



## Subject Text

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### Title

## Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Action Required)

### Summary

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

### Recommendation

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

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

3. Amend rule 8.605 to:
  - a. Limit its application to counsel appointed in automatic appeals, including by moving the qualifications standards for counsel in death penalty-related habeas corpus proceedings to a new rule;
  - b. Amend the statement of “purpose” to clarify that the qualifications are designed to promote competence and assist the court in appointing counsel;
  - c. Delete the definitions, which have been moved to proposed rule 8.601;
  - d. Modify the experience requirement to provide that the appeals may be on behalf of either party, but a subset of the appeals must be as counsel of record on behalf of the defendant;
  - e. Modify the training requirement to add that counsel may receive training credit for instruction if approved by the Supreme Court;
  - f. Clarify that the recent automatic appeals experience may satisfy “some or all” of the training requirement; and
  - g. Make other minor clarifying and conforming changes;
4. Adopt rule 8.652 to contain the qualifications standards for counsel to be included on a panel, appointed by the Supreme Court, or appointed by a superior court for a death penalty-related habeas corpus proceeding, including those standards currently set forth in existing rule 8.605, and specifically to:
  - a. Parallel the overall structure of the qualifications standards for automatic appeals in proposed rule 8.605 by describing required years of practice, case experience, knowledge, training, skills, and alternative experience;
  - b. Increase the current required length of time counsel has been in the active practice of law from four years to five;
  - c. Modify and streamline the existing case experience requirement by:
    - Providing that it may be satisfied by past service as counsel of record for a person in a death penalty-related habeas corpus proceeding;
    - Providing that it may be satisfied by any combination of completed appeals, jury trials, or habeas corpus proceedings (as opposed to the current requirement of a certain number of appeals or writs, and a certain number of jury trials or habeas corpus proceedings), on behalf of any party, but in at least two cases counsel must have filed habeas corpus petitions involving serious felonies;
    - Deleting the reference to “writ proceedings” so that writ proceedings other than habeas corpus proceedings no longer satisfy the case experience requirement; and
    - Deleting the requirement that at least one appeal or writ proceeding must involve a murder conviction;
  - d. Modify the existing training requirement by:
    - Increasing from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, of which at least 10 (increased from 6) hours must address death penalty-related habeas corpus proceedings;
    - Providing that the State Bar of California-not the Supreme Court-must approve the training courses; and
    - Mirroring the training requirement in proposed amended rule 8.605 to clarify that past capital case experience may satisfy “some or all” of the training requirement, and to provide that an instructor may receive credit for teaching a course upon approval of the entity vetting counsel’s qualifications;
  - e. Modify the existing skills requirement by retaining the requirement that recommendations, evaluations, and writing samples must be considered in an assessment of counsel’s qualifications, but clarifying that it is counsel’s responsibility to submit the necessary recommendations and writing samples, and the responsibility of the entity vetting counsel-which may be a committee or a superior court, as proposed in the separate council report regarding the appointment of death penalty-related habeas corpus counsel,

- or the Supreme Court-to obtain and review any applicable evaluations;
- f. Further modify the existing skills requirement to specify that the writing samples must include:
- At least two filed habeas petitions involving serious felonies; or
  - At least one filed death penalty-related habeas corpus petition; or
  - Habeas corpus petitions filed, if any, if counsel is qualifying for appointment under the alternative experience standard;
5. Renumber and reorganize several rules, chapters, and divisions in title 8 that do not relate to capital proceedings so as to permit the rules regarding posttrial capital proceedings in the Supreme Court and Courts of Appeal to be located together, for the most part, in division 2 (new rules adopted by the Judicial Council on September 21, 2018), specifically:
- a. Renumber chapters 11 and 12, in division 1, as chapters 1 and 2, respectively, and move these chapters to new division 3;
  - b. Renumber rule 8.495 as 8.720, rule 8.496 as 8.724, rule 8.498 as 8.728, and rule 8.499 as 8.730, and move these renumbered rules to new chapter 3 in new division 3;
  - c. Reserve for future use chapter 8 in division 1, which will have no rules under it once rules 8.495, 8.496, 8.498 and 8.499 are renumbered and moved; and
  - d. Renumber existing divisions 2-5 as divisions 4-7; and
6. Refer to the appropriate Judicial Council advisory body or bodies, for their consideration, commenters' suggestions for additional substantive changes to the rules that the working group was not able to consider at this time.