

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SP18-12

Title	Action Requested
Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings	Review and submit comments by Friday, August 24
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603	January 1, 2019
Proposed by	Contact
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Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing amendments to the rule relating to the qualifications of counsel in death penalty appeals and habeas corpus proceedings, including moving to a new rule the provisions regarding the qualifications of counsel in death penalty-related habeas corpus proceedings. These proposed rule changes are intended to 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.

Background

Proposition 66

On November 8, 2016, California voters 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 California. Among other things, the act modified Government Code section 68665, which addresses mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. The act amended this

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

section to direct the Judicial Council and the Supreme Court to “reevaluate the standards as needed to ensure that they meet the [following] criteria”:

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

The act also provided that the trial courts must offer and, unless the offer is rejected, appoint counsel for indigent persons in capital habeas corpus proceedings. (Official Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 66, § 16, p. 217.)

The act did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, in *Briggs v. Brown et al.* (S238309). On October 25, 2017, the Supreme Court’s opinion in the *Briggs* case ((2017) 3 Cal.5th 808) became final and the act took effect.

Existing qualifications rule

In 1997, the California Legislature passed former section 68655 of the Government Code (later renumbered to 68665), mandating that “[t]he Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.”¹ A committee consisting of Supreme Court and Judicial Council staff was formed to develop a proposed rule. The rule was ultimately adopted by both the Supreme Court and the Judicial Council and eventually became rule 8.605 of the California Rules of Court.

Before the act took effect, the Supreme Court generally was responsible for the appointment of counsel for both the direct appeal and habeas corpus proceedings in capital cases. As a result, rule 8.605 is currently written to establish the minimum qualifications for attorneys appointed by the Supreme Court in these proceedings. Rule 8.605 contains separate subsections addressing the qualification requirements for appellate counsel and habeas counsel. Each of these subsections requires attorneys to have completed at least four years of practice, to have specified criminal defense experience, and specified knowledge and training, and to demonstrate commitment and

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

proficiency at certain skills. The rule also includes a subsection containing “alternative qualifications,” which permits the Supreme Court to appoint attorneys who do not have the criminal defense experience, such as prosecutors or civil practitioners, providing they complete additional training and meet other requirements.

Working group process

Shortly after the act took effect, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the act. The council charged the working group with, among other things, considering whether changes to the qualifications of counsel appointed in death penalty direct appeals and habeas corpus proceedings are needed to address the act’s provisions.

A subgroup of working group members was formed to consider this topic and make recommendations to the full working group. In undertaking this task, the working group considered the criteria required by the act. (See page 2.) In considering these criteria, the working group made two general observations:

- Some of these criteria may pull in opposite directions in terms of qualification requirements. For example, meeting the standards needed to qualify for Chapter 154 may pull toward increasing some qualification requirements while the need to avoid unduly restricting the available pool of attorneys may pull toward reducing some qualification requirements.
- Chapter 154 addresses only the appointment and qualifications of counsel for state habeas corpus proceedings, not for the appeals in capital cases.²

As part of its consideration, the working group also examined, among other things, the qualification standards recommended by the American Bar Association, the qualification standards adopted by other jurisdictions, and the final rule issued by the United State Department

² As noted above, Chapter 154 establishes “fast-track” procedures for federal habeas corpus proceedings. State procedures for the appointment of counsel in capital habeas corpus proceedings must meet certain standards in order to qualify for these “fast-track” procedures: To certify a state is in compliance, the Attorney General must determine:

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; and

...

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(28 U.S.C., § 2265(a)(1)(A), (C); see also *id.*, § 2261(b).)

If a state’s standards of competency meet or exceed the benchmarks set by the federal government’s implementing regulations, those state standards are presumptively adequate under Chapter 154. However, the implementing regulations are also intended to be flexible and requires only that a state reasonably assure the availability and appointment of competent counsel; there is no requirement that the benchmark criteria be met in order to be certified by the Attorney General under Chapter 154.

of Justice regarding how to qualify under Chapter 154.³ This examination indicated that the existing requirements in rule 8.605 are generally similar to those in other jurisdictions—sometimes slightly lower and sometimes slightly higher, but never far from the typical qualifications required in other jurisdictions.

The working group also considered the actual qualifications of attorneys who have sought appointment by the Supreme Court in death penalty appeals and death penalty–related habeas corpus proceedings in recent decades. Working group members reported that, in practice, attorneys applying for appointment typically have training and experience that far exceed the existing minimum qualification standards set out in rule 8.605. Members indicated that it is rare that an attorney who has just met the requirements in rule 8.605 will seek appointment in a capital case. Many do not apply until they have decades of criminal law experience. As a result, it was not apparent to working group members that the existing qualification standards are restricting otherwise interested and competent counsel from seeking appointment in capital cases. Instead, members pointed to oft-cited reasons for attorneys choosing not to seek appointment in capital cases, including the level of compensation for this work,⁴ the lengthy time commitment required, and the nature of the cases.

Proposal

This proposal is intended to help fulfill the Judicial Council’s obligation under Proposition 66 to reevaluate the competency standards for the appointment of counsel in death penalty direct appeals and related habeas corpus proceedings.

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

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

³ U.S. Dept. of Justice, Certification Process for State Capital Counsel System, final rule [78 Fed. Reg. 58,160](#) et seq. (“Final Rule”); see also 28 C.F.R. § 26.20 et seq.

⁴ The Consolidated Appropriations Act of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to \$188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the Supreme Court is \$145, a rate that has not increased since 2012.

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

Another change is that, previously, virtually all death penalty–related habeas corpus petitions were filed in, and heard by, the Supreme Court. Thus, the Supreme Court vetted and appointed counsel for those proceedings.⁵ The court also designated an “assisting entity” or, where the entity had a conflict, experienced “assisting counsel” to provide appointed habeas corpus counsel with assistance. Now, the superior courts generally will hear the initial petitions and appoint counsel for those proceedings. Accordingly, the proposed rules on qualifications of counsel in capital habeas corpus proceedings refer not only to the Supreme Court—which will continue to vet counsel for its own appointments—but also to the committees and appointing courts that now will apply the qualification criteria when a superior court makes the appointment. The formation and duties of the proposed committees are discussed in separate rules regarding the appointment of habeas corpus counsel. Also discussed in separate rules is the designation of an assisting entity or counsel to provide assistance to appointed habeas corpus counsel. These rules (proposed rules 8.654 and 8.655) are still being developed by the working group and will be circulated for comment at a later date. However, this qualifications proposal presumes that habeas corpus counsel appointed by a superior court will continue to be assisted by an experienced entity or attorney designated for that purpose. Different minimum qualifications standards may be appropriate if, going forward, habeas corpus counsel are unassisted.

Below is a discussion of the specific proposed changes.

Definitions

The definitions set forth in existing rules 8.600(e)(2) and 8.605(c)(1–5) would be moved to a new proposed rule 8.601. These definitions would apply to both the rules regarding qualifications of counsel for death penalty appeals and for death penalty–related habeas corpus proceedings.

- The proposed new rule also defines “panel” and “committee,” two entities proposed and discussed in greater detail in separate rules regarding the appointment of capital habeas corpus counsel. “Panel” refers to the panel of attorneys eligible for appointment by a superior court in death penalty–related habeas corpus proceedings, and “committee” refers to the entity charged with vetting attorneys for inclusion in the panel. The committees and

⁵ 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.

panels are established under the proposed rules that are still being developed by the working group and will be circulated for comment at a later date.

- The proposal makes minor changes to existing definitions to reflect changes to habeas corpus proceedings (e.g., statutory right to appeal) enacted by Proposition 66.
- The definition of “associate counsel” and the advisory committee comment thereto are amended to delete, as unnecessary, additional language regarding the specific duties of counsel.

Qualifications of counsel for death penalty appeals

As noted above, the working group is proposing only a few changes to the qualifications standards for counsel on appeal, which are set forth in existing rule 8.605(d) and (f). Following are the two main substantive changes proposed:

Criminal appellate experience. The existing rule already permits the appointment of counsel who does not have the standard criminal defense experience. (See rule 8.605(f) [alternative qualifications].) Nevertheless, in reevaluating the qualifications, the working group concluded that, consistent with Proposition 66’s direction that the experience requirements for counsel not be limited to defense experience, the existing requirements should be amended to more clearly convey that experience for either party counts toward meeting the case experience requirements. Subdivision (d)(2) of existing rule 8.605 requires past experience serving as counsel of record for a defendant. The proposal amends that requirement to expressly state that service as counsel of record for *either* party satisfies part of the requirement, but a subset of that case experience (e.g., four of seven completed felony appeals) must still be as counsel of record for a defendant. The working group concluded that some defense experience was generally necessary to become reasonably proficient in issue-spotting and other defense skills on appeal. However, counsel without such experience could continue to qualify under the “alternative qualifications” provision, which would be retained in the proposed rule.

The working group would particularly appreciate comments about whether the proposed change is necessary when the existing rules already provide alternative ways to qualify for appointment that do not expressly require any prior defense experience, and whether the proposed number of cases on behalf of a defendant is appropriate.

Training. The existing rule states that past capital case experience may satisfy the training requirement. (See rule 8.605(d)(4), (f)(3).) The proposal clarifies that past capital case experience may satisfy “some or all” of the training requirement. The proposal also provides that an instructor may request and receive credit for teaching a course, subject to the Supreme Court’s approval.

Qualifications of counsel for death penalty–related habeas corpus proceedings

As noted above, this proposal creates a new rule to house the provisions regarding qualifications of counsel for death penalty–related habeas corpus proceedings. Specifically, subdivisions e–k, in existing rule 8.605, are either moved to or repeated in proposed new rule 8.652. Throughout, references to the Supreme Court are supplemented or replaced with references to the “committee” or the “court appointing counsel pursuant to a local rule as provided in rule 8.655,” and in one instance to “the California courts.”⁶ The overall structure of the qualifications standards remains the same as in rule 8.605, describing required years of practice, case experience, knowledge, training, skills, and alternative experience. However, this proposal refines or increases several of the requirements, as described in further detail below.

General legal experience. The proposal increases from four to five years the required length of time counsel has been in the active practice of law. (See existing rule 8.605(e)(1), (f)(1) [four years].) This change is proposed to be consistent with Proposition 66’s direction that the Judicial Council and the Supreme Court consider the standards needed to qualify under Chapter 154. Since the existing qualifications standards were adopted in 1997, the federal government has provided new guidance on the standards needed to qualify for Chapter 154. Now, standards of competency are presumptively adequate for purposes of Chapter 154 if they provide for the “[a]ppointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience.” (28 C.F.R. § 26.22(b)(1)(i).)

The working group would particularly appreciate comments about whether five years is appropriate or whether the number of years should be lower or higher.

Case experience. The working group is proposing several changes to the current requirements relating to prior case experience.

Combination of cases. Current rule 8.605 requires counsel to have past case experience consisting of a set number of appeals or writ proceedings, and a set number of jury trials or habeas corpus proceedings. The proposed new rule streamlines the case experience requirement by providing it may be satisfied by past service as counsel of record for a person in a death penalty–related habeas corpus proceeding in a California state court in which the petition has been filed. Alternatively, the case experience requirement may be satisfied by any combination of completed appeals, jury trials, or habeas corpus proceedings (either eight or five, total, depending on whether counsel has previously served as a “supervised attorney” in a capital habeas corpus proceeding), as long as at least two cases are habeas corpus proceedings involving a serious felony and the petitions have been filed. The proposal would no longer require service as counsel of record in a murder case. The proposal also deletes the reference to “writ proceedings”; as a result, writ proceedings other than habeas corpus proceedings would no

⁶ The existing rule requires, in part, that counsel have familiarity with the practices and procedures of the Supreme Court. The proposal replaces the reference to the Supreme Court with the California courts, to reflect that counsel may be practicing in the superior courts, the Courts of Appeal, and/or the Supreme Court.

longer satisfy the past case experience requirement. The working group reasoned that the broad category of “writ proceedings” (as opposed to the more specific “habeas corpus proceedings”) may include very simple writ petitions that are not particularly indicative of the level of skill and experience necessary in a death penalty–related habeas corpus proceeding.

The working group would particularly appreciate comments about the following:

- Whether permitting any combination of case experience—instead of set numbers of each type of case—is appropriate, because an attorney could then qualify for appointment without having completed any felony appeals or any jury trials;
- Whether other writ proceedings should be allowed to satisfy some part of the past case experience requirement; and
- Whether counsel should be required to have handled a murder case and, if so, in what context (e.g., trial, appeal, habeas corpus proceeding), or whether it is sufficient that the past cases involve serious felonies.

Habeas corpus experience. The working group concluded that prior habeas corpus experience was necessary now that counsel will face a one-year period in which to file a petition. Additionally, federal regulations and guidance on the standards needed to qualify for Chapter 154 emphasize the importance of prior postconviction litigation experience.⁷ The proposed rule therefore specifies that unless counsel has previously served as counsel of record in a death penalty–related habeas corpus proceeding, counsel must have filed petitions in at least two habeas corpus proceedings involving serious felonies.

The working group would particularly appreciate comments about whether requiring past experience filing two habeas corpus petitions is appropriate or whether that number should be higher or lower.

Service as counsel of record for either party. As with the qualifications for counsel for appeals, the working group concluded that, consistent with Proposition 66’s direction that the experience requirements for counsel not be limited to defense experience, the existing requirements for counsel for habeas corpus proceedings should be amended to more clearly convey that experience requirements are not limited to defense experience. Accordingly, the proposal amends the existing requirement to expressly state that service as counsel of record for *either* party satisfies part of the requirement, but counsel without prior death penalty–related habeas corpus experience must have filed at least two habeas corpus petitions involving serious felonies.

⁷ See Final Rule, 78 Fed.Reg. 58,169 (“Prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings.”); 28 C.F.R. § 26.22(b)(1)(i) (articulating benchmark for the appointment of counsel “who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience”).

The working group would particularly appreciate comments about whether the proposed change is unnecessary where the existing rules already provide alternative ways to qualify for appointment that do not expressly require any prior defense experience, and whether the proposed number and types of cases on behalf of a petitioner is appropriate.

Training. The proposal would increase from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, and would specify that at least 10 (increased from 6) of these hours must address death penalty–related habeas corpus proceedings. In addition, superior courts will generally have responsibility for appointing death penalty–related habeas counsel and therefore will be involved, either individually or as part of a regional committee, in determining whether counsel are qualified. Accordingly, the references to the Supreme Court approving training courses have been deleted. Instead, language borrowed from existing rule 4.117 (Qualifications for appointed trial counsel in capital cases) has been added requiring that the training must be approved for Minimum Continuing Legal Education credit by the State Bar of California. The proposed rule also provides that the training must be completed within three years before inclusion on a panel or, where applicable, appointed by a court. As with the proposed rule for counsel for appeals, this proposal clarifies that past capital case experience may satisfy “some or all” of the training requirement. The proposal also provides that an instructor may request and receive credit for teaching a course, subject to the approval of the entity vetting counsel’s qualifications.

The proposed 15 hours of training is similar to the training hours required of trial counsel in capital cases (15 hours of capital case defense training, within two years before appointment), and the training hours required in some other jurisdictions (e.g., Florida, which requires 12 hours devoted specifically to the defense of capital cases, and Pennsylvania, which requires 18 hours of training relevant to representation in capital cases). The working group concluded that the increased hours were warranted in light of the fact that counsel will have less time to learn on the job because the time to investigate and file an initial petition has been shortened to one year from the date of the order appointing counsel. The working group also concluded that increasing this requirement is unlikely to affect the pool of eligible counsel available for appointment because, in the experience of working group members, counsel who are interested in doing this type of work generally want to attend relevant trainings.

The working group would particularly appreciate comments about whether:

- The number of hours is appropriate;
- The trainings should be approved by the committee(s) responsible for vetting attorneys, or other entities, instead of or in addition to the State Bar;
- The trainings should be more recent, e.g., within two years before inclusion on a panel;
- Past case experience should continue to satisfy some or all of the training requirement; and
- Instructors of qualifying courses should automatically receive training credit and in what amount.

Skills. The proposal provides that the entity responsible for vetting counsel—which may be a committee or a superior court, as proposed in separate rules regarding the appointment of habeas corpus counsel, or the Supreme Court—must assess counsel’s skills and obtain and review any applicable evaluations. The proposal keeps the requirement for three writing samples, but also specifies that the samples must include two or more habeas corpus petitions involving serious felonies or one capital habeas corpus petition if the attorney filed that petition as lead counsel of record. Additionally, counsel who have served as associate or supervised counsel in a death penalty–related habeas corpus proceeding must submit the portions of the petition prepared by them.

The working group would particularly appreciate comments about whether the number and type of writing samples is appropriate.

Reorganization of other rules

This proposal includes the creation within the Appellate Rules of a new Division 2, which would focus on death penalty appeals and death penalty–related habeas corpus proceedings. The working group’s companion proposals relating to the record on appeal and appointment of counsel in death penalty–related habeas corpus proceedings⁸ include provisions in other chapters and articles within this proposed new division. This proposal addresses only the rules in Chapters 1–3 relating to qualifications of counsel.

Alternatives Considered

Organization of the qualification rules

The working group considered organizing the rules by the court hearing the proceeding. For example, the working group considered whether the proposed rule on qualifications of counsel in habeas corpus proceedings should be located in title 4 (Criminal Rules), which currently contains rules regarding procedures in habeas corpus proceedings in the superior courts, while the rules regarding the qualifications of counsel on appeal, including automatic appeals and appeals from the superior court’s denial of an initial habeas corpus petition, should be located in title 8 (Appellate Rules). The working group concluded that having the rules relating to capital review proceedings together in one place would make them easier to locate for practitioners and the courts.

Qualifications of counsel for death penalty appeals

The working group considered whether to automatically grant additional training credit to instructors. (E.g., for counsel appointed to represent a child in family law proceedings, rule 5.242(e)(4) provides for “1.5 hours of course participation credit for each hour of course instruction”; the State Bar provides that an instructor may claim actual speaking time multiplied

⁸ As noted above, the working group is still working on a proposal on the appointment of habeas counsel, which will be circulated at a later date.

by four for the first presentation.) The working group concluded that this determination should be left to the discretion of the Supreme Court.

Qualifications of counsel for death penalty–related habeas corpus proceedings

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

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

Training. The working group considered several alternatives with respect to training requirements for habeas corpus counsel:

- Whether trainings should be required to be approved by the committee(s) responsible for vetting attorneys, or by other entities. The working group concluded that having trainings approved state-wide by a single entity would promote uniformity and relieve the committees of an additional duty. (The State Bar already approves capital case defense training for trial counsel (rule 4.117(d)(6), (e)(6)).)
- Whether to leave the number of training hours unchanged. The working group concluded that the increased hours were warranted.
- Whether training should be completed within two years of inclusion on a panel. The working group concluded that three years was sufficiently recent.
- Whether to automatically grant additional training credit to instructors. The working group concluded that this determination should be left to the discretion of the entity responsible for vetting the attorney applicant (e.g., the Supreme Court, the committee(s), or a court appointing counsel pursuant to a local rule).

Implementation Requirements, Costs, and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases—in particular, those provisions generally giving to the superior courts responsibility for appointing counsel for, and hearing, initial death penalty—related habeas corpus petitions—will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. The specific rule changes proposed here, with respect to qualifications of

counsel, are unlikely on their own to impose any appreciable implementation requirements, costs, or operational impacts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the working group is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposal appropriately consider the criteria articulated by Proposition 66:
 - The qualifications needed to achieve competent representation;
 - The need to avoid unduly restricting the available pool of attorneys;
 - The standards needed to qualify for Chapter 154; and
 - That the experience requirements must not be limited to defense experience?
- Should service as counsel on behalf of any party satisfy the requirement for prior case experience, or should some or all of the experience be as counsel for the defendant/appellant/habeas corpus petitioner?
- Should counsel have more or fewer years of active practice?
- Should all counsel be required to attend a qualifying training, or should prior capital case experience continue to satisfy some or all of the training requirement?
- How many hours of training is appropriate?
- Should the trainings for habeas corpus counsel have to be approved by the State Bar and/or the committee responsible for vetting counsel?
- How recently before inclusion on a panel must counsel complete the training for habeas corpus counsel?
- Should instructors of qualifying trainings also receive participation credit? If so, in what amount? Should the decision be automatic or discretionary?
- What minimum combination of past case experience should counsel have before being eligible for appointment in a death penalty–related habeas corpus proceeding?
- Should counsel be required to have experience in habeas corpus proceedings, appeals, jury trials, and/or other writ proceedings?
- Should counsel seeking appointment in a death penalty–related habeas corpus proceeding have prior case experience relating to a murder charge or conviction?

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.
- 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.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

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

Attachments and Links

1. Cal. Rules of Court, rules 8.600, 8.601, 8.603, 8.605, and 8.652, at pages 13–29
2. Link A: Text of Prop. 66, pp. 212–222, and ballot description and arguments for and against Prop. 66, pp. 104–109, from Nov. 2016 *Official Voter Information Guide*, <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>
3. Link B: U.S. Dept. of Justice, Certification Process for State Capital Counsel System, final rule (Sept. 23, 2013), www.gpo.gov/fdsys/pkg/FR-2013-09-23/pdf/2013-22766.pdf

Rules 8.601 and 8.652 of the California Rules of Court would be adopted, 8.605 amended, and 8.600 amended and renumbered as 8.603, effective January 1, 2019, to read:

1 **Title 8. Appellate Rules**

2
3 DRAFTERS' NOTES ON PROPOSED DIVISION 2 of TITLE 8: This proposal includes
4 within the Appellate Rules the creation of a new division 2, which would focus on death
5 penalty appeals and death penalty–related habeas corpus proceedings. The working
6 group's companion proposals relating to the record on appeal and appointment of
7 counsel in death penalty–related habeas corpus proceedings include provisions in other
8 chapters and articles within this proposed new division. This proposal addresses only
9 the rules in chapters 1–3 relating to qualifications of counsel.

10
11 **Division 2. Rules Relating to Death Penalty Appeals and Death Penalty–Related**
12 **Habeas Corpus Proceedings**

13
14 **Chapter 1. General Provisions**

15
16 DRAFTERS' NOTES ON PROPOSED RULE 8.601: Proposed new rule 8.601 provides
17 definitions for the terms “panel” and “committee,” which are described in further detail in
18 proposed new rule 8.655. (Proposed rule 8.655 is part of a proposal that is being
19 circulated separately from this proposal.) The remaining terms and definitions in
20 proposed new rule 8.601 are taken from current rules 8.600(e)(2) and 8.605(c)(1–5).
21 Minor changes have been made to reflect that death penalty–related habeas corpus
22 proceedings will generally take place in the superior courts, and appeals of those
23 decisions will take place in the Courts of Appeal. The definition of “associate counsel”
24 and the related advisory committee comment would be amended to delete, as
25 unnecessary, additional language regarding the duties of counsel. In this rule and other
26 rules in this division, references to a “defendant” generally would be replaced with
27 references to a “person.”

28
29 **Rule 8.601. Definitions**

30
31 For purposes of this division:

- 32
33 (1) “Appointed counsel” or “appointed attorney” means an attorney appointed to
34 represent a person in a death penalty appeal, death penalty–related habeas
35 corpus proceedings, or an appeal of a decision in death penalty–related
36 habeas corpus proceedings. Appointed counsel may be either lead counsel or
37 associate counsel.
38
39 (2) “Lead counsel” means an appointed attorney or an attorney in the Office of
40 the State Public Defender, the Habeas Corpus Resource Center, the
41 California Appellate Project in San Francisco, or a Court of Appeal district

1 appellate project who is responsible for the overall conduct of the case and
2 for supervising the work of associate and supervised counsel. If two or more
3 attorneys are appointed to represent a person jointly in a death penalty appeal,
4 in death penalty–related habeas corpus proceedings, or in both classes of
5 proceedings together, one such attorney will be designated as lead counsel.
6

7 (3) “Associate counsel” means an appointed attorney who does not have the
8 primary responsibility for the case but nevertheless has casewide
9 responsibility. Associate counsel must meet the same minimum qualifications
10 as lead counsel.
11

12 (4) “Supervised counsel” means an attorney who works under the immediate
13 supervision and direction of lead or associate counsel but is not appointed by
14 the court. Supervised counsel must be an active member of the State Bar of
15 California.
16

17 (5) “Assisting counsel or entity” means an attorney or entity designated by the
18 appointing court to provide appointed counsel with consultation and resource
19 assistance. Entities that may be designated include the Office of the State
20 Public Defender, the Habeas Corpus Resource Center, the California
21 Appellate Project in San Francisco, and a Court of Appeal district appellate
22 project.
23

24 (6) “Trial counsel” means both the defendant’s trial counsel and the prosecuting
25 attorney.
26

27 (7) “Panel” means a panel of attorneys from which superior courts may appoint
28 counsel in death penalty–related habeas corpus proceedings.
29

30 (8) “Committee” means a death penalty–related habeas corpus panel committee
31 that accepts and reviews attorney applications to determine whether
32 applicants are qualified for inclusion on a panel.
33

34 **Advisory Committee Comment**

35
36 **Number (3).** The definition of “associate counsel” in (3) is intended to make it clear that
37 although appointed lead counsel has overall and supervisory responsibility in a capital case,
38 appointed associate counsel also has casewide responsibility.
39

40 **Chapter 102. Automatic Appeals From Judgments of Death**

41 **Article 1. General Provisions**

42
43

1 DRAFTERS' NOTE ON PROPOSED RULE 8.603: Current rule 8.600 would be
2 renumbered as rule 8.603 to accommodate proposed new rule 8.601, consolidating
3 definitions. The definition in current rule 8.600(e)(2) would be moved to rule 8.601.
4 Additionally, subdivisions (c), (d), and (e)(1) of current rule 8.600 would be moved to the
5 rules addressing record preparation. The Habeas Corpus Resource Center would be
6 added to subdivision (b), which identifies who must receive certified copies of a
7 judgment of death.

8
9 **Rule ~~8.600~~8.603. In general**

10
11 **(a) Automatic appeal to Supreme Court**

12
13 If a judgment imposes a sentence of death, an appeal by the defendant is
14 automatically taken to the Supreme Court.

15
16 **(b) Copies of judgment**

17
18 When a judgment of death is rendered, the superior court clerk must immediately
19 send certified copies of the commitment to the Supreme Court, the Attorney
20 General, the Governor, the Habeas Corpus Resource Center, and the California
21 Appellate Project in San Francisco.

22
23 **(c) Extensions of time**

24
25 ~~When a rule in this part authorizes a trial court to grant an extension of a specified~~
26 ~~time period, the court must consider the relevant policies and factors stated in rule~~
27 ~~8.63.~~

28
29 **(d) Supervising preparation of record**

30
31 ~~The clerk/executive officer of the Supreme Court, under the supervision of the~~
32 ~~Chief Justice, must take all appropriate steps to ensure that superior court clerks~~
33 ~~and reporters promptly perform their duties under the rules in this part. This~~
34 ~~provision does not affect the superior courts' responsibility for the prompt~~
35 ~~preparation of appellate records in capital cases.~~

36
37 **(e) Definitions**

38
39 For purposes of this part:

- 40
41 (1) ~~The delivery date of a transcript sent by mail is the mailing date plus five~~
42 ~~days; and~~

1 (2) “Trial counsel” means both the defendant’s trial counsel and the prosecuting
2 attorney.
3

4 DRAFTERS’ NOTES ON PROPOSED RULE 8.605: Following are the main substantive
5 changes proposed to the rule regarding qualifications of attorneys for death penalty
6 appeals:
7

- 8 • The stated purpose of the rule would be amended with language borrowed from
9 existing rule 4.117 regarding qualifications of trial counsel in death penalty cases.
- 10 • Consistent with Proposition 66’s direction that the experience requirements for
11 counsel not be limited to defense experience, the qualification addressing past
12 criminal appellate experience would be amended to state that service as counsel of
13 record for *either* party counts toward satisfying the requisite experience.
- 14 • The qualification addressing training would be amended to permit counsel to receive
15 credit for course instruction.
- 16 • Several subdivisions in current rule 8.605 would be moved to proposed new rules.
17 The definitions in subdivision (c) would be moved to proposed new rule 8.601,
18 above. The provisions addressing death penalty–related habeas corpus proceedings
19 would be moved to proposed new rule 8.652, in the proposed new chapter
20 addressing death penalty–related habeas corpus proceedings.
21

22 The remainder of the provisions regarding the qualifications of attorneys for death
23 penalty appeals would remain largely unchanged.
24

25 **Rule 8.605. Qualifications of counsel in death penalty appeals and habeas corpus**
26 **proceedings**
27

28 **(a) Purpose**
29

30 This rule defines the minimum qualifications for attorneys appointed by the
31 Supreme Court in death penalty appeals and habeas corpus proceedings related to
32 sentences of death. These minimum qualifications are designed to promote
33 competent representation and to avoid unnecessary delay and expense by assisting
34 the court in appointing qualified counsel. Nothing in this rule is intended to be used
35 as a standard by which to measure whether the defendant received effective
36 assistance of counsel. An attorney is not entitled to appointment simply because the
37 attorney meets these minimum qualifications.
38

39 **(b) General qualifications**
40

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

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

4
5 **(e) Definitions**

6
7 ~~As used in this rule:~~

8
9 (1) ~~“Appointed counsel” or “appointed attorney” means an attorney appointed to~~
10 ~~represent a person in a death penalty appeal or death penalty related habeas~~
11 ~~corpus proceedings in the Supreme Court. Appointed counsel may be either~~
12 ~~lead counsel or associate counsel.~~

13
14 (2) ~~“Lead counsel” means an appointed attorney or an attorney in the Office of~~
15 ~~the State Public Defender, the Habeas Corpus Resource Center, or the~~
16 ~~California Appellate Project in San Francisco who is responsible for the~~
17 ~~overall conduct of the case and for supervising the work of associate and~~
18 ~~supervised counsel. If two or more attorneys are appointed to represent a~~
19 ~~defendant jointly in a death penalty appeal, in death penalty related habeas~~
20 ~~corpus proceedings, or in both classes of proceedings together, one such~~
21 ~~attorney will be designated as lead counsel.~~

22
23 (3) ~~“Associate counsel” means an appointed attorney who does not have the~~
24 ~~primary responsibility for the case but nevertheless has casewide~~
25 ~~responsibility to perform the duties for which that attorney was appointed,~~
26 ~~whether they are appellate, habeas corpus, or appellate and habeas corpus~~
27 ~~duties. Associate counsel must meet the same minimum qualifications as lead~~
28 ~~counsel.~~

29
30 (4) ~~“Supervised counsel” means an attorney who works under the immediate~~
31 ~~supervision and direction of lead or associate counsel but is not appointed by~~
32 ~~the Supreme Court. Supervised counsel must be an active member of the~~
33 ~~State Bar of California.~~

34
35 (5) ~~“Assisting counsel or entity” means an attorney or entity designated by the~~
36 ~~Supreme Court to provide appointed counsel with consultation and resource~~
37 ~~assistance. Entities that may be designated include the Office of the State~~
38 ~~Public Defender, the Habeas Corpus Resource Center, and the California~~
39 ~~Appellate Project in San Francisco.~~

1 **(d)(c) Qualifications for appointed appellate counsel**

2
3 Except as provided in (d), an attorney appointed as lead or associate counsel in a
4 death penalty appeal must have at least satisfy the following minimum
5 qualifications and experience:

6
7 (1) California legal experience

8
9 Active practice of law in California for at least four years.

10
11 (2) Criminal appellate experience

12
13 Either:

14
15 (A) Service as counsel of record for ~~a defendant~~ either party in seven
16 completed felony appeals, including as counsel of record for a
17 defendant in at least four felony appeals, one of which was a murder
18 case; or

19
20 (B) Service as:

21
22 (i) Counsel of record for a defendant either party in five completed
23 felony appeals, including as counsel of record for a defendant in
24 at least three of these appeals; and

25
26 (ii) as Supervised counsel for a defendant in two death penalty
27 appeals in which the opening brief has been filed. Service as
28 supervised counsel in a death penalty appeal will apply toward
29 this qualification only if lead or associate counsel in that appeal
30 attests that the supervised attorney performed substantial work on
31 the case and recommends the attorney for appointment.

32
33 (3) Knowledge

34
35 Familiarity with Supreme Court practices and procedures, including those
36 related to death penalty appeals.

37
38 (4) Training

39
40 (A) Within three years before appointment, completion of at least nine
41 hours of Supreme Court–approved appellate criminal defense training,
42 continuing education, or course of study, at least six hours of which
43 involve death penalty appeals. Counsel who serves as an instructor in a

1 course that satisfies the requirements of this rule may receive course
2 participation credit for instruction, on request to and approval by the
3 Supreme Court, in an amount to be determined by the Supreme Court.
4

5 (B) If the Supreme Court has previously appointed counsel to represent a
6 ~~defendant~~ person in a death penalty appeal or a related habeas corpus
7 proceeding, and counsel has provided active representation within three
8 years before the request for a new appointment, the court, after
9 reviewing counsel’s previous work, may find that such representation
10 constitutes compliance with some or all of this requirement.
11

12 (5) Skills
13

14 Proficiency in issue identification, research, analysis, writing, and advocacy,
15 taking into consideration all of the following:
16

- 17 (A) Two writing samples—ordinarily appellate briefs—written by the
18 attorney and presenting an analysis of complex legal issues;
19
20 (B) If the attorney has previously been appointed in a death penalty appeal
21 or death penalty–related habeas corpus proceeding, the evaluation of
22 the assisting counsel or entity in that proceeding;
23
24 (C) Recommendations from two attorneys familiar with the attorney’s
25 qualifications and performance; and
26
27 (D) If the attorney is on a panel of attorneys eligible for appointments to
28 represent indigents in the Court of Appeal, the evaluation of the
29 administrator responsible for those appointments.
30

31 (e) **~~Qualifications for appointed habeas corpus counsel~~**
32

33 ~~An attorney appointed as lead or associate counsel to represent a person in death~~
34 ~~penalty–related habeas corpus proceedings must have at least the following~~
35 ~~qualifications and experience:~~
36

37 (1) ~~Active practice of law in California for at least four years.~~
38

39 (2) ~~Either:~~
40

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

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

3
4 (B) Service as counsel of record for a defendant in five completed felony
5 appeals or writ proceedings and service as supervised counsel in two
6 death penalty related habeas corpus proceedings in which the petition
7 has been filed. Service as supervised counsel in a death penalty related
8 habeas corpus proceeding will apply toward this qualification only if
9 lead or associate counsel in that proceeding attests that the attorney
10 performed substantial work on the case and recommends the attorney
11 for appointment.

12
13 (3) Familiarity with the practices and procedures of the California Supreme
14 Court and the federal courts in death penalty related habeas corpus
15 proceedings.

16
17 (4) Within three years before appointment, completion of at least nine hours of
18 Supreme Court approved appellate criminal defense or habeas corpus
19 defense training, continuing education, or course of study, at least six hours
20 of which address death penalty habeas corpus proceedings. If the Supreme
21 Court has previously appointed counsel to represent a defendant in a death
22 penalty appeal or a related habeas corpus proceeding, and counsel has
23 provided active representation within three years before the request for a new
24 appointment, the court, after reviewing counsel's previous work, may find
25 that such representation constitutes compliance with this requirement.

26
27 (5) Proficiency in issue identification, research, analysis, writing, investigation,
28 and advocacy, taking into consideration all of the following:

29
30 (A) Three writing samples—ordinarily two appellate briefs and one habeas
31 corpus petition—written by the attorney and presenting an analysis of
32 complex legal issues;

33
34 (B) If the attorney has previously been appointed in a death penalty appeal
35 or death penalty related habeas corpus proceeding, the evaluation of
36 the assisting counsel or entity in that proceeding;

37
38 (C) Recommendations from two attorneys familiar with the attorney's
39 qualifications and performance; and

40
41 (D) If the attorney is on a panel of attorneys eligible for appointments to
42 represent indigent appellants in the Court of Appeal, the evaluation of
43 the administrator responsible for those appointments.

1
2 **(f)(d) Alternative qualifications**

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

- 8
9 (1) The court finds that the attorney has extensive experience in another
10 jurisdiction or a different type of practice (such as civil trials or appeals,
11 academic work, or work for a court or prosecutor) for at least four years,
12 providing the attorney with experience in complex cases substantially
13 equivalent to that of an attorney qualified under ~~(d)(c) or (e)~~.
14
15 (2) Ongoing consultation is available to the attorney from an assisting counsel or
16 entity designated by the court.
17
18 (3) Within two years before appointment, the attorney has completed at least 18
19 hours of Supreme Court–approved appellate criminal defense or habeas
20 corpus defense training, continuing education, or course of study, at least
21 nine hours of which involve death penalty appellate or habeas corpus
22 proceedings. The Supreme Court will determine in each case whether the
23 training, education, or course of study completed by a particular attorney
24 satisfies the requirements of this subdivision in light of the attorney’s
25 individual background and experience. If the Supreme Court has previously
26 appointed counsel to represent a defendant in a death penalty appeal or a
27 related habeas corpus proceeding, and counsel has provided active
28 representation within three years before the request for a new appointment,
29 the court, after reviewing counsel’s previous work, may find that such
30 representation constitutes compliance with some or all of this requirement.
31

32 **(g) ~~Attorneys without trial experience~~**

33
34 ~~If an evidentiary hearing is ordered in a death penalty related habeas corpus~~
35 ~~proceeding and an attorney appointed under either (e) or (f) to represent a~~
36 ~~defendant in that proceeding lacks experience in conducting trials or evidentiary~~
37 ~~hearings, the attorney must associate an attorney who has such experience.~~
38

39 **(h)(e) Use of supervised counsel**

40
41 An attorney who does not meet the qualifications described in (c) or (d), ~~(e), or (f)~~
42 may assist lead or associate counsel, but must work under the immediate
43 supervision and direction of lead or associate counsel.

1
2 **~~(i)~~(f) Appellate and habeas corpus appointment**
3

- 4 (1) An attorney appointed to represent a ~~defendant~~ person in both a death penalty
5 appeal and death penalty–related habeas corpus proceedings must meet the
6 minimum qualifications of both ~~(d) and (e)~~ (c) or (d) and of (f) rule 8.652.
7
- 8 (2) Notwithstanding (1), two attorneys together may be eligible for appointment
9 to represent a ~~defendant~~ person jointly in both a death penalty appeal and
10 death penalty–related habeas corpus proceedings if the Supreme Court finds
11 that one attorney satisfies the minimum qualifications set forth in
12 subdivisions their qualifications in the aggregate satisfy the provisions of
13 both (d) and (e) (c) or (d), and the other attorney satisfies the minimum
14 qualifications set forth in of (f) rule 8.652.
15

16 **~~(j)~~(g) Designated entities as appointed counsel**
17

- 18 (1) Notwithstanding any other provision of this rule, both the State Public
19 Defender is qualified to serve as appointed counsel in death penalty appeals,
20 the Habeas Corpus Resource Center is qualified to serve as appointed counsel
21 in death penalty related habeas corpus proceedings, and the California
22 Appellate Project in San Francisco is are qualified to serve as appointed
23 counsel in both classes of proceedings death penalty appeals.
24
- 25 (2) When serving as appointed counsel in a death penalty appeal, the State Public
26 Defender or the California Appellate Project in San Francisco must not assign
27 any attorney as lead counsel unless it finds the attorney qualified under
28 ~~(d)~~(c)(1)–(5) or the Supreme Court finds the attorney qualified under ~~(f)~~(d).
29
- 30 ~~(3) When serving as appointed counsel in a death penalty related habeas corpus~~
31 ~~proceeding, the Habeas Corpus Resource Center or the California Appellate~~
32 ~~Project in San Francisco must not assign any attorney as lead counsel unless~~
33 ~~it finds the attorney qualified under (e)(1)–(5) or the Supreme Court finds the~~
34 ~~attorney qualified under (f).~~
35

36 **~~(k)~~ Attorney appointed by federal court**
37

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

1
2 **Advisory Committee Comment**
3

4 ~~**Subdivision (c).** The definition of “associate counsel” in (c)(3) is intended to make it clear that~~
5 ~~although appointed lead counsel has overall and supervisory responsibility in a capital case,~~
6 ~~appointed associate counsel also has casewide responsibility to perform the duties for which he or~~
7 ~~she was appointed, whether they are appellate duties, habeas corpus duties, or appellate *and*~~
8 ~~habeas corpus duties.~~
9

10
11 **Chapter 3. Death Penalty–Related Habeas Corpus Proceedings**
12

13 **Article 1. General Provisions**
14

15 **Rule 8.650. In general**

16 [To be drafted]
17

18 DRAFTERS' NOTES ON PROPOSED RULE 8.652: Subdivisions (e)–(k) in existing rule
19 8.605 address or otherwise are applicable to habeas corpus proceedings and thus have
20 been moved to, or repeated in, this proposed new rule 8.652, which addresses
21 qualifications for attorneys to be appointed in such proceedings. Subdivisions (a)–(b) in
22 proposed amended rule 8.605, regarding the purpose and general qualifications of
23 counsel, have been repeated here with minor amendments.
24

25 The qualifications requirements that would be moved from current rule 8.605 have been
26 modified in a number of ways:
27

- 28 • Under Proposition 66, superior courts generally will appoint counsel for, and hear,
29 initial death penalty–related habeas corpus petitions. The proposed rule thus reflects
30 that superior courts will be involved, either individually or as part of a regional
31 committee under separate proposed rule 8.655, in determining whether attorneys
32 meet the qualifications to serve as counsel. Due to a scarcity of applicants and other
33 factors, the Supreme Court does not maintain a list of qualified counsel awaiting
34 appointments in death penalty–related habeas corpus proceedings that would be
35 suitable for statewide use by the superior courts in making appointments. In light of
36 Proposition 66 making superior courts generally responsible for appointment of death
37 penalty–related counsel, it is not anticipated that the Supreme Court will be
38 developing such a list.
- 39 • As in proposed rule 8.605, above, the stated purpose of the rule would include
40 language borrowed from existing rule 4.117 regarding qualifications of trial counsel in
41 death penalty cases.
- 42 • Under the statutory amendments enacted by Proposition 66, the time to investigate
43 and file an initial petition is now one year from the order appointing counsel.

1 Previously, counsel typically had at least three years to perform this function. This
2 reduction in time means that counsel needs to have sufficient experience to be able
3 to quickly proceed with the necessary investigation and preparation of a habeas
4 corpus petition. Accordingly, some of the experience requirements would be
5 increased or modified to be more specific to habeas corpus proceedings.

- 6 ○ The proposed rule would require an attorney to have served as counsel of record
7 in one or more filed habeas corpus petitions (one in a capital case, at least two in
8 noncapital cases), whereas the existing rule does not require any prior habeas
9 corpus experience.
- 10 ○ Attorneys would be required to submit writing samples of their work in prior
11 habeas corpus proceedings.
- 12 ○ The training hours required have been increased. In addition, because the
13 superior courts will generally have responsibility for appointing death penalty–
14 related habeas counsel and will be involved, therefore, either individually or as
15 part of a regional committee under rule 8.655, in determining whether counsel
16 are qualified, references to the Supreme Court approving training courses have
17 been deleted. Instead, language borrowed from existing rule 4.117 has been
18 added requiring that the training must be approved for Minimum Continuing Legal
19 Education credit by the State Bar of California.
- 20 ● To be consistent with Proposition 66’s direction that the Judicial Council and the
21 Supreme Court consider the standards needed to qualify under Chapter 154 of Title
22 28 of the United States Code, the proposed rule would require counsel to have
23 practiced law for a minimum of five years, increased from four years. This change is
24 proposed to match, in part, current federal regulations that provide that standards of
25 competency are presumptively adequate to qualify under Chapter 154 if they provide
26 for the appointment of counsel who have been admitted to the bar for at least five
27 years and have at least three years of postconviction litigation experience.
- 28 ● The proposed rule also would streamline the case experience requirements. It would
29 provide that the requirement may be satisfied by service as counsel of record in one
30 filed death penalty–related habeas corpus petition on behalf of a petitioner *or* any
31 combination of completed appeals, jury trials, or habeas corpus proceedings, as long
32 as at least two cases are habeas corpus proceedings involving a serious felony,
33 where the petition has been filed. Service as counsel of record in a murder case
34 would no longer be required. Extraordinary writ proceedings other than habeas
35 corpus proceedings would no longer satisfy the case experience requirement.

36
37 **Rule 8.652. Qualifications of counsel in death penalty–related habeas corpus**
38 **proceedings**

39
40 **(a) Purpose**

41
42 This rule defines the minimum qualifications for attorneys to be appointed by a
43 court to represent a person in a habeas corpus proceeding related to a sentence of

1 death. These minimum qualifications are designed to promote competent
2 representation in habeas corpus proceedings related to sentences of death and to
3 avoid unnecessary delay and expense by assisting the courts in appointing qualified
4 counsel. Nothing in this rule is intended to be used as a standard by which to
5 measure whether a person received effective assistance of counsel. An attorney is
6 not entitled to appointment simply because the attorney meets these minimum
7 qualifications.

8
9 **(b) General qualifications**

10
11 An attorney may be included on a panel, appointed by the Supreme Court, or
12 appointed by a court under a local rule as provided in rule 8.655, only if it is
13 determined, after reviewing the attorney’s experience, training, writing samples,
14 references, and evaluations, that the attorney meets the minimum qualifications in
15 this rule and has demonstrated the commitment, knowledge, and skills necessary to
16 competently represent a person in a habeas corpus proceeding related to a sentence
17 of death. An appointed attorney must be willing to cooperate with an assisting
18 counsel or entity that the appointing court designates.

19
20 **(c) Qualifications for appointed habeas corpus counsel**

21
22 An attorney included on a panel, appointed by the Supreme Court, or appointed by
23 a court under a local rule as provided in rule 8.655, must satisfy the following
24 minimum qualifications:

25
26 (1) *California legal experience*

27
28 Active practice of law in California for at least five years.

29
30 (2) *Case experience*

31
32 The case experience identified in (A), (B), or (C).

33
34 (A) Service as counsel of record for a person in a death penalty–related
35 habeas corpus proceeding in which the petition has been filed in the
36 California Supreme Court, a Court of Appeal, or a superior court.

37
38 (B) Service as:

39
40 (i) Supervised counsel in two death penalty–related habeas corpus
41 proceedings in which the petition has been filed. Service as
42 supervised counsel in a death penalty–related habeas corpus
43 proceeding will apply toward this qualification only if lead or

1 associate counsel in that proceeding attests that the attorney
2 performed substantial work on the case and recommends the
3 attorney for appointment; and
4

5 (ii) Counsel of record for either party in a combination of at least five
6 completed appeals, habeas corpus proceedings, or jury trials in
7 felony cases, including as counsel of record for a petitioner in at
8 least two habeas corpus proceedings, each involving a serious
9 felony in which the petition has been filed. The combined case
10 experience must be sufficient to demonstrate proficiency in
11 investigation, issue identification, and writing.
12

13 (C) Service as counsel of record for either party in a combination of at least
14 eight completed appeals, habeas corpus proceedings, or jury trials in
15 felony cases, including as counsel of record for a petitioner in at least
16 two habeas corpus proceedings, each involving a serious felony in
17 which the petition has been filed. The combined case experience must
18 be sufficient to demonstrate proficiency in investigation, issue
19 identification, and writing.
20

21 (3) Knowledge
22

23 Familiarity with the practices and procedures of the California courts and the
24 federal courts in death penalty–related habeas corpus proceedings.
25

26 (4) Training
27

28 (A) Within three years before being included on a panel, appointed by the
29 Supreme Court, or appointed by a court under a local rule as provided
30 in rule 8.655, completion of at least 15 hours of appellate criminal
31 defense or habeas corpus defense training approved for Minimum
32 Continuing Legal Education credit by the State Bar of California, at
33 least 10 hours of which address death penalty habeas corpus
34 proceedings.
35

36 (B) Counsel who serves as an instructor in a course that satisfies the
37 requirements of this rule may receive course participation credit for
38 instruction, on request to and approval by the committee, the Supreme
39 Court, or a court appointing counsel under a local rule as provided in
40 rule 8.655, in an amount to be determined by the approving entity.
41

42 (C) If the attorney has previously represented a petitioner in a death
43 penalty–related habeas corpus proceeding, the committee, the Supreme

1 Court, or the court appointing counsel under a local rule as provided in
2 rule 8.655, after reviewing counsel’s previous work, may find that such
3 representation constitutes compliance with some or all of this
4 requirement.

5
6 (5) Skills

7
8 Demonstrated proficiency in issue identification, research, analysis, writing,
9 investigation, and advocacy. To enable an assessment of the attorney’s skills:

10
11 (A) The attorney must submit:

- 12
13 (i) Three writing samples written by the attorney and presenting
14 analyses of complex legal issues. If the attorney has previously
15 served as lead counsel of record for a petitioner in a death
16 penalty–related habeas corpus proceeding, these writing samples
17 must include one or more habeas corpus petitions filed by the
18 attorney in that capacity. If the attorney has previously served as
19 associate or supervised counsel for a petitioner in a death
20 penalty–related habeas corpus proceeding, these writing samples
21 must include the portion of the habeas corpus petition prepared
22 by the attorney in that capacity. If the attorney has not served as
23 lead counsel of record for a petitioner in a death penalty–related
24 habeas corpus proceeding, these writing samples must include
25 two or more habeas corpus petitions filed by the attorney as
26 counsel of record for a petitioner in a habeas corpus proceeding
27 involving a serious felony; and
28
29 (ii) Recommendations from two attorneys familiar with the
30 attorney’s qualifications and performance.

31
32 (B) The committee, the Supreme Court, or the court appointing counsel
33 under a local rule as provided in rule 8.655, must obtain and review:

- 34
35 (i) If the attorney has previously been appointed in a death penalty
36 appeal or death penalty–related habeas corpus proceeding, the
37 evaluation of the assisting counsel or entity in those proceedings;
38 and
39
40 (ii) If the attorney is on a panel of attorneys eligible for appointments
41 to represent indigent appellants in the Court of Appeal, the
42 evaluation of the administrator responsible for those
43 appointments.

1
2 **(d) Alternative experience**

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

- 7
8 (1) The committee or the Supreme Court finds that the attorney has extensive
9 experience as an attorney at the Habeas Corpus Resource Center or the
10 California Appellate Project in San Francisco, or in another jurisdiction or a
11 different type of practice (such as civil trials or appeals, academic work, or
12 work for a court or as a prosecutor), for at least five years, providing the
13 attorney with experience in complex cases substantially equivalent to that of
14 an attorney qualified under (c)(1) and (2).
- 15
16 (2) Ongoing consultation is available to the attorney from an assisting counsel or
17 entity designated by the court.
- 18
19 (3) Within two years before being included on a panel or appointed by the
20 Supreme Court, the attorney has completed at least 18 hours of appellate
21 criminal defense or habeas corpus defense training approved for Minimum
22 Continuing Legal Education credit by the State Bar of California, at least 10
23 hours of which involve death penalty habeas corpus proceedings. The
24 committee or the Supreme Court will determine whether the training
25 completed by an attorney satisfies the requirements of this subdivision in
26 light of the attorney's individual background and experience.

27
28 **(e) Attorneys without trial experience**

29
30 If an evidentiary hearing is ordered in a death penalty-related habeas corpus
31 proceeding and an attorney appointed under (c) or (d) to represent a person in that
32 proceeding lacks experience in conducting trials or evidentiary hearings, the
33 attorney must associate with an attorney who has such experience.

34
35 **(f) Use of supervised counsel**

36
37 An attorney who does not meet the qualifications described in (c) or (d) may assist
38 lead or associate counsel, but must work under the immediate supervision and
39 direction of lead or associate counsel.

1 **(g) Appellate and habeas corpus appointment**
2

3 (1) An attorney appointed to represent a person in both a death penalty appeal
4 and death penalty–related habeas corpus proceedings must meet the
5 minimum qualifications of both (c) or (d) and of rule 8.605.
6

7 (2) Notwithstanding (1), two attorneys together may be eligible for appointment
8 to represent a person jointly in both a death penalty appeal and death penalty–
9 related habeas corpus proceedings if it is determined that one attorney
10 satisfies the minimum qualifications stated in subdivision (c) or (d), and the
11 other attorney satisfies the minimum qualifications stated in rule 8.605.
12

13 **(h) Entities as appointed counsel**
14

15 (1) Notwithstanding any other provision of this rule, the Habeas Corpus
16 Resource Center and the California Appellate Project in San Francisco are
17 qualified to serve as appointed counsel in death penalty–related habeas
18 corpus proceedings.
19

20 (2) When serving as appointed counsel in a death penalty–related habeas corpus
21 proceeding, the Habeas Corpus Resource Center or the California Appellate
22 Project in San Francisco must not assign any attorney as lead counsel unless
23 it finds the attorney is qualified under (c) or (d).
24

25 **(i) Attorney appointed by federal court**
26

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