attorneys whose principal place of business is outside the state." (Italics added.) Reference to the "superior courts" in this subdivision is confusing and is somewhat inconsistent with the language used throughout the rest of the proposed rules. Accordingly, the Fourth District recommends changing "superior courts in" to "region of."	The working group appreciates this suggestion and to avoid the ambiguity identified by the commenter, revised proposed rule 4.562(d)(2)(C) to provide in relevant part "the First Appellate District committee must also accept applications . . . ."
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	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 commenter is apparently referring to Government Code section 68661(d), which provides for a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases that is maintained by HCRC with the approval of the Supreme Court. The statute does not preclude other judicial branch entities from maintaining their own lists of qualified attorneys for use by the superior courts, and there is no provision in Proposition 66 that requires a superior court to draw counsel from the Government Code section 68661(d) roster. The working group considers it unlikely that a committee in which judges hold the majority position would require protection against "ideological blackballing." The working group appreciates the

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	suggestion that an applicant who is rejected should have a mechanism for review, but declined to revise the rules on this point. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. 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. The working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Marylou Hillberg, Attorney at Law Sebastopol, California	[From Ms. Hillberg,'s comments on Proposal SP18-12:] 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 appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time. The working group did, however, revise the proposal to include an advisory committee comment *encouraging* courts and regional committees to "to support activities to expand the pool of attorneys that are qualified to represent petitioners in death penalty–related habeas corpus proceedings. Examples of such activities include providing mentoring and training programs, and encouraging the use of supervised counsel."
Joint Rules Subcommittee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should regional committees take on duties different from those specified in the proposal?*** They should not take on additional duties different than the ones specified, except maybe to assist in offering trainings, mentor attorneys, etc., to expand the pool.	The working group notes the commenter's support for these provisions in the rule.
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	[P]roposed rule [4.562](d)(2)(B) provides that "each committee must accept applications only from attorneys whose principal place of business is within the appellate district." We suggest the language be modified so that it is clear whether this means that the committee may only accept applications from local attorneys, or whether it means that while the committee is only required to accept applications from local attorneys, it may choose to accept applications from non-local attorneys as well. While we suspect it is intended to mean the former in order to serve the goals of dividing the process equitably (after all,	The working group appreciates this input and has revised rule 4.562(d)(2)(B) to clarify that "each committee must accept applications from attorneys whose principal place of business is within the appellate district and from only those attorneys."

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	successful applicants go to the same statewide panel) and recruiting local attorneys, the language could be clearer.	
Superior Court of Los Angeles County	***Should regional committees take on duties different from those specified in the proposal?*** No. Regional committees should not take on duties different from those specified in the proposal.	The working group notes the commenter's support for these provisions in the rule.

Rule 4.562(d) circulated as rule 8.655(d)) – Regional Committees: Contracting with an Assisting Entity		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Assessing the qualifications of capital counsel is comparable to the process of board certification of a physician in a medical specialty, a process that is overseen by physicians who already hold the same specialty certification. (See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[3] see also Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* (2008) 36 Hofstra L. Rev. 775, 777 [capital defense is the "cardiac surgery of legal representations"].) That analogy suggests a number of ways in which the rule concerning the regional committees could be improved. The Council's questions ask whether the regional panel should be authorized to contract with an assisting entity to perform the committee's duties. That would be a simple way of placing the	There was no consensus in the working group on the proposal that regional committees be authorized to contract with an assisting entity to perform the functions required of the committee under proposed rule 4.562(d). By statute, the appointment of counsel for indigent individuals in death penalty–related habeas corpus proceedings is an exclusively judicial function. (Pen. Code, § 1509(b), Gov. Code, § 68662.) Many members of the working group consider the determination of whether an attorney meets the minimum qualifications, by extension, to require substantial judicial involvement and they do not believe an assisting entity can properly perform this function. Other members cited the thirty year history of the five appellate projects that currently and successfully perform this function for the six Courts of Appeal. (See Cal. Rules of Court, rule 8.300(e) [The

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Rule 4.562(d) circulated as rule 8.655(d)) – Regional Committees: Contracting with an Assisting Entity		
Commenter	**Comment**	**Proposed Working Group Response**
	qualification process in the hands of attorneys who are themselves qualified, in the same manner as a medical specialty board administers the certification process.[4] Perhaps a rule can be phrased to encourage, rather than merely authorizing, the regional panels to enter into such contracts. Either HCRC or CAP, or a joint venture of the two, would serve this purpose well. (See also § 68661, subd. (d) [HCRC already has the statutory duty to recommend attorneys for inclusion on the roster of qualified counsel].) [3] "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*.) [4] In order to protect the ability of counsel to exercise independent judgment in the best interests of the client, the American Bar Association recommends that judges not participate either in the determination that an individual attorney is qualified to represent capital clients, or in the assignment of attorneys to individual cases. (American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) §§ 3.1.B,	court may contract with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed by this rule.]) Due to the lack of consensus within the working group, no provision was included within the rule that would permit a regional committee to contract with an assisting entity to perform the committee's functions.

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Rule 4.562(d) circulated as rule 8.655(d)) – Regional Committees: Contracting with an Assisting Entity		
Commenter	**Comment**	**Proposed Working Group Response**
	5.1, 31 Hofstra L. Rev. 913 [hereafter "ABA Guidelines"].) Sections 68661 and 68662, subdivision (d), preclude literal adherence to these recommendations, but the ABA's point is an important one. The next few paragraphs of text suggest a number of ways in which the rule regarding regional committees can be amended to further this recommendation without running afoul of the governing statutes.	
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	The regional committees should be prohibited from delegating the committee's duties to any entity other than the State Public Defender, CAP, HCRC, the regional Appellate Project, or a similar statewide entity that exclusively practices criminal defense. Otherwise, there will be no assurance that the evaluation of the applicant's qualifications will properly insure that the applicant is able to provide competent representation in a capital habeas proceeding. If the committee's duties are delegated to one of these enumerated entities, that entity must be provided with sufficient funding to enable it to perform these duties.	See the response to Robert D. Bacon above.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*** Yes. However, the functions set forth in subdivisions (e)(4) ["statewide panel of qualified counsel"] and (e)(5) ["matching qualified attorneys to cases"] of rule [4.562] should not be exercised by the regional committees. These two functions should be shifted to CAP-SF to be handled on a statewide basis.	Although CAP-SF may have the ability to serve the functions described by the commenter, CAP-SF is a non-profit corporation that provides services to the Supreme Court in connection with capital cases pursuant to a contract. The functions described by the commenter relate to habeas corpus proceedings in the superior

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Rule 4.562(d) circulated as rule 8.655(d)) – Regional Committees: Contracting with an Assisting Entity		
Commenter	**Comment**	**Proposed Working Group Response**
	* * * General Comment While the regional committees can primarily serve in the recruitment of counsel which is an endemic weakness of the current system, the management of the panel, which prominently must include training and continuing education, and the matching of case-to-counsel, must be done on a statewide basis by the agency that is qualified to perform these functions, which is CAP-SF. The principal structural flaw in the regional committee model is that it fails to take account of the fact that effective management and administration of the panel requires skill, experience, and resources, as does the critically important function of matching counsel with the case. The regional committees will not have the skills, experience, or the resources to effectively manage and administer the panel nor, of course, will they have the statewide perspective on these issues. We must learn from the experience of the appellate projects, including CAP-SF, that extends now over 30 years, that the administration of the panel of attorneys available for appointment is a complex task that requires full-time professional staff. ***Should the habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?*** Yes, definitely. Just like the Courts of Appeal who depend on	courts and are not necessarily within the scope of that contract. See the response to Robert D. Bacon above.

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Rule 4.562(d) circulated as rule 8.655(d)) – Regional Committees: Contracting with an Assisting Entity		
Commenter	**Comment**	**Proposed Working Group Response**
	their respective "projects" to manage the defense panel, the regional committees need to draw on the experience and expertise of CAP-SF to manage the panel. It is important to note that "management" historically includes the very important functions of furnishing continuing education and training. This is particularly important in habeas proceedings where even experienced counsel will lack the up-to-date background necessary to represent the defendant.	
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?*** Yes.	See the response to Robert D. Bacon above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the regional habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?*** No. The regional panel committees should not be authorized by rule to divest themselves of their responsibility to recruit and vet qualified counsel.	See the response to Robert D. Bacon above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	In conjunction with the comments made to [4.562](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.	See response to that comment above.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee agrees with proposed Rule [4.562](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.	The working group notes the commenter's support for this provision of the rule.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	Finally, removal of an attorney should be required from the statewide panel if there has been a judicial ruling finding that the attorney rendered ineffective assistance of counsel. Given the decisions by the United States Supreme Court requiring state habeas proceedings to begin anew in a capital case where initial habeas counsel was ineffective (*Trevino*, *supra*, 133 S.Ct. 1911; *Martinez*, *supra*, 566 U.S. 1), and the need to prevent both victims and-defendants from enduring the additional delays that would result if habeas counsel was ineffective yet again, counsel should not be appointed if he or she was previously found ineffective. * * *	Based on the other comments received, the working group declined to make this suggested change. A rule that required removal of an attorney who was found to have provided ineffective assistance of counsel would provide no flexibility for the extenuating circumstances that might warrant allowing an attorney to remain on the statewide panel.

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Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
	An attorney should not be allowed to continue to be on the list unless he or she maintains current training in capital habeas litigation. Thus, [proposed rule 4.562(d)(4)(C)] should be modified to read: "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 on condition that the attorney completes 20 hours of habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty habeas corpus proceedings, every 2 years." For the reasons explained above, delete the second sentence and replace it with the following: "An attorney shall also be removed from the panel if there has been a final judicial ruling reversing a judgment based on a finding that the attorney has rendered the ineffective assistance of counsel."	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. 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 this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?*** No.	The working group notes the commenter's support for this provision of the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?*** No.	The working group notes the commenter's support for this provision of the rule.

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Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The proposal provides in Rule [4.562](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.	The working group notes the commenter's support for this provision of the rule.

Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Paragraphs (f) and (g) of Rule [4.562] should be deleted. A local qualification process independent of the regional committees appears to be a solution in search of a problem, and a potential source of new problems. No reason suggests itself	The working group declined to make this suggested change. Although not all members of the working group agreed, many members considered it important that any rule provide individual superior courts with the latitude to establish local panels, so long as the court establishes

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	why a qualified attorney who is willing to take appointments would not apply to join the statewide panel. If the superior court knows of such attorneys, it can and should encourage them to apply to the regional committee. An attorney on the statewide panel can presumably decline an offer of appointment from an inconvenient venue, with the commitment that s/he will take an appointment in a more convenient county instead. A separate local qualification process would be unnecessary to accommodate the geographic limitations on individual attorneys' ability to serve. A duplicative qualification process at the local level would cost money and require the commitment of other resources on the part of the superior court, to do exactly the same things that the regional committee would already be doing on a larger and more efficient scale. The local-rule option appears questionable for another reason also. As discussed earlier, capital habeas cases often include challenges – direct or indirect[5] – to county procedures for the appointment and compensation of counsel, the provision and funding of ancillary services, and the like. The lawyers not on the statewide panel who the superior court knows and is likely to consider appointing are the lawyers who practice before it. The likelihood is substantial that they, like the county public defender, will be potentially conflicted on these issues and so will not be suitable candidates for appointment. These potential conflicts are more insidious than those of the public defender because they are less likely to be apparent at the time of	appropriate procedures and requires attorneys to meet the minimum qualifications under proposed rule 8.652(c). Adoption of a local rule ensures transparency for the public and confirms that the full bench of the court has been consulted on the decision to have a local panel. In addition, some members felt that the local panel was consistent with the intent of Proposition 66 to shift responsibility for making appointments to the superior courts. Superior courts may be more familiar with the caliber of the attorneys practicing before them than would a regional committee.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	appointment. The conflicts may manifest themselves after the representation is well underway through subjective internal or external pressure on counsel to refrain from investigating these potential grounds for habeas relief. Counsel deeply invested in the local county's capital trial process may, with or without justification, fear biting the hand that feeds them, and may deliberately or subconsciously truncate their investigation accordingly, to the detriment of the client. [5] Systemic deficiencies can cause prejudicial ineffective assistance of counsel, even if counsel's skills and familiarity with the capital practice are sufficient. (E.g., *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1205.)	
California Appellate Defense Counsel, Inc. (CADC) By Kyle Gee, Chair CADC Government Relations Committee Oakland, California	The issue concerns proposed Rule [4.562](g). While proposed Rule [4.562](c) carefully describes the composition of "regional habeas corpus panel committees," proposed Rule [4.562](g) allows a superior court to adopt a "local rule" to allow the appointment of attorneys who are not members of the statewide panel. This "local rule" alternative provides no guidance or limitation on the composition of the local entity or how it would operate to qualify counsel for Superior Court habeas corpus proceedings. The only requirements are that the local rule must "establish procedures" for submission and review of the approved application form, and must require attorneys to meet the minimum qualifications under proposed Rule 8.652(c).	The working group declined to make this suggested change. Many on the working group considered it sufficient to require the superior court to establish procedures and comply with the California Rules of California on attorney qualifications. Given the diversity of courts in California, it should be left to each court that opts to maintain a local panel to determine the administrative structure and processes it uses to review the qualifications of counsel.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	For these reasons, CADC respectfully suggests that the Working Group should consider further description or definition of the local entity that would undertake this alternative means of appointing counsel, which description might mirror the provisions of Rule 4.562(c) in regard to "regional habeas corpus panel committees."	
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	As set forth in [rule 4.562(e)(3)] and proposed Rule [4.562](g), CAP-SF objects to allowing superior courts to adopt local rules regarding the appointment of counsel. The process set forth in proposed Rule [4.562](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 For these reasons, CADC respectfully suggests that the Working Group should consider further description or definition of the local entity that would undertake this alternative means of appointing counsel, which description might mirror the provisions of Rule [4.562](c) in regard to	See response to Robert D. Bacon above.

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Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	"regional habeas corpus panel committees."	
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	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 working group notes the commenter's support for this provision in the rule and appreciates the input.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We recognize there are concerns over whether anyone but the State Supreme Court has or should have the authority to identify counsel qualified to represent the defendant/petitioner in capital habeas corpus proceedings. We are not taking a position on that issue. However, to the extent that anyone other than the Supreme Court should be permitted to identify qualified counsel, that authority should be limited to regional committees, not local superior courts. Application of the death penalty is a matter of statewide importance, governed by statewide initiatives and statutes, and the state and federal constitution. Standards governing its application must be uniformly applied throughout the state. An attorney deemed unqualified by the State Supreme Court or even a regional committee cannot be allowed to represent a condemned individual by the same superior court that condemned that individual. Whereas the State Supreme Court or even a regional committee would apply uniform qualification standards throughout its jurisdiction, thereby resulting in consistent standards of representation, different superior courts	See response to Robert D. Bacon above.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	are likely to apply differing standards, especially where that superior court has a disproportionate number of death judgments requiring the appointment of counsel and limited resources to fund the litigation. Therefore, superior courts should not be allowed to promulgate local rules concerning the qualifications for appointment of habeas counsel. Instead, the standards must be uniformly applicable throughout the State of California. * * * Under no circumstances should a superior court be permitted to appoint an attorney who is not on the panel of qualified counsel. Such appointments could lead to allegations of favoritism, including racial and gender bias in the selection of counsel. They will also lead to inequities in who gets a lawyer quickly and who does not, which will cause concen1 from families of victims in jurisdictions that choose to appoint off the panel. It bears emphasis that, in the trial context, most jurisdictions use panels specifically to prevent allegations of favoritism and bias. Further, consciously or unconsciously, a judge has an inherent interest in maintaining the finality of a judgment reached in his or her court, especially on a high-profile case such as a death penalty case, and considering that all superior court judges must stand for retention elections every six years. Those influences may very well be at play in a local judge's selection of a particular attorney who has not been found qualified by the State Supreme Court or a regional committee. That risk is	

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	unacceptable. * * * This subdivision should be deleted completely for the reasons explained above. Further, given that it would require attorneys to meet the same requirements spelled out in Rule 8.652(c), there is no reason why those attorneys should not be vetted through the same review process as everyone else. The regional committee should determine if counsel meets the minimum qualifications, instead of having a superior court judge make that determination. The former assures some relative objectivity and consistency, whereas the latter promotes subjectivity and inconsistency, and may result in a local judge appointing an attorney who has not been found qualified by the regional committee.	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*** Yes, in the interest of improving the recruitment of counsel for capital cases, including habeas proceedings. ***If a court determines that an attorney is qualified pursuant to a local rule, could that qualification be provisional, pending approval of a regional committee?*** No, it is not necessary to create special categories. If the attorney is qualified under local rules, it should be left to him or her to seek, or not to seek, inclusion in the statewide panel.	The working group notes the commenter's support for this provision in the rule. The working group appreciates this input.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel? Yes.	The working group appreciates this input.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*** Yes. ***If a court determines that an attorney is qualified pursuant to a local rule, could that qualification be provisional, pending approval of a regional committee?*** Yes. ***Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel?*** Yes.	The working group notes the commenter's support for this provision in the rule The working group appreciates this input. The working group appreciates this input.
Joint Rules Subcommittee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*** Courts should MOST DEFINITELY be authorized to appoint attorneys who are not part of the State-wide panels. Each court generally knows its attorneys and their qualifications. ***If a court determines that an attorney is qualified pursuant to a local rule, could that qualification be provisional, pending approval of a regional committee?*** If a court approves an appointment, there should not be a delay awaiting approval from the regional committee.	The working group notes the commenter's support for this provision in the rule. The working group appreciates this input.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel? Attorneys should be allowed to seek inclusion on any and all panels-local, regional and State. The form is adequate and should be mandatory for the reasons stated regarding the other form.	The working group appreciates this input.
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	See comments under rule 4.561(e)—Appointment of Counsel, Generally, above.	See response to those comments above.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Mexico does not support authorizing the appointment of attorneys who are not members of the statewide panel, as it is through their inclusion on this panel that qualified specialists may be identified and vetted; allowing appointments from outside of this panel could circumvent the requirement that counsel have the necessary additional qualifications.	See the response to Robert D. Bacon above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*** No. In the event that a local superior court judge wishes to appoint a particular attorney who is not on the statewide panel, the judge need simply refer the attorney to the panel for vetting. We would support a rule requiring expedited consideration of any such referral by a superior court judge.	See response to Robert D. Bacon above.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	If a court determines that an attorney is qualified pursuant to a local rule, should that qualification be provisional, pending approval of a regional committee? Yes. The ultimate determination of qualification rests with the Supreme Court (Gov't Code § 68661(d)). The committee panels will be comprised of designees of the Chief Justices. No final qualification determination should occur at the superior court level.	There is no statute that states the ultimate determination of qualification rests with the Supreme Court for the appointment of counsel by the superior courts. Government Code section 68661(d) governs a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases that is maintained by HCRC with the approval of the Supreme Court. The statute does not preclude other judicial branch entities from maintaining their own lists of qualified attorneys for use by the superior courts, and there is no provision in Proposition 66 that requires a superior court to draw counsel from the Government Code section 68661(d) roster. Finally, as noted above, the regional committees will be appointed by the administrative presiding justices of the Courts of Appeal, not the Chief Justice.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	We object to the "local rule" provision of rule [4.561](e)(3) and rule [4.562](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 4.561(d) list of 25. Third, a local rule invites insular, separate decision making that will undercut the quality and consistency of the counsel appointments.	See the response to Robert D. Bacon above.

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Rule 8.655(d)(2)(A), (g) – Form Declaration of Counsel re Minimum Qualifications (HC-100)		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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.	The Judicial Council adopts forms for use in and by the courts. Attorneys interested in being on the roster established under Government Code section 68661 should contact HCRC.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	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.	The working group appreciates this input on form HC-100. The working group declined to make the suggested change. Providing written attestations and recommendations will be of more assistance to the committee, and will represent better documentation, than would contact information. The working group declined to make the suggested change. This language is modeled after language in the relevant rule of court.

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Rule 8.655(d)(2)(A), (g) – Form Declaration of Counsel re Minimum Qualifications (HC-100)		
Commenter	**Comment**	**Proposed Working Group Response**
	• For section 8, consider adding "(if applicable)" after "Previous application."	The working group appreciates this input and revised the proposed form to make the suggested changes.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the rule require attorneys to submit applications to be considered for the statewide panel on a mandatory Judicial Council form?*** Yes. ***Does the proposed form require the information necessary to determine the qualifications of an attorney or should it require different information?*** The form is adequate.	The working group notes the commenter's support for this provision in the rule. The working group appreciates this input.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the rule require attorneys to submit applications to be considered for the statewide panel on a mandatory Judicial Council form?*** Yes. ***Does the proposed form require the information necessary to determine the qualifications of an attorney or should it require different information?*** The proposed form is adequate to determine the qualifications of an attorney.	The working group notes the commenter's support for this provision in the rule. The working group appreciates this input.

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Fiscal Impacts		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Would the proposal provide cost savings? If so, please quantify.*** The proposal would definitely not provide cost savings and would instead require the expenditure of additional funds.	The working group appreciates this input.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Would the proposal provide cost savings? If so, please quantify.*** No. The process for recruiting, qualifying, and appointing counsel requires time and the expenditure of resources. Over the past few years, very few habeas appointments have been made. Any effort to recruit, qualify and appoint more habeas attorney necessarily will increase the amount of time and money spent on this endeavor.	The working group appreciates this input.
Superior Court of Los Angeles County	***Would the proposal provide cost savings? If so, please quantify.*** No.	The working group appreciates this input.

Operational Impacts		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***What would the implementation requirements be for courts?*** The superior courts would have to develop implementation for the processing of capital habeas petitions.	The working group appreciates this input.

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Operational Impacts		
Commenter	**Comment**	**Proposed Working Group Response**
	How well would this proposal work in courts of different sizes? Given the regional committees, and assuming appropriate staff support from CAP-SF and HCRC, the proposal would work in courts of different sizes.	The working group appreciates this input.
Superior Court of Los Angeles County	***What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?*** Implementation would require approximately four hours of training on new procedure, forms and CMS for current Judicial Assistants (JAs). The JA training program would then incorporate this into their criminal training module. Some staff time would be required to develop procedures and training materials. Development of a new CMS docket code would require minimal resources. ***How well would this proposal work in courts of different sizes?*** The volume and number of cases will impact courts differently.	The working group appreciates this input. The working group appreciates this input.

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Time for Implementation		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	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.	Based on this and other comments, the working group is recommending that the Judicial Council adopt these rules at its November 2018 meeting, with an effective date about five months later, on the April 25, 2019. The working group recognizes there are many practical and organizational impediments to implementation of these rules and Proposition 66. As discussed more fully in the body of the report, the working group notes that it is not clear whether it will be the judicial branch or counties that have responsibility for the costs of appointed private counsel.

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Time for Implementation		
Commenter	**Comment**	**Proposed Working Group Response**
	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. [1] Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L.R. 677 (2008)	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Would 1 1/2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** That is probably insufficient time to implement the new proceedings in superior court.	Based on this and other comments, the working group is recommending that the Judicial Council adopt these rules at its November 2018 meeting, with an effective date about five months later, on the April 25, 2019, which is the date by which Proposition 66 requires the Judicial Council to adopt an initial set of rules of court. (Pen. Code, § 190.6(d).)
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Would 1 1/2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** 45 days WOULD NOT provide adequate time for courts to prepare. This is an enormous undertaking. 90 days would be a minimum to begin implementation.	See response above to the comment of the Court of Appeal, Second Appellate District.

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Time for Implementation		
Commenter	**Comment**	**Proposed Working Group Response**
Superior Court of Los Angeles County	***Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** No. Eighteen months will be necessary for implementation considering the formation of regional committees.	See response above to the comment of the Court of Appeal, Second Appellate District.

Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**1. The rules even if adopted now, should not take effect until the habeas corpus process is fully funded** My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system and specifically for the inability to appoint qualified capital habeas counsel in a timely manner. (*See In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about, as noted on page 5 of your proposal. These rules should not take effect until after the Legislature has	The working group appreciates these comments and recognizes that courts, individuals subject to a judgment of death, and attorneys involved in death penalty–related proceedings will face significant challenges as these rules and Proposition 66 are implemented. Proposition 66 became effective on October 25, 2017, when the Supreme Court's opinion in the *Briggs* case ((2017) 3 Cal.5th 808) became final. The Judicial Council has a statutory obligation to adopt an initial set of rules within 18 months of that date - April 25, 2019. (Pen. Code, § 190.6(d).) The commenter raises legitimate concerns about how the provisions of Proposition 66 will be funded. Funding, however, is outside the scope of these rules and involves entities outside the judicial branch.

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Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	appropriated sufficient funds for the purpose, which will be an annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus. Expanding the pool of qualified attorneys – one of the goals of this rulemaking – means offering them more money. No qualified attorney will apply for or accept appointment as capital habeas counsel without assurance that he or she will be paid for the work at a level commensurate with magnitude of the task, the skill required, and the compressed time frame. Nor will qualified counsel accept appointment without assurance that adequate funds will be available for investigative and expert services, paralegal support, and the like, and that adequate numbers of qualified personnel are available to perform these services on the time schedule demanded by Proposition 66 and at the rates the courts are willing to pay. Habeas counsel must possess a "unique combination of skills" that the Supreme Court has found to be possessed by "[q]uite few" lawyers. (*Morgan*, 50 Cal.4th at pp. 932, 938.)[1] The rates the Supreme Court currently offers have proven inadequate either to attract enough of these qualified lawyers to take habeas appointments, or to persuade enough additional lawyers to obtain the necessary training and experience. Basic laws of economics dictate that significantly higher rates, for both attorney fees and investigation and expert expenses, will have to be offered to persuade a sufficient number of lawyers to become qualified for, and to accept, these appointments.	

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Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	An additional multiplier will be necessary because Proposition 66 demands that counsel do the same amount of work in one year for which the Supreme Court now allows three years. By analogy, a multiplier above market rates may be applied to an award of attorney's fees under a fee-shifting statute if "the nature of the litigation precluded other employment by the attorneys" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; accord, *Carter v. Caleb Brett LLC* (9th Cir. 2014) 757 F.3d 866, 868-869), or based on "time limitations imposed by the client or the circumstances" (*Carter, ibid*.). Similarly, the superior court should not begin appointing habeas counsel until that court is adequately staffed and funded for the substantial burden that these massive cases will impose – not just judges and judicial staff attorneys, but the staff required for accounting and other administrative services. The compressed time frame means that, for instance, attorney's fees and funds for ancillary services will have to be authorized and paid more quickly than the Supreme Court often does now. [1]This statement from *Morgan* is an empirical fact, not a proposition of law.	
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	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	Please see the response to Robert D. Bacon above. Determining how appointed counsel will paid is an important issue, but one that cannot be resolved through rules of court. As explained at greater length in the accompanying report, payment of appointed counsel is likely a county expense, and it would be premature to

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Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	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. [2] Rule 8.652(c)(2)(B)(i.)	adopt rules governing the payment of appointed counsel until there is greater certainty about the source and amount of funding available.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	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	Please see the responses to Robert D. Bacon and CAP-SF above.

SP18-13
Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101)

All comments are verbatim unless indicated by an asterisk (*). References to rule numbers as circulated have been replaced [in brackets] with the rule numbers used in the current draft of the rule accompanying this comment chart for the reader's ease of reference.

Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	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.	

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August 24, 2018

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

Re: No. SP18-13: Appointment of Capital Habeas 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. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded

My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system and specifically for the inability to appoint qualified capital habeas counsel in a timely manner. (See *In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about, as noted on page 5 of your proposal.

These rules should not take effect until after the Legislature has appropriated sufficient funds for the purpose, which will be an annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus.

Expanding the pool of qualified attorneys – one of the goals of this rulemaking – means offering them more money. No qualified attorney will apply for or accept appointment as capital habeas counsel without assurance that he or she will be paid for the work at a level commensurate with magnitude of the task, the skill required, and the compressed time frame. Nor will qualified counsel accept appointment without assurance that adequate funds will be available for investigative and expert services, paralegal support, and the like, and that adequate numbers of qualified personnel are available to perform these services on the time schedule demanded by Proposition 66 and at the rates the courts are willing to pay.

Habeas counsel must possess a "unique combination of skills" that the Supreme Court has found to be possessed by "[q]uite few" lawyers. (*Morgan*, 50 Cal.4th at pp. 932, 938.)[1] The rates the Supreme Court currently offers have proven inadequate either to attract enough of these qualified lawyers to take habeas appointments, or to persuade enough additional lawyers to obtain the necessary training and experience. Basic laws of economics dictate that significantly higher rates, for both attorney fees and investigation and expert expenses, will have to be offered to persuade a sufficient number of lawyers to become qualified for, and to accept, these appointments.

An additional multiplier will be necessary because Proposition 66 demands that counsel do the same amount of work in one year for which the Supreme Court now allows three years. By analogy, a multiplier above market rates may be applied to an award of attorney's fees under a fee-shifting statute if "the nature of the litigation precluded other employment by the attorneys" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; accord, *Carter v. Caleb Brett LLC* (9th Cir. 2014) 757 F.3d 866, 868-869), or based on "time limitations imposed by the client or the circumstances" (*Carter, ibid.*).

Similarly, the superior court should not begin appointing habeas counsel until that court is adequately staffed and funded for the substantial burden that these massive cases will impose – not just judges and judicial staff attorneys, but the staff required for accounting and other administrative services. The compressed time frame means that, for instance, attorney's fees and funds for ancillary services will have to be authorized and paid more quickly than the Supreme Court often does now.

[1] This statement from *Morgan* is an empirical fact, not a proposition of law.

2. Regional qualification committees are a reasonable means of accomplishing the rule's objectives; some of the specific rules about the committees can be improved

Regional qualification committees are a reasonable means of implementing both the Supreme Court's and HCRC's duty to maintain a statewide roster of qualified counsel (Govt. Code, § 68661, subd. (d))[2] and the superior court's duty to appoint counsel (§ 68662). That said, some revisions to the proposed rules would strengthen the process and provide greater protection for the independence of habeas counsel.

Assessing the qualifications of capital counsel is comparable to the process of board certification of a physician in a medical specialty, a process that is overseen by physicians who already hold the same specialty certification. (See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[3] see also Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* (2008) 36 Hofstra L. Rev. 775, 777 [capital defense is the "cardiac surgery of legal representations"].) That analogy suggests a number of ways in which the rule concerning the regional committees could be improved.

The Council's questions ask whether the regional panel should be authorized to contract with an assisting entity to perform the committee's duties. That would be a simple way of placing the qualification process in the hands of attorneys who are themselves qualified, in the same manner as a medical specialty board administers the certification process.[4] Perhaps a rule can be phrased to encourage, rather than merely authorizing, the

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[2] Unexplained section references are to the Government Code.

[3] "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.*)

[4] In order to protect the ability of counsel to exercise independent judgment in the best interests of the client, the American Bar Association recommends that judges not participate either in the determination that an individual attorney is qualified to represent capital clients, or in the assignment of attorneys to individual cases. (American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) §§ 3.1.B, 5.1, 31 Hofstra L. Rev. 913 [hereafter "ABA Guidelines"].) Sections 68661 and 68662, subdivision (d), preclude literal adherence to these recommendations, but the ABA's point is an important one. The next few

regional panels to enter into such contracts. Either HCRC or CAP, or a joint venture of the two, would serve this purpose well. (See also § 68661, subd. (d) [HCRC already has the statutory duty to recommend attorneys for inclusion on the roster of qualified counsel].)

If the inclusion of judges as members of the regional committees is felt necessary, perhaps the rules or commentary could express a preference for those judges who, while practicing law, represented capital habeas petitioners.

Rule 8.655(c)(1)(C) should be amended to provide that judges not be involved in the selection of attorney members of the regional committees. Perhaps the executive directors of HCRC, CAP-SF, and the district appellate projects could appoint the attorney members.

The same rule should be amended to provide that if "another entity" is involved in the selection of attorney members, it may not be an entity with any prosecutorial functions.

Rule 8.655(d)(4)(A) should be amended to provide that no attorney may be determined to be qualified based on the votes of judges alone, without the support of at least one attorney member of the committee.

The Council asks what minimum number of the attorney members of the regional committee need have capital habeas experience. If there are three attorney members, I would suggest that at least two of them have such experience. An attorney without capital habeas experience may have familiarity with many candidate attorneys in the district and be a useful participant in the process alongside the members who are themselves capital habeas counsel; all attorneys without an active capital practice need not be categorically excluded from the committees.

3. At an absolute minimum, two counsel should be appointed in each case; individual cases may require more

The need for multiple counsel at each stage of a capital case is well accepted, given both the magnitude of the task and what is at stake. (See, e.g., *Keenan v. Superior Court* (1982) 31 Cal.3d 424; ABA Guidelines, § 4.A.1.) Two is an absolute minimum. More may be necessary, given that the new statute requires the same amount of work to be

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paragraphs of text suggest a number of ways in which the rule regarding regional committees can be amended to further this recommendation without running afoul of the governing statutes.

done in one-third of the time. The rule could appropriately borrow the phrasing of the ABA Guideline: "no fewer than two attorneys."

4. The public defender should not be the default habeas counsel

The majority of the working group has the better of this argument: It would be a "futile step" to offer the appointment to the county public defender first, and the rules should not require this.

Except possibly in Los Angeles, the county public defender agency is not likely to be large enough to support a critical mass of habeas-qualified attorneys and the necessary infrastructure for habeas representation, while still performing all the rest of its statutory duties. Even one habeas appointment would likely require a significant increase in the public defender agency's budget, a factor that is beyond the direct control of the appointing court.

If the public defender represented the client at trial or was conflicted from doing so, they will be conflicted on habeas. There is a significant likelihood of conflicts in other cases also. Capital habeas cases frequently present systemic issues concerning a county's procedures for appointing and compensating trial counsel and experts, and the like. (See, e.g., *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069; *Proctor v. Ayers* (E.D. Cal.) 2007 WL 1449720 at *49-*54.) The public defender agency may well have an institutional interest in these issues that is not the same as the interest of the habeas client. The agency's staff attorneys may well be material fact witnesses on these habeas claims.

Proposed Rule 8.654(e)(2) sets forth a more workable alternative: designation of HCRC as the default habeas counsel. HCRC has many of the characteristics of a public defender agency, but without the concerns described in the two previous paragraphs. The rationale of the statutes giving preference to the public defender would be served by deeming HCRC to be the "public defender" for capital habeas purposes. The Judicial Council should consider recommending that the Legislature repeal the statutory ceiling on the number of attorneys at HCRC and appropriate funds to significantly enlarge that agency, a recommendation which was also made by the Commission on the Fair Administration of Justice. If the Legislature does so, HCRC could then represent a larger number of clients in its role as presumptive or default state habeas counsel. This would produce substantial if not literal compliance with the statutes arguably expressing a preference for the "public defender."

5. Allowing for a local qualification process independent of the regional committees is unnecessary and unwise.

Paragraphs (f) and (g) of Rule 8.655 should be deleted.

A local qualification process independent of the regional committees appears to be a solution in search of a problem, and a potential source of new problems. No reason suggests itself why a qualified attorney who is willing to take appointments would not apply to join the statewide panel. If the superior court knows of such attorneys, it can and should encourage them to apply to the regional committee. An attorney on the statewide panel can presumably decline an offer of appointment from an inconvenient venue, with the commitment that s/he will take an appointment in a more convenient county instead. A separate local qualification process would be unnecessary to accommodate the geographic limitations on individual attorneys' ability to serve.

A duplicative qualification process at the local level would cost money and require the commitment of other resources on the part of the superior court, to do exactly the same things that the regional committee would already be doing on a larger and more efficient scale.

The local-rule option appears questionable for another reason also. As discussed earlier, capital habeas cases often include challenges – direct or indirect[5] – to county procedures for the appointment and compensation of counsel, the provision and funding of ancillary services, and the like. The lawyers not on the statewide panel who the superior court knows and is likely to consider appointing are the lawyers who practice before it. The likelihood is substantial that they, like the county public defender, will be potentially conflicted on these issues and so will not be suitable candidates for appointment. These potential conflicts are more insidious than those of the public defender because they are less likely to be apparent at the time of appointment. The conflicts may manifest themselves after the representation is well underway through subjective internal or external pressure on counsel to refrain from investigating these potential grounds for habeas relief. Counsel deeply invested in the local county's capital trial process may, with or without justification, fear biting the hand that feeds them, and may deliberately or subconsciously truncate their investigation accordingly, to the detriment of the client.

6. It would be appropriate to designate CAP-SF as the default assisting entity, provided CAP-SF is adequately funded to perform the task

An assisting entity will be even more essential than it has been in the past, given the compressed time for preparation of the petition and the likelihood that more lawyers will be appointed who have not previously litigated capital habeas cases. Capital habeas

[5] Systemic deficiencies can cause prejudicial ineffective assistance of counsel, even if counsel's skills and familiarity with the capital practice are sufficient. (E.g., *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1205.)

lawyers learn from each other every day; they could not do otherwise, given the magnitude of the task and the limited time and resources available. An assisting entity facilitates that sharing of knowledge and experience.

If CAP-SF is not the assisting entity for appointed habeas counsel, one or more new agencies very similar to CAP-SF will have to be created to fulfill that function. The state would be money ahead expanding CAP-SF and identifying it in the rules as the assisting entity for all cases in which it is not conflicted, rather than creating new administrative structures to replicate what CAP-SF already does well.[6]

CAP-SF is funded through a contract with the Judicial Council rather than a direct statutory appropriation. The adequacy of CAP-SF's funding to assist all attorneys with pending habeas cases is therefore more within the control of the Judicial Council than are most of the other funding issues raised but not resolved by the proposed rules.

CAP-SF is already mentioned by name in several other rules: 8.600, 8.605, 8.619, 8.622, 8.625, and 8.630. Naming CAP-SF in the rules as the default assisting entity would not set an unwise precedent; it would continue current practice.

Thank you again for the opportunity to comment.[7]

Sincerely,

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

[6] Disclosure: I receive payment from CAP-SF for contractual resource, consulting, and training services in support of the assistance that their employed staff gives to appointed capital appellate and habeas counsel. The comments in this letter are my own and do not purport to speak for CAP-SF.

Also, in my role as appointed capital counsel myself, I benefit greatly from the assistance that CAP-SF provides to me. That was true when I started, and it is true today when I have 28 years of capital habeas experience.

[7] 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.

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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
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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

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

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
Superior Court Appointment of Habeas 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 one observation relevant to the proposed rules regarding "Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings."

The Potential Problem

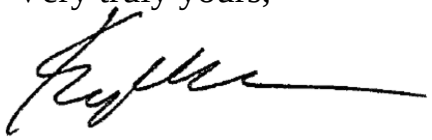
The issue concerns proposed Rule 8.655(g). While proposed Rule 8.655(c) carefully describes the composition of "regional habeas corpus panel committees," proposed Rule 8.655(g) allows a superior court to adopt a "local rule" to allow the appointment of attorneys who are not members of the statewide panel. This "local rule" alternative provides no guidance or limitation on the composition of the local entity or how it would operate to qualify counsel for Superior Court habeas corpus proceedings. The only requirements are that the local rule must "establish procedures" for submission and review of the approved application form, and must require attorneys to meet the minimum qualifications under proposed Rule 8.652(c).

2626 Harrison Street, Oakland, CA 510/435-6707, kylegee@pacbell.net

For these reasons, CADC respectfully suggests that the Working Group should consider further description or definition of the local entity that would undertake this alternative means of appointing counsel, which description might mirror the provisions of Rule 8.655(c) in regard to "regional habeas corpus panel committees."

Thank you for your time and consideration.

Very truly yours,



KYLE GEE
Chair, CADC Government Relations Committee

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

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 concerning **Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings**, Item Number SP18-13.

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 Invitation to Comment solicits comments on a number of specific topics at pages 13-14 of the Invitation (page 14 is directed exclusively to judicial officers). We are responding to a portion of these topics.

Prioritization and Appointment

We agree that the oldest cases should generally be given priority. The only question is whether the oldest judgment where the appeal has been completely filed should take precedence over an older judgment where the appeal has not been filed. Our sense is that appellate counsel is often able to flag some issues for habeas counsel, which helps habeas counsel proceed more efficiently, so it may be prudent to prioritize cases where the appellant's briefs have been completed. In addition, if an appeal has been filed on a "newer" case, that may be because the record in the newer case is not as long or complicated as compared to an older case where the appeal briefs have not been filed. Consequently, it may be easier to litigate these "newer" cases before the more complicated older case.

We submit that superior court judges should not be authorized to appoint counsel on any case after advising the Supreme Court that counsel is available for appointment. That would usurp the authority of the Supreme Court, who may be carefully evaluating the wisdom of appointing the "available" counsel. Ultimately, the Supreme Court will review the superior court's ruling on the habeas petition—either on a petition for review by the defendant or the appeal from a habeas grant by the prosecution—and should be entitled to have confidence in the quality of counsel who is appointed to represent the defendant/petitioner, lest the Supreme Court (and lower courts) be saddled with additional layers of proceedings challenging the effectiveness of habeas counsel. (See, e.g., *Trevino v. Thaler* (2013) 569 U.S. ___ [133 S.Ct. 1911]; *Martinez v. Ryan* (2012) 566 U.S. 1.)

There should be a minimum of two lawyers appointed. If the case is complex or the record lengthy there should be more than two. Experience has demonstrated that it takes years for a complete habeas petition to be filed from a death sentence. Under Proposition 66, that time period is compressed into an absolute deadline of one year. A typical record in a death penalty case exceeds 10,000 pages, and it is not uncommon for the record to exceed 25,000 pages. In addition to reviewing the entire trial record, habeas counsel must review the entire appellate record. And on

top of all of that, habeas counsel must investigate the case anew, particularly with respect to the defendant's social history and mental health, in order to evaluate potential issues of ineffective assistance of counsel. All of this takes time, which is why experience has shown that it takes years for a complete habeas petition to be filed. There are only so many hours in one year, and one attorney simply cannot perform the thousands of hours of work required to produce a constitutionally sufficient habeas petition in one year. The only hope for achieving compliance with the one-year deadline is to appoint at least two lawyers on each habeas petition, with provision for additional counsel based on the particular circumstances of the individual case.

We agree that the rule should not impose any requirement to appoint the public defender. The public defender should not be appointed under any circumstances. First, the public defender will almost always have a conflict of interest. If the public defender represented the defendant/petitioner at trial, she has an inherent conflict in evaluating, investigating and litigating issues concerning the ineffective assistance of counsel, a claim which must at least be investigated in any capital habeas proceeding. If the public defender did not represent the defendant/petitioner at trial, that was either because of a conflict of interest or the defendant retained private counsel. In the former situation, the conflict will continue throughout the litigation, including the habeas proceedings. Thus, unless the defendant had retained counsel at trial, there will always be a conflict of interest that prevents the public defender from representing the defendant in the capital habeas proceedings. Second, county public defenders are trained to represent individuals in the trial courts, not the appellate courts or in post-conviction habeas proceedings. Realistically, county public defenders will never have the necessary training and qualifications to represent a condemned prisoner in a capital habeas proceeding, and do not have the budget to fund the investigation and litigation of a capital habeas proceeding. Appointing the public defender will be an idle act that will only take precious time off of the one-year deadline in which to file the habeas petition.

The superior courts should be required to designate an entity to assist and support private counsel appointed to represent the defendant on habeas. However, in order to assure the competency of counsel and adherence to standards of representation, the entity must be a statewide agency, such as the California Appellate Project San Francisco (CAP) or Habeas Corpus Resource Center (HCRC), and must have sufficient staffing to enable them to provide such assistance.

Regional Committees and Vetting of Attorney Qualifications

At least two members of each committee should have significant capital habeas experience as defense counsel. Given that the purpose of the committees is to ensure that the appointed counsel are qualified and able to provide the effective

assistance of counsel required by the Sixth Amendment (see, *Trevino, supra*, 133 S.Ct. 1911; *Martinez, supra*, 566 U.S. 1), it is essential that the committee members must be able to identify counsel who are qualified and will be able to competently represent the defendant/petitioner in the habeas proceedings from the death sentence. Capital habeas litigation is unique compared to any other litigation. Counsel who is experienced in such litigation is in the best position to evaluate whether an applicant is qualified and will provide competent representation in a capital habeas proceeding within the strict deadlines of Proposition 66. Therefore, a majority of the regional committee must have that experience. If the regional committee consists of three members, that means two must have significant capital habeas experience as defense counsel.

We recognize there are concerns over whether anyone but the State Supreme Court has or should have the authority to identify counsel qualified to represent the defendant/petitioner in capital habeas corpus proceedings. We are not taking a position on that issue. However, to the extent that anyone other than the Supreme Court should be permitted to identify qualified counsel, that authority should be limited to regional committees, not local superior courts. Application of the death penalty is a matter of statewide importance, governed by statewide initiatives and statutes, and the state and federal constitution. Standards governing its application must be uniformly applied throughout the state. An attorney deemed unqualified by the State Supreme Court or even a regional committee cannot be allowed to represent a condemned individual by the same superior court that condemned that individual. Whereas the State Supreme Court or even a regional committee would apply uniform qualification standards throughout its jurisdiction, thereby resulting in consistent standards of representation, different superior courts are likely to apply differing standards, especially where that superior court has a disproportionate number of death judgments requiring the appointment of counsel and limited resources to fund the litigation. Therefore, superior courts should not be allowed to promulgate local rules concerning the qualifications for appointment of habeas counsel. Instead, the standards must be uniformly applicable throughout the State of California.

We believe the rule should specify who is responsible for appointing members of the committee, and that person should either be the Chief Justice or the Presiding Justice of the court of appeal for that region. Consequently, the Rule should be amended to provide that the superior courts may nominate judges to be appointed to the three positions for superior court judges, rather than "agreed upon" by the presiding judges of the superior courts. There should also be a process for taking applications to join the regional committees. Further, we agree that the term for each committee member should be set at three years, and the terms of the various committee members should be staggered.

Regarding the composition of attorney members of the regional committee, while the feeder groups identified in Rule 8.655(c) are reasonable, it is critical that no more than one member should be from the local public defender office or local bar combined. The purpose of the Rule is to identify counsel who is qualified to represent a defendant/petitioner in a capital habeas proceeding, not a trial. No attorney in a county public defender office is likely to have any substantial experience in complex habeas litigation, much less capital habeas litigation. Nor is there any assurance under the proposed rule that the "attorney designated by another entity" (Rule 8.655(c)(1)(C)(vi)) will have any such experience. Thus, neither is in a position to have the requisite knowledge or experience to be able to identify whether an applicant is qualified and able to provide competent representation in a capital habeas proceeding. By contrast, the feeder groups identified in subparagraphs (i) through (iv) of Rule 8.655(c)(1)(C) are likely to have such experience and knowledge, especially if the Rule is amended to require that at least two of the three attorney members must have substantial experience as defense counsel in capital habeas litigation. Finally, we recommend that the attorney members of the regional committee must be selected from the attorneys nominated by the attorney groups. Alternatively, if the Rule were to be amended to allow the chair "to select the attorney groups from which it wants to draw members and let the groups designate an attorney" (Invitation, page 14), the Rule should require the chair select at least two of the attorney groups identified in subparagraphs (i) through (iv), and further require that at least two of the three attorney members must have substantial experience as defense counsel in capital habeas litigation.

The regional committees should be prohibited from delegating the committee's duties to any entity other than the State Public Defender, CAP, HCRC, the regional Appellate Project, or a similar statewide entity that exclusively practices criminal defense. Otherwise, there will be no assurance that the evaluation of the applicant's qualifications will properly insure that the applicant is able to provide competent representation in a capital habeas proceeding. If the committee's duties are delegated to one of these enumerated entities, that entity must be provided with sufficient funding to enable it to perform these duties.

Under no circumstances should a superior court be permitted to appoint an attorney who is not on the panel of qualified counsel. Such appointments could lead to allegations of favoritism, including racial and gender bias in the selection of counsel. They will also lead to inequities in who gets a lawyer quickly and who does not, which will cause concern from families of victims in jurisdictions that choose to appoint off the panel. It bears emphasis that, in the trial context, most jurisdictions use panels specifically to prevent allegations of favoritism and bias.

Further, consciously or unconsciously, a judge has an inherent interest in maintaining the finality of a judgment reached in his or her court, especially on a

high-profile case such as a death penalty case, and considering that all superior court judges must stand for retention elections every six years. Those influences may very well be at play in a local judge's selection of a particular attorney who has not been found qualified by the State Supreme Court or a regional committee. That risk is unacceptable.

Finally, removal of an attorney should be required from the statewide panel if there has been a judicial ruling finding that the attorney rendered the ineffective assistance of counsel. Given the decisions by the United States Supreme Court requiring state habeas proceedings to begin anew in a capital case where initial habeas counsel was ineffective (*Trevino, supra,* 133 S.Ct. 1911; *Martinez, supra,* 566 U.S. 1), and the need to prevent both victims and defendants from enduring the additional delays that would result if habeas counsel was ineffective yet again, counsel should not be appointed if he or she was previously found ineffective.

Our additional comments to specific Rules are as follows:

Rule 8.654 (d)(4):

Insert "qualified" so it begins "If **qualified** counsel..."

Rule 8.655(c)(1)(B):

Change "as agreed on" to "from those judges nominated" so that the sentence reads: "A total of three judges from those nominated by the presiding judges of the superior courts located within the appellate district;..."

Rule 8.655(c)(1)(C):

For the reasons explained above, at least two of the three attorney members should be from the groups identified in subparagraphs (i) through (iv), with no more than one attorney member from those identified in subparagraphs (v) through (vi). Thus, we recommend that this subdivision be modified to read: "(C) A total of three attorneys drawn from the following categories, as selected by the judicial officers on the committee [insert chair of the committee], provided that at least two of the attorney members are from the groups identified in subparagraphs (i) through (iv), with no more than one attorney member from those identified in subparagraphs (v) through (vi), and at least two of the attorney members have substantial experience as defense counsel in capital habeas litigation:"

Rule 8.655(d)(4)(C):

An attorney should not be allowed to continue to be on the list unless he or she maintains current training in capital habeas litigation. Thus, the proposed Rule

should be modified to read: "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 on condition that the attorney completes 20 hours of habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty habeas corpus proceedings, every 2 years."

Rule 8.655(d)(6):

For the reasons explained above, delete the second sentence and replace it with the following: "An attorney shall also be removed from the panel if there has been a final judicial ruling reversing a judgment based on a finding that the attorney has rendered the ineffective assistance of counsel."

Rule 8.655(g) Local Rule:

This subdivision should be deleted completely for the reasons explained above. Further, given that it would require attorneys to meet the same requirements spelled out in Rule 8.652(c), there is no reason why those attorneys should not be vetted through the same review process as everyone else. The regional committee should determine if counsel meets the minimum qualifications, instead of having a superior court judge make that determination. The former assures some relative objectivity and consistency, whereas the latter promotes subjectivity and inconsistency, and may result in a local judge appointing an attorney who has not been found qualified by the regional committee.

Thank you for your consideration,

Robin Lipetzky
President, California Public Defenders Association

Court of Appeal

STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

TO: Heather Anderson
Michael Giden

CC: Presiding Justice Dennis M. Perluss, Chair of the Proposition 66 Rules Working Group
Presiding Justice Manuel A. Ramirez
Presiding Justice Kathleen E. O'Leary
Bob Lowney
Deborah Collier-Tucker

FROM: Administrative Presiding Justice Elwood Lui
Court of Appeal, Second Appellate District

DATE: July 20, 2018

RE: Request for Informal Feedback from APJAC
Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings

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The Second Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty-related habeas corpus proceedings. In response to the working group's request for informal feedback from the Administrative Presiding Justices Advisory Committee, the Second District offers the following responses to the working group's specific questions.

Prioritization and Appointment

- Should courts prioritize the appointment of counsel for the oldest judgments of death?

  Response: Yes.

- Should the first group of judgments for which HCRC sends out notice include 25 judgments or a different number?

Response: The question appears to assume that HCRC is the only current statewide body that can perform statewide functions regarding capital cases. That is not true. The California Appellate Project—San Francisco (CAP-SF) also has the capability to perform statewide functions in capital litigation. It is suggested below that the management of the panel, and the function of matching counsel to cases, be recognized as a statewide function to be performed by CAP-SF.

Assuming that HCRC should perform this function, 25 death judgments in the first group is acceptable.

- Should the number of judgments for which HCRC send out subsequent notice include 20 judgments or a different number?

Response: 20 judgments is acceptable.

- Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?

Response: The question is inapplicable to petitions filed in the first instance with the superior court. As to those petitions, Proposition 66 requires the superior court to appoint counsel (Pen. Code, § 1509, subd. (b); Gov. Code, § 68662), and the Supreme Court would accordingly play no role in those appointments.

With respect to the *Morgan* petitions that were previously filed with (and are now pending before) the Supreme Court, we recommend a special rule that empowers the superior court to appoint counsel for a habeas petition to be re-filed or transferred to the superior court.

- Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?

Response: No, this is not necessary. Initially, only one lawyer should be appointed. This lawyer may later request the appointment of another counsel to furnish needed assistance.

- Should judges be required [to] request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?

Response: No. Local public defenders are usually disqualified by conflict considerations.

- Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?

Response: Yes, definitely. There is only one entity qualified *and staffed* to render assistance in capital habeas proceedings and that is CAP-SF. The superior courts should be made aware of this. Until and unless alternate resources are developed, the rule should refer to CAP-SF as the assisting entity.

- Should the proposal designate a specific assisting entity (e.g., CAP-SF)?

Response: Yes. It is to be kept in mind that the superior courts will be looking for guidance and assistance and that it cannot be assumed that every superior court judge in California will be familiar with CAP-SF and the fact that CAP-SF, other than the lawyer appointed when CAP-SF has a conflict, is the only entity that is staffed and qualified to render assistance in capital habeas petitions.

- Should the proposal require use of a mandatory form for a superior court to appoint counsel?

Response: Yes.

- Does the form provide the fields necessary for a superior court to appoint counsel?

Response: Yes.

Regional Committees and Vetting of Attorney Qualifications

- Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?

Response: Yes. However, the functions sets forth in subdivisions (e)(4) ["statewide panel of qualified counsel"] and (e)(5) ["matching qualified attorneys to cases"] of rule 8.655 should not be exercised by the regional committees. These two functions should be shifted to CAP-SF to be handled on a statewide basis.

- Should regional committees take on duties different from those specified in the proposal?

Response: Yes. The maintenance of the panel, which should include the continuing education and training of persons on the panel, as well as the function of matching attorneys to cases, should be shifted to CAP-SF.

- Should it be mandatory that the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience?

Response: No. This kind of specific background is too rare to become an absolute qualification for membership on the committee.

- Should committees be composed of a membership different [from] that specified in the proposal?

Response: No. However, we agree with the Fourth District's suggestion that the three superior court judges be "nominated" by the superior courts within the District rather than "agreed upon" by them.

- Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? And if so, is a three-year term appropriate?

Response: Yes to both questions.

- Should the habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?

Response: Yes, definitely. Just like the Courts of Appeal who depend on their respective "projects" to manage the defense panel, the regional committees need to draw on the experience and expertise of CAP-SF to manage the panel. It is important to note that "management" historically includes the very important functions of furnishing continuing education and training. This is particularly important in habeas proceedings where even experienced counsel will lack the up-to-date background necessary to represent the defendant.

- Should the committees be managed or governed in a way different from what is specified in the proposal?

Response: No.

- Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?

  Response: No.

- Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?

  Response: Yes, in the interest of improving the recruitment of counsel for capital cases, including habeas proceedings.

- If a court determines that an attorney is qualified pursuant to a local rule, could that qualification be provisional, pending approval of a regional committee?

  Response: No, it is not necessary to create special categories. If the attorney is qualified under local rules, it should be left to him or her to seek, or not to seek, inclusion in the statewide panel.

- Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel?

  Response: Yes.

- Should the rule require attorneys to submit applications to be considered for the statewide panel on a mandatory Judicial Council form?

  Response: Yes.

- Does the proposed form require the information necessary to determine the qualifications of an attorney or should it require different information?

  Response: The form is adequate.

Cost and Implementation Matters

- Would the proposal provide cost savings? If so, please quantify.

  Response: The proposal would definitely not provide cost savings and would instead require the expenditure of additional funds.

- What would the implementation requirements be for courts?

Response: The superior courts would have to develop implementation for the processing of capital habeas petitions.

- Would 1 1/2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Response: That is probably insufficient time to implement the new proceedings in superior court.

- How well would this proposal work in courts of different sizes?

Response: Given the regional committees, and assuming appropriate staff support from CAP-SF and HCRC, the proposal would work in courts of different sizes.

General Comment

While the regional committees can primarily serve in the recruitment of counsel which is an endemic weakness of the current system, the management of the panel, which prominently must include training and continuing education, and the matching of case-to-counsel, must be done on a statewide basis by the agency that is qualified to perform these functions, which is CAP-SF.

The principal structural flaw in the regional committee model is that it fails to take account of the fact that effective management and administration of the panel requires skill, experience, and resources, as does the critically important function of matching counsel with the case. The regional committees will not have the skills, experience, or the resources to effectively manage and administer the panel nor, of course, will they have the statewide perspective on these issues. We must learn from the experience of the appellate projects, including CAP-SF, that extends now over 30 years, that the administration of the panel of attorneys available for appointment is a complex task that requires full-time professional staff.

The Second District appreciates the Proposition 66 Rules Working Group's consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

CONTACT

Elwood Lui
Administrative Presiding Justice
Court of Appeal, Second District
300 South Spring Street
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COURT OF APPEAL
FOURTH APPELLATE DISTRICT

TO: Heather Anderson
Michael Giden

CC: Presiding Justice Dennis M. Perluss, Chair of the Proposition 66 Rules Working Group
Presiding Justice Manuel A. Ramirez
Presiding Justice Kathleen E. O'Leary
Bob Lowney
Deborah Collier-Tucker

FROM: Administrative Presiding Justice Judith D. McConnell
Court of Appeal, Fourth Appellate District

DATE: July 19, 2018

RE: Request for Informal Feedback from APJAC
Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

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The Fourth Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty–related habeas corpus proceedings. In response to the working group's request for informal feedback from the Administrative Presiding Justices Advisory Committee, the Fourth District offers the following responses to the working group's specific questions and provides additional comments on the proposed rules.

Responses to the Working Group's Requests for Specific Comments

Prioritization and Appointment

• Should courts prioritize the appointment of counsel for the oldest judgments of death?

Response: Yes.

• Should the first group of judgments for which HCRC sends out notices include 25 judgments or a different number?

Response: Twenty-five judgments is an appropriate number for the first batch of notices to the superior courts.

• Should the number of judgments for which HCRC sends out subsequent notices include 20 judgments or a different number?

Response: The Fourth District agrees with the proposed number of 20 judgments for subsequent notices because that number allows for a cushion of flexibility to accommodate cases for which it may be difficult to find counsel.

• Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long?

Response: Yes. To avoid potential confusion and delays, the rule should include a provision that the superior court is authorized to appoint counsel if the Supreme Court has not acted in 60 days.

• Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?

Response: The Fourth District does not take a position on this question.

• Should judges be required request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?

Response: The Fourth District does not take a position on this question.

• Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?

Response: Yes.

• Should the proposal designate a specific assisting entity (e.g., CAP-SF)?

Response: Yes.

• Should the proposal require use of a mandatory form for a superior court to appoint counsel?

Response: Yes.

• Does the form provide the fields necessary for a superior court to appoint counsel?

Response: Yes.

Regional Committees and Vetting of Attorney Qualifications

• Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty–related habeas corpus counsel?

Response: Yes. However, please see the comments below to proposed rule 8.655 concerning the composition and appointment of members to the regional committees.

• Should regional committees take on duties different from those specified in the proposal?

Response: No.

• Should it be mandatory that the attorney members of the regional habeas corpus panel committees have death penalty–related habeas corpus experience?

Response: Yes. However, in some regions it likely will not be possible to recruit and maintain three attorney committee members with death penalty–related habeas corpus experience. To ensure that the regional committees have the benefits of relevant death penalty–related habeas corpus experience without being overly restrictive, the rule should require that at least one attorney member have that experience.

• Should committees be composed of a membership different than specified in the proposal?

Response: No. However, please see the comments below concerning proposed rule 8.655.

• Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? And if so, is a three-year term appropriate?

Response: Yes, three-year terms are appropriate.

• Should the regional habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?

Response: Yes.

• Should the committees be managed or governed in a way different from what is specified in the proposal?

Response: Please see the comments below concerning proposed rule 8.655.

• Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?

Response: No.

• Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?

Response: Yes.

• If a court determines that an attorney is qualified pursuant to a local rule, could that qualification be provisional, pending approval of a regional committee?

Response: Yes.

• Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel?

Response: Yes.

• Should the rule require attorneys to submit applications to be considered for the statewide panel on a mandatory Judicial Council form?

Response: Yes.

• Does the proposed form require the information necessary to determine the qualifications of an attorney or should it require different information?

Response: The proposed form is adequate to determine the qualifications of an attorney.

Additional Comments Concerning Proposed Rule 8.655

- Subdivision (c):

  This subdivision states that each Court of Appeal must establish a death penalty–related habeas corpus committee. However, the rule does not specify who appoints the committee members. Accordingly, the Fourth District proposes that the subdivision should further provide that members of the committee shall be appointed by the Administrative Presiding Justice of the appellate district.

- Subdivision (d)(1)(B):

  This subdivision provides that each regional habeas corpus panel committee shall include a total of three superior court judges "as *agreed upon* by the superior courts located within the appellate district." (Italics added.) This rule may be problematic for appellate districts with numerous superior courts. Accordingly, the Fourth District suggests revising the subdivision to replace "agreed upon" with "nominated."

- Subdivision(d)(1)(C)(i) – (v):

  These subdivisions pertain to selection of the attorney members of each regional habeas corpus panel committee and provide that the judicial officers of the committee should select attorneys from: (i) the Habeas Corpus Resource Center; (ii) the California Appellate Project – San Francisco; (iii) the appellate project with which the Court of Appeal contracts; (iv) the Federal Public Defenders' Offices of the Federal Districts in which the participating courts are located; and (v) the public defender's office in a county where the participating courts are located.

  The judicial officers of the regional committees are not in the best position to select members from the above groups without guidance because the judicial officers likely will not be familiar with the attorneys from the various groups. Accordingly, the Fourth District proposes that the five groups identified above should each nominate attorney candidates from their own group to serve on the committees. The nominations should be made to the administrative presiding justice of the district who would make the selections.

- Subdivision (d)(4):

  This subdivision provides that except as otherwise provided in the rule, each committee is authorized to establish the procedures under which it is governed. As proposed, the rule does not specify how committees can

remove and replace members who fail to meet their committee obligations or are otherwise detrimental to the committees' purposes. Accordingly, the Fourth District proposes that the subdivision be revised to include the following underlined language: "Except as provided in this rule, each committee is authorized to establish the procedures under which it is governed, <u>including procedures for removal and replacement of members</u>."

- Subdivision (e)(2)(C):

This subdivision provides: "In addition to accepting applications from attorneys whose principal place of business is in its district, the committee for the *superior courts in* the First Appellate District must also accept applications from attorneys whose principal place of business is outside the state." (Italics added.)

Reference to the "superior courts" in this subdivision is confusing and is somewhat inconsistent with the language used throughout the rest of the proposed rules. Accordingly, the Fourth District recommends changing "superior courts in" to "region of."

The Fourth District appreciates the Proposition 66 Rules Working Group's consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

<u>CONTACT</u>:

Judith D. McConnell
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San Diego, CA 92101
(619) 744-0760

Criminal Justice Legal Foundation

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.

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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

Presiding Justice Greenwood
Sixth District Appellate Court
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MEMO

TO: Heather Anderson
Michael Giden

CC: Presiding Justice Dennis M. Perluss, Chair of the Proposition 66 Rules Working Group
Presiding Justice Manuel A. Ramirez
Presiding Justice Kathleen E. O'Leary
Bob Lowney
Deborah Collier-Tucker

FROM: Administrative Presiding Justice, Mary J. Greenwood
Court of Appeal, Sixth Appellate District

DATE: 7/31/2018

RE: Request for Informal Feedback from APJAC Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty−Related Habeas Corpus Proceedings

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I thank the Proposition 66 Rules Working Group for their work on the proposed rules concerning appointment of counsel in death penalty-related habeas corpus proceedings.

I join in the comments made by my colleague Justice McConnel on behalf of the Fourth District, with the following additional comments.

- Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?

Response: No. I agree with the majority of the working group that the rule should not impose such a requirement.

As Administrative Presiding Justice of the Sixth District Court of Appeal, I take no position on the lawful interpretation of Government Code section 27706 or *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858. I do offer the following based on my experience as the Chief Defender of the Santa Clara County Public Defender Office from 2005 to 2012, where I administered both the Public Defender and Alternate Defender Office.

In practice, capital defendants at the trial level are almost invariably represented by the Public Defender or, if the Public Defender declares a conflict, its ethically walled ancillary office, such as the

Alternate Defender. Competent post trial habeas and appellate review requires an evaluation of the performance of trial counsel. As a result, the Public Defender and its ancillary offices would be required to declare a conflict in all but the very exceptional case.

The only potential mechanism for appointment of the Public Defender in capital habeas cases would be through the establishment of a separate, ethically walled office for habeas appointments under the Public Defender's administration. Even under these circumstances, the likelihood of conflicts discovered *after* appointment would be high – evidence related to capital defendants often includes the use of informants and other jail house witnesses whose testimony cross pollinates in multiple cases. Such delayed discovery of conflicts within the institutional office would disqualify all the attorneys in the organization, and would occasion significant delays inconsistent with the underlying intent of Proposition 66.

Additionally, an institutional office would be far more expensive than the appointment of private counsel. Public defender offices provide high quality defense at a low cost, but the fiscal benefit is dependent on a high case volume. Ancillary ethically walled institutional offices that provide salary and benefits to attorneys become less cost effective when the lawyers represent very few clients, as would be the case in capital habeas representation. Public Defender Offices in major urban areas often have one cost effective ancillary Alternate Defender Office, but default to private attorney panel appointments if neither office can legally accept representation of a defendant.

Because of the likelihood of delay inherent in identifying legal conflicts, and because of the high cost associated with the appointment of the Public Defender, the appointment of private attorneys, less burdened by the issues of legal conflicts, is the more appropriate mechanism in these habeas proceedings.

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: August 24, 2018

Re: SP 18-13 - Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings

The below comments to SP 18-13 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, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 13-15 of the Invitation to Comment.

Responses to Selected Requests for Specific Comments:

Prioritization and Appointment

- *Should courts prioritize the appointment of counsel for the oldest judgments of death?*

Yes, the rules should require that courts prioritize appointment of habeas corpus counsel for the oldest death judgments. Currently, thirty-nine persons sentenced to death have waited over twenty years for appointment of habeas counsel and the necessary funding to pursue post-conviction relief. Thirteen different California counties entered the death judgments against these persons, including Los Angeles County (nine judgments), Orange County (five judgments), Riverside (five judgments), and San Bernardino (four judgments). In light of the large number of individuals waiting many years for the appointment of habeas counsel, fairness and equity – for both the persons sentenced to death and the families of crime victims waiting for resolution of these cases – demand that California courts prioritize the oldest death judgments for appointment of counsel. The appointment of habeas counsel to newly death-sentenced persons may result in legal challenges to the appointment process and cause further delays in the appointment of counsel and progress of habeas corpus cases.

- *For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a petition is pending before the Supreme Court from those that do not have a petition pending before the Supreme Court?*

The rule should not distinguish or exclude cases in which a habeas corpus petition is pending before the California Supreme Court for the purpose of appointment prioritization. Priority for appointment should be given to the oldest judgments regardless of whether there is a petition pending. The Supreme Court and the superior courts should work in concert to ensure that qualified counsel is appointed to the oldest cases first. Although amended Government Code section 68662 provides that the superior courts shall offer and appoint habeas counsel, that provision provides no express timeframe for making appointments. Nor does it preclude the fair and just prioritization of all existing cases in which defendants have waited decades for the promised appointment of habeas corpus counsel. The amended statute contemplates such a coordinated approach by the Supreme Court and superior courts; amended section 68661(d) requires that the Supreme Court continue to be involved in the qualification and appointment of habeas counsel in that it requires the Court to make a final determination of attorneys to be included on the state-wide roster of counsel qualified to accept an appointment in a state habeas corpus proceeding.

In addition, the superior court should not be permitted to appoint habeas counsel to a habeas case that has already been initiated in the Supreme Court without the assent of that Court. The Supreme Court retains the inherent judicial power to appoint counsel in habeas corpus cases before it. *See In re Anderson*, 69 Cal. 2d 613, 632-34 (1968); *see also Briggs v. Brown*, 3 Cal. 5th 808, 848-54 (2017) (discussing the inherent power of a court to administer its proceedings). Given the longstanding shortage of qualified habeas counsel, and the fact that the automatic appeals of death-sentenced persons who have not been provided habeas counsel will continue to progress (and be rejected), persons whose appeals conclude before their habeas petition has been filed will continue to file initial petitions in the California Supreme Court under *In re Morgan*, 50 Cal. 4th 932 (2010). With the assistance of HCRC, the Supreme Court and the superior courts should track the persons in need of habeas counsel and appoint counsel to the oldest judgments whenever possible.

- *For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a Morgan petition is pending before the Supreme Court (as opposed to a petition filed by counsel, but for which there is not currently an attorney as a result of, for example, death or withdrawal of the attorney)?*

No, priority should be given to cases based on the oldest judgment regardless of whether

a full-counseled habeas petition is pending, a *Morgan* petition is pending, or no habeas petition has been filed.

- *Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long? Would 60 days be appropriate?*

No. As noted above, a superior court should not appoint counsel to a habeas case initiated in the California Supreme Court. The Supreme Court must affirmatively relinquish its jurisdiction and inherent judicial power to appoint counsel in habeas cases initiated in the Supreme Court before a superior court judge can appoint habeas counsel.

- *Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*

Yes, the proposed rules should require the appointment of no fewer than two qualified habeas counsel to each death-sentenced person, in accordance with the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1 – except when a qualified entity (e.g., the Habeas Corpus Resource Center or the California Appellate Project) is appointed as habeas counsel. In addition, the shortened one-year timeframe for the filing of an initial habeas petition under Penal Code section 1509(c) demands the appointment of at least two habeas counsel. A single attorney will not be able to complete the extensive work required to file a professionally adequate habeas petition in one year and effectively represent his or her client in the habeas proceeding.

- *Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*

No. In cases where the public defender represented the defendant at trial, the public defender must not accept the habeas corpus appointment. Similarly, where the public defender declared a conflict prior to the trial, neither the public defender nor alternative defender will be normally available. It makes little sense to include a rule that requires a court to routinely conduct an act that will rarely, if ever, lead to the appointment of unconflicted counsel.

- *Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*

Yes, superior courts should be required to designate an assisting entity or counsel for private appointed counsel. Historically, the assistance provided by an assisting entity or

counsel has been vital to ensuring that private counsel have access to appropriate training, resources, and expert advice throughout their representation of death-sentenced persons.

- S*hould the proposal designate a specific assisting entity (e.g., CAP-SF)?*

Yes, the proposed rules should designate the California Appellate Project-San Francisco (CAP-SF) as the default assisting entity because of its decades-long experience providing assistance to private counsel in habeas cases. Designating HCRC as the default assisting entity would be problematic for at least three reasons: First, HCRC enabling legislation (Gov't Code § 68661) makes it unclear as to whether HCRC may perform the full breadth of duties expected of an assisting entity; second, in contrast to CAP-SF, HCRC provides direct representation to condemned inmates and adding this responsibility to HCRC attorneys would reduce the number of cases in which HCRC would be able to provide direct representation; third, unlike CAP-SF, HCRC has only very minimal experience providing such assistance to private counsel.

Regional Committees and Vetting of Attorney Qualifications

- *Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*

Yes, regional panel committees should be formed to vet attorneys for inclusion on a statewide panel of qualified attorneys from which superior courts may appoint habeas counsel. Similar panel committees of subject-matter experts are used successfully by federal courts in California to recruit and vet counsel for appointment in federal capital habeas cases. The regional panel committees should be able to more effectively recruit counsel from their geographic areas than a centralized statewide vetting authority. The regional panel committees also will distribute the burden for vetting potential habeas counsel.

- *Should it be mandatory that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience? If yes, how many of the three?*

Yes, it is necessary that the attorneys on the regional panel committees have subject-matter expertise in order to properly vet and evaluate the panel applicants. The federal court committees include such attorneys. All of the required attorney members of the committees should have experience representing death-sentenced persons in habeas corpus proceedings. If the chair of a regional committee deems it necessary that the panel include a member without subject-matter expertise, the chair may appoint that individual as an advisory member.

- *Should the proposed rule specify who is responsible for appointing members of the committee? If yes, should it be the chair of the committee?*

Yes. Given Government Code section 68661(d)'s requirement that the Supreme Court be the final arbiter of who may be included on a roster of attorneys qualified to accept capital habeas corpus appointments, it makes sense that the Chief Justice or her designee work in concert with each committee chair to appoint the committee members.

- *Should the proposed rule require that the attorney members be selected from among those nominated by the attorney groups? Or should the proposed rule require the chair to select the attorney groups from which it wants to draw members and let the groups designate an attorney?*

The chair of the regional committee should select the attorney groups from which it will draw members and let the groups designate an attorney for membership on the committee.

- *Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? If yes, is a three-year term appropriate?*

Yes. Given that the Chief Justice and Chair should work in concert to determine the members of the committee (see above), it makes sense to include in the rule a three-year term as a default, along with language that makes it clear that members serve at the pleasure of the Chief Justice and the committee Chair.

- *Should the regional habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?*

No. The regional panel committees should not be authorized by rule to divest themselves of their responsibility to recruit and vet qualified counsel.

- *Should the rule require committees to provide for procedures for the removal and replacement of its own members?*

A rule seems unnecessary. Just as the Chief Justice and Chair should work in concert to determine the members of the committee (see above), in the event that a committee member is unwilling or unable to fulfill their responsibility, the Chief Justice and Chair can simply remove the nonfunctioning member.

- *Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*

No. In the event that a local superior court judge wishes to appoint a particular attorney who is not on the statewide panel, the judge need simply refer the attorney to the panel for vetting. We would support a rule requiring expedited consideration of any such referral by a superior court judge.

- *If a court determines that an attorney is qualified pursuant to a local rule, should that qualification be provisional, pending approval of a regional committee?*

Yes. The ultimate determination of qualification rests with the Supreme Court (Gov't Code § 68661(d)). The committee panels will be comprised of designees of the Chief Justices. No final qualification determination should occur at the superior court level.

Cost and Implementation Matters

- *Would the proposal provide cost savings? If so, please quantify.*

No. The process for recruiting, qualifying, and appointing counsel requires time and the expenditure of resources. Over the past few years, very few habeas appointments have been made. Any effort to recruit, qualify and appoint more habeas attorney necessarily will increase the amount of time and money spent on this endeavor.

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
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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

Comments on Appointment of Counsel - Death Penalty Habeas Corpus Proceedings

Submitted by Becky Dugan, Chair of PJ Committee- Rules and Forms

1) Yes, courts should prioritize appointments of counsel for the oldest judgments. Allowing flexibility makes sense, but there does not seem to be another equitable way todo it.
2) 25 judgments is an arbitrary number, but as good as any, especially since another 20 will be right behind it. Most judgments will come out of just a few counties anyway.
3) Yes, the superior court judge should be authorized to appoint counsel if the Supreme Court has not acted. 60 days should be enough time for the Supreme Court to respond to the Superior Court. The point of the proposition is to speed up the processing of the appeals and the Supreme Court should not have an indeterminate time to respond.
4) No- the rules should not include a proposal as to how many attorneys should be appointed to initiate a petition. Each set of facts will vary widely. An attorney could request additional help if he/she thinks it necessary.
5) Judges should be required to request the Public Defender if it makes sense to do so. In other words, they would not be appointed if they represented the defendant at trial because of the likelihood of "incompetent counsel" claims. However, there may be times where a private counsel represented the defendant at trial. If so, appointing the PD would make sense. The court should screen the case to see if appointing the PD would be appropriate.
6) Superior Courts should be designating an entity to assist and support private counsel. The obvious problem, as with every part of this proposal, is what agency is going to pay for such an entity. The proposal should not designate a specific assisting entity unless the State intends to fund such an entity. It would then make sense not to re-invent the wheel and use CAP-SF, which already has the experience.
7) Yes, there should be a mandatory form for appointment. That way, counsel will know what to supply to the committee and multiple requests for further information will not have to be sent. The form looks good and seems to have the required fields.
8) Regional committees could assist or slow the process down. Many courts, such as San Bernardino and Riverside, will be fighting for the same limited set of attorneys. However, a regional committee may be able to assist in widening the pool of available counsel. As log as the Superior Court is not limited to the counsel approved by the committee, having a committee should do more good than harm. They should not take on additional duties different than the ones specified, except maybe to assist in offering trainings, mentor attorneys, etc., to expand the pool.
9) The Proposed rule should NOT specify three year term. The community of judges and attorneys competent and interested in being on such a committee is quite small. Each committee should make its own rules based on the culture and availability in a particular region.
10) It should not be mandatory that attorneys on the committee have death penalty related experience. In some areas, you would probably have no qualified attorneys. However, they should have felony experience in appellate work. Again, different regions should be able to tailor their rules. The proposed membership makes sense.

11) Courts should MOST DEFINITELY be authorized to appoint attorneys who are not part of the State-wide panels. Each court generally knows its attorneys and their qualifications. If a court approves an appointment, there should not be a delay awaiting approval from the regional committee. Attorneys should be allowed to seek inclusion on any and all panels-local, regional and State. The form is adequate and should be mandatory for the reasons stated regarding the other form.
12) 45 days WOULD NOT provide adequate time for courts to prepare. This is an enormous undertaking. 90 days would be a minimum to begin implementation.

Thanks for all your hard work on this very onerous and complicated process.

Becky L. Dugan 7-19-18

EMBAJADA DE MÉXICO

Washington, DC
August 23, 2018

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

Re: SP 18-13, 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 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.

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. 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.

The proposal, SP 18-13, requests specific comments on two categories of questions: prioritization and appointment, and regional committees and vetting of attorney qualifications. Regarding prioritization and appointment, Mexico generally agrees that courts should prioritize appointment of counsel for the oldest judgments of death. Problems that occur with the passage of time, such as the inability to locate witnesses and the loss or destruction of records, can be especially challenging in the cases of Mexican nationals. In these cases, significant evidence is always located in Mexico, where record-keeping is much less consistent and standardized than in the United States and where the location of witnesses can be significantly more challenging. Especially in poor rural areas, where many of the defendants are from, witnesses cannot be located via property ownership records, cell phones, credit cards, vehicle registration, and other common methods used in the United States; investigators must rely instead on local residents' knowledge and memory, which inevitably deteriorates over time.

Mexicans under sentence of death in California without habeas counsel include individuals with death judgments more than 20 years old. These cases where the risk of lost evidence is greatest should be prioritized over newer cases. These risks exist regardless of whether a petition is pending before the Supreme Court.

As detailed in Mexico's comments on the companion proposal, SP 18-12, the representation of foreign nationals is a specialized type of representation, requiring specific skills and experience not necessary for capital habeas cases generally. A rule requiring the attempted appointment of a public defender could result in the required appointment of a public defender without the necessary specialized skills and experience over an available private attorney who would be much better qualified to handle the particular case.

Mexico's primary concern about the appointment of counsel is that, as currently drafted, the proposal does not account for the fact that certain cases—specifically, the cases of foreign nationals—will have specialized needs requiring the appointment of counsel with additional qualifications, as discussed in Mexico's comments on SP 18-12. To ensure that qualified counsel is appointed for each defendant, the roster of attorneys should be structured to include a sub-category of attorneys who are qualified by additional required training and experience to accept foreign national cases. Counsel should only be appointed to represent a foreign national if he or she has been determined to possess these additional qualifications. Including this specialized designation in the records of available attorneys would greatly assist in locating and appointing counsel who are qualified to represent particular defendants, especially because such attorneys are comparatively rare and are likely spread around the state.

The proposed rules, while appearing to recognize that certain cases will have specific needs apart from simply meeting the minimum qualifications,[2] create a much less formal system, whereby regional committees could, if asked, help superior courts match available counsel to particular cases, without any guidelines or requirements for this process. This proposal is not sufficient to ensure effective representation for all defendants. It neither requires that superior courts solicit such input nor guarantees that counsel so "matched" will actually be qualified to undertake the representation. Mexico fears that under the current proposal, counsel could be "matched" to a Mexican national case because he or she speaks some Spanish, even if he or she lacks fluency, knows nothing about Mexican culture, and has no experience whatsoever in representing foreign nationals. Or a local attorney could be appointed who meets the bare minimum qualifications for a death penalty habeas appointment, without even attempting to identify an attorney who could actually provide effective representation in that particular specialized case.

Importantly, the rules must not rely on the optional provision of informal advice, rendered without articulated standards, to ensure that counsel appointed to represent a foreign national is qualified to provide effective representation. They must do more than simply hope or assume appointments will be made only when an attorney fully qualified for a particular case is located; they must provide for the assessment of the specific necessary qualifications, and limit appointments in foreign national cases to attorneys so qualified.

This necessity informs Mexico's answers to several of the specific questions put forth in the proposal. For instance, Mexico does not support authorizing the appointment of attorneys who are not members of the statewide panel, as it is through their inclusion on this panel that qualified specialists may be identified and vetted; allowing appointments from outside of this panel could circumvent the requirement that counsel have the

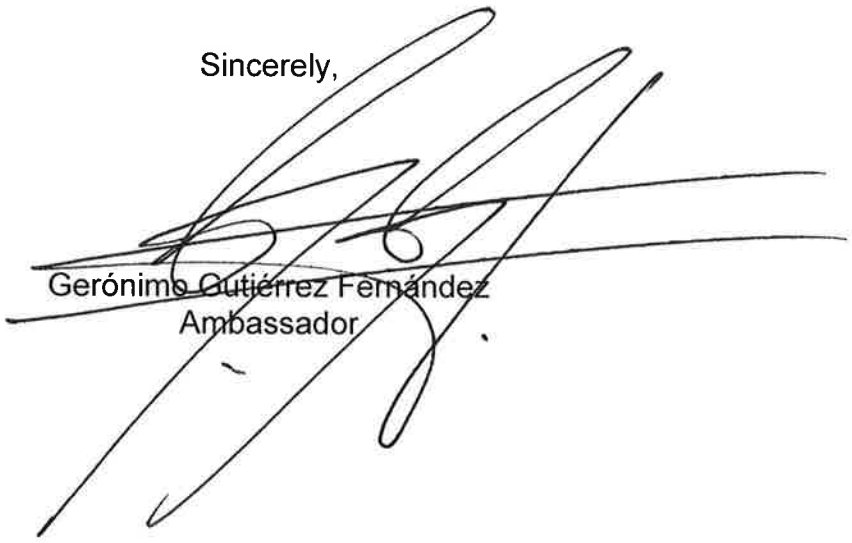
[2] For instance, the proposal recognizes that "making appointments may be more difficult in some cases than in others," p. 6, and explains that a committee may "assist in identifying an attorney on the panel who is suitable for the appointment," pp. 7-8.

necessary additional qualifications. Moreover, the proposed forms are not sufficient because they do not solicit the information necessary to determine if an attorney is qualified to represent foreign nationals or require, for appointment in such cases, that a court find counsel is qualified to represent a foreign national.

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.

Sincerely,



Gerónimo Gutiérrez Fernández
Ambassador

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August 24, 2018

Judicial Council of California
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invitations@jud.ca.gov

RE: Comments of Federal Defender Heather E. Williams, Eastern District of California regarding *Invitation to Comment SP18-13, Rules and Forms: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings.*

Dear Judicial Council members:

I write to comment on the proposed *Rules and Forms: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings, SP18-13.*

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 8.654(b):

We agree with the recommendation to prioritize appointing death penalty-related habeas corpus counsel first for those persons subject to the oldest death judgments.

According to the Executive Summary, 360 persons await capital habeas counsel appointments. Of these, about half have been waiting over ten years since sentenced to death. *Briggs v. Brown*, 3 Cal. 5th 808, 864 (2017) (Liu, J., concurring). Twenty-five persons whose cases originated in Eastern District counties have been waiting over ten

years for habeas corpus counsel appointments. Of those, two have been waiting for habeas corpus counsel appointment since 1996 – 22 years.

I cannot overstate how difficult it is to investigate and prepare a federal habeas petition in a case over a decade old. Witnesses are lost to death or faded memory. Documents are lost or destroyed. *See People v. Morales*, 2 Cal. 5th 523, 531 (2017) (delay in appointing death penalty-related habeas corpus counsel may result in loss of documents or evidence). The client's memory fades so he is unable to relate facts about the trial, the circumstances surrounding his charges, or his family, friends and childhood. Because the risk that critical evidence and information will be lost in the passage of time, we agree the rule should prioritize appointing death penalty-related habeas corpus counsel to those individuals who have waited the longest.

Proposed Rule 8.654(e)(1):

This proposed rule directs the sentencing court to appoint "a qualified attorney or attorneys to represent the person in death penalty-related habeas corpus proceedings."

This Proposed Rule envisions there will be cases for assigning only one attorney. We recommend the rule provide for appointing two attorneys in all death penalty-related habeas corpus proceedings.

Penal Code Section 1509(c), enacted as part of Proposition 66, creates a one-year statute of limitations for filing death penalty-related habeas corpus petitions. Prior to Proposition 66, no statute of limitations existed. A death penalty-related habeas corpus petition was considered timely filed when it was filed within three years of habeas corpus counsel appointment. Supreme Court of Cal., *Supreme Court Policies Regarding Cases Arising from Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1. This means an attorney accepting a death penalty-related habeas corpus petition appointment must complete three years' work now in one year. To compensate for the two-year loss, the Rule must appoint to every death-sentenced person two lawyers for death penalty-related habeas corpus proceedings to try to complete three year's work into one year.

The second reason to require superior courts to appoint two attorneys for each death penalty-related habeas corpus proceeding is to expand the eligible attorney pool. There will be attorneys who apply for the panel who are not qualified to serve as lead counsel yet can serve as associate counsel. *See* Proposed Rule 8.601(2), (3). By appointing less experienced lawyers as associate counsel, the Panel will provide those lawyers experience, so they may eventually accept lead counsel appointments.

Proposed Rule 8.654(e)(3):

A sentencing court must designate an assisting entity or counsel when that court appoints death penalty-related habeas corpus proceeding counsel. We recommend the

rule direct superior courts to appoint the California Appellate Project – San Francisco (CAP-SF) in the first instance, then, only if CAP-SF has a conflict of interest, look to appoint other entities.

Currently, no entity exists able and qualified to serve as an assisting entity other than CAP-SF. If the rule does not specify CAP-SF, it must state the assisting entity has statewide capital habeas corpus procedure experience and knowledge.

The Habeas Corpus Resource Center (HCRC) conceivably could provide such assisting entity support. However, Proposed Rule 8.654(e)(2) requires superior courts first determine whether HCRC can accept **counsel** appointment before considering other counsel. This Rule makes HCRC the default choice as **counsel** in death penalty-related habeas corpus proceedings. HCRC is limited by statute to 34 attorneys. Gov. Code § 68661(a). Implementing Proposed Rule 8.654(e)(2) will result in HCRC's appointment in many death penalty-related habeas corpus proceedings. Those 34 attorneys should not also be tasked with serving as the **assisting entity** to private counsel except in extraordinary circumstances, such as a CAP-SF conflict of interest.

The Office of the State Public Defender (OSPD) likewise should not be appointed as assisting entity absent extraordinary circumstances. OSPD's mission is to represent death-sentenced persons in their automatic appeals. Gov. Code § 15421(a). Its expertise is in appeals, not death penalty-related habeas corpus proceedings.

Proposed Rule 8.655(c):

This Rule should specify that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience.

My duties as Federal Defender include serving or designating someone form my Office to serve on the Eastern District Selection Board, which vets attorneys for federal capital habeas corpus case appointment. E.D. Local Rule 191(c). The Selection Board consists of five attorneys experienced in capital trial, appellate and/or habeas representation. From my experience with the Selection Board, I know how important it is that the people vetting attorneys for capital habeas cases themselves have capital habeas experience.

First, capital cases are different from other felony cases. *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) ("[D]eath is a punishment different from all other sanctions . . . ."). Unlike in a felony case, in a capital case, the attorney must investigate and present a defense against the charges and a guilty verdict while simultaneously must investigate and present a case in mitigation in case there is a guilty verdict. *See Florida v. Nixon*, 543 U.S. 175, 190-191 (2004) (a capital trial's two-phase structure must inform counsel's strategic calculus). Moreover, the attorney must present a coordinated defense, so the trial defense is consistent with the penalty phase

life sentence evidence and arguments. An attorney presenting a death penalty-related habeas corpus petition must understand how capital cases are different and be able to devise strategies maximizing the chance of vacating the judgment.

Second, habeas corpus is different from both trial and appellate proceedings:

> First, work on a capital habeas corpus petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both.

In re Morgan, 50 Cal. 4th 932, 938 (2010).

In addition to the specialized skill set needed, death penalty-related habeas corpus proceedings counsel must master the labyrinthine habeas corpus rules, which are designed to make it difficult for a petitioner to prevail. *See In re Gallego*, 18 Cal. 4th 825, 842 (1998) (Brown, J., concurring and dissenting) (describing procedural rules governing habeas corpus as "a Byzantine system of procedural hurdles, each riddled with exceptions and fact-intensive qualifications").

"'Habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.'" *In re Reno*, 55 Cal. 4th 428, 450 (2012), quoting *People v. Gonzalez*, 51 Cal. 3d 1179, 1260 (1990). "If a criminal defendant has unsuccessfully tested the state's evidence at trial and appeal and wishes to mount a further, collateral attack, 'all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.'" *Reno*, 55 Cal. 4th at 451, quoting *People v. Duvall*, 9 Cal.4th 464, 474 (1995), quoting *Gonzalez*, 51 Cal. 3d at 1260. An attorney representing a petitioner in death penalty-related habeas corpus proceedings must understand the law governing capital cases and the procedural rules governing the habeas corpus remedy.

Attorneys representing persons in death penalty-related habeas corpus proceedings in California state courts must also be familiar with the rules governing federal habeas corpus proceedings, lest an error made in state court prevents the petitioner from obtaining federal review of her death judgment. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (recognizing that state habeas counsel's error could preclude federal review of petitioner's claims); *Coleman v. Thomspon*, 501 U.S. 722, 753-754 (1991) (same).

> [Q]uality legal representation is necessary in capital habeas corpus proceedings in light of "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." [citation]. An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because "the complexity of our jurisprudence in this area . . .

> makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Murray v. Giarratano*, 492 U.S. 1, 14, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (Kennedy, J., joined by O'Connor, J., concurring in judgment); *see also id*., at 28 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("This Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").

McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (citation omitted).

The state court is the "principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). If petitioner's counsel does not conduct a thorough investigation and raise claims in accordance with state procedural rules, the petitioner will lose any chance of vindicating her constitutional rights in state or federal court. Because the stakes are so high, the committees must be staffed with attorneys experienced in state and federal capital habeas corpus litigation.

Finally, the committees are charged with assisting superior courts in matching qualified counsel with persons who need death penalty-related habeas corpus counsel. *See* Proposed Rule 8.655(d)(5). To be effective in that role, committee membership must include attorneys familiar with the cases, the clients, **and** the attorney applicants. Requiring committee members to also have capital habeas experience will help ensure the committee can recommend counsel appropriate for a particular case.

Thank you for this opportunity.

Very truly yours,

HEATHER E. WILLIAMS
Federal Defender, Eastern District of California

/hew

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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

From: Invitations
To: Invitations
Subject: Invitation to Comment: SP18-13
Date: Friday, August 24, 2018 5:17:51 PM

Proposal: SP18-13
Position: Agree if modified
Name: Kristin Traicoff
Title: Attorney
Organization: Law Office of Kristin Traicoff
Comment on Behalf of Org.: No
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Telephone:
Email: kristin@traicofflaw.com
COMMENT:
After reading these proposed rules, I remain confused as to how, if at all, they are intended to intersect with the current SUPREME COURT POLICIES REGARDING
CASES ARISING FROM JUDGMENTS OF DEATH (hereafter, "Policies"). In some regards, the proposed rules appear to supplant the Policies but in some respects (notably in describing the funding mechanisms), the proposed rules appear to imply (though I may be incorrect in this interpretation) that the Policies will remain in effect even when the Superior Court has assumed responsibility of appointment of counsel. As a solo practitioner who is currently appointed on a capital appeal and who contemplates requesting appointment on a capital habeas, I rely greatly on the detail provided in the Policies concerning numerous practical aspects of my appointment. Foremost among these are the funding guarantees and the detailed policies describing how funding is obtained. I simply could not operate my business without such certainty, and I have declined to represent capitally-sentenced inmates in other jurisdictions where the funding provisions are unclear. I believe the proposed rules need to make explicit to what extent, if at all, they intend to incorporate the Policies. I urge the Committee strongly to retain the Policies notwithstanding the proposed rule amendments, as the Policies provide a great deal of practical, detailed information governing counsel's appointments, which are simply wholly absent from the proposed rules and, without which, it is difficult to imagine a system of appointment functioning effectively.

Item SP18-13 Response Form

TITLE: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

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

Comments:

Please see the attached document.

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.

SP18-13 Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Request for Specific Comments:

Prioritization and Appointment

- **Should courts prioritize the appointment of counsel for the oldest judgments of death?**

  Yes, the courts should prioritize appointment of counsel for the oldest judgments of death.

- **Should the number of judgments for which HCRC sends out subsequent notices include 20 judgments or a different number?**

  It appears, based on the number of inmates awaiting habeas counsel, that notices for 20 judgments at a time are appropriate, so as not to inundate trial courts.

- **Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?**

  No. Judges should not be required to request that a public defender or alternate public defender accept representation prior to appointing private counsel.

Regional Committees and Vetting of Attorney Qualifications

- **Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty–related habeas corpus counsel?**

  Yes. The Los Angeles Superior Court is in favor of the regional committee approach to the vetting of counsel for habeas petitions.

- **Should regional committees take on duties different from those specified in the proposal?**

  No. Regional committees should not take on duties different from those specified in the proposal.

The working group also seeks comments from *courts* on the following cost and implementation matters:

- **Would the proposal provide cost savings? If so, please quantify.**

  No.

- **What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?**

  Implementation would require approximately four hours of training on new procedure, forms and CMS for current Judicial Assistants (JAs). The JA training program would then incorporate this into their criminal training module. Some staff time would be required to develop procedures and training materials.

  Development of a new CMS docket code would require minimal resources.

- **Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?**

  No. Eighteen months will be necessary for implementation considering the formation of regional committees.

- **How well would this proposal work in courts of different sizes?**

  The volume and number of cases will impact courts differently.

From: Invitations
To: Invitations
Subject: Invitation to Comment: SP18-13
Date: Friday, August 24, 2018 2:13:07 PM

Proposal: SP18-13
Position: Agree
Name: Susan D. Ryan
Title: Chief Deputy of Legal Services
Organization: Riverside Superior Court
Comment on Behalf of Org.: Yes
Address: 4050 Main Street
City, State, Zip: Riverside CA , 92502
Telephone:
Email:
COMMENT:
It is difficult to anticipate how smoothly the appointment process will work out in practice, nevertheless, it appears the proposed rules are generally well thought out and do a good job of balancing the various concerns in play.

We have two specific comments.

We are concerned about the language of proposed rule 8.654(d)(6) regarding the Habeas Corpus Resource Center's receipt of "information indicating that an appointment is for any reason not required." Though this provision may have drafted with pro-per parties in mind, there could be other circumstances where appointment may not be required or appropriate – like with an inmate who has become incapacitated. We suggest the rule include a mechanism whereby either the HCRC or the trial court can decide that, notwithstanding the age of the case, the particular inmate should be removed from the list.

In addition, proposed rule 8.655(d)(2)(B) provides that "each committee must accept applications only from attorneys whose principal place of business is within the appellate district." We suggest the language be modified so that it is clear whether this means that the committee may only accept applications from local attorneys, or whether it means that while the committee is only required to accept applications from local attorneys, it may choose to accept applications from non-local attorneys as well. While we suspect it is intended to mean the former in order to serve the goals of dividing the process equitably (after all, successful applicants go to the same statewide panel) and recruiting local attorneys, the language could be clearer.

Response to Request for Specific Comments:
Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? Yes, and 60 days seems appropriate.

Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel? No, in light of the fact that the public defender will most often have a conflict of interest.

Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? Yes; and a three-year term appropriate so long as membership can be renewed as appropriate. Membership should be staggered so that not all members leave the panel at the same time.

Should the rule require committees to provide for procedures for the removal and replacement of its own members? Yes.