



JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS
COMMITTEE

www.courts.ca.gov/ruprometings.htm
ruprometings@jud.ca.gov

RULES AND PROJECTS COMMITTEE

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))

THIS MEETING IS BEING RECORDED

Date: Monday, July 2, 2018
Time: 4:00 p.m. to 5:00 p.m.
Location: Conference Call
Public Call-In Number 1-877-820-7831/Listen Only Passcode: 8254930

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. DISCUSSION AND POSSIBLE ACTION ITEMS

MINUTES

Item 1

Approval of Minutes: May 16, 2018, Joint RUPRO and E&P Committee Meeting (Action required – RUPRO Action Only)

JUDICIAL ADMINISTRATION

Item 2

Court Administration: Judicial Sabbaticals (amend rule 10.502) (Action required – recommend Judicial Council action)

Presenter: Susan McMullan

CRIMINAL- PROP 66 WORKING GROUP

Item 3

Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases (amend rules 8.610, 8.613, 8.616, 8.619, and 8.622; adopt rules 4.119, 4.230, 8.608, and 8.611; repeal

rule 8.625; adopt forms CR-600 and CR-605; and approve forms CR-601, CR-602, CR-603, and CR-604) (Action required – approval for circulation)

Presenters: Heather Anderson, Michael Giden, and Seung Lee

Item 4

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (adopt rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603) (Action required – approval for circulation)

Presenters: Seung Lee, Heather Anderson, and Michael Giden

III. ADJOURNMENT

Adjourn



JUDICIAL COUNCIL OF CALIFORNIA

EXECUTIVE AND
PLANNING COMMITTEE

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RULES AND PROJECTS COMMITTEE

EXECUTIVE AND PLANNING COMMITTEE

MINUTES OF OPEN MEETING WITH CLOSED SESSION

May 16, 2018

Teleconference

RUPRO Members Present: Justice Harry E. Hull (Chair); Judge Dalila C. Lyons (Vice-chair); Judges Kevin C. Brazile, Harold W. Hopp, and Stuart M. Rice; Mr. Jake Chatters, Ms. Rachel W. Hill, and Mr. Patrick Kelly

RUPRO Members Absent: Judge Scott M. Gordon

E&P Members Present: Justice Douglas P. Miller (Chair); Judge Marla O. Anderson, (Vice-chair); Justice Harry E. Hull, Jr.; Presiding Judges Patricia M. Lucas and Gary Nadler; Judges Stacy Boulware Eurie, Samuel K. Feng, and David M. Rubin; Ms. Kimberly Flener, and Ms. Gretchen Nelson

Others Present: Justice Marsha G. Slough, Ms. Amber Barnett, Ms. Roma Cheadle, Ms. Benita Downs, Ms. Lucy Fogarty, Ms. Angela Guzman, Ms. Eve Hershcopf, Ms. Donna Ignacio, Ms. Donna Newman, Mr. Patrick O'Donnell, Ms. Brandy Sanborn, Ms. Millicent Tidwell, Ms. Josely Yangco-Fronza, Ms. Laura Speed, and Mr. Zlatko Theodorovic

RULES AND PROJECT COMMITTEE

OPEN MEETING

Call to Order and Roll Call

The Rules and Projects (RUPRO) Committee chair called the meeting to order at 12:13 p.m. and requested a roll call, at which time the Executive and Planning (E&P) Committee chair also requested a roll call.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

Judicial Administration: Public Disclosure of Settlement Agreements (amend rule 10.500)
(Action required – recommend Judicial Council action)

Action: *The Rules and Projects Committee recommended approval on the Judicial Council's May 24, 2018, discussion agenda.*

ADJOURNMENT

There being no further RUPRO meeting business, the meeting was adjourned at 12:35 p.m.

EXECUTIVE AND PLANNING COMMITTEE

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:36 p.m.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

Continue Agenda Setting for the May 24, 2018 Judicial Council Meeting (Action Required)

Review additional reports for placement on the May 24 Judicial Council meeting agenda.

Action: The committee reviewed additional draft reports and continued to set the agenda for the Judicial Council meeting in May.

ADJOURNMENT

Prior to adjournment, the chair indicated the closed session was cancelled. There being no further E&P meeting business, the meeting was adjourned at 12:51 p.m.

CLOSED SESSION

Closed session cancelled

Approved by the Rules and Projects Committee on _____.

Approved by the Executive and Planning Committee on _____.

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: Juny 2, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*

Court Administration: Judicial Sabbaticals

Committee or other entity submitting the proposal:

Executive and Planning Committee

Staff contact (name, phone and e-mail): Susan McMullan, 415-505-8063, susan.mcmullan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by RUPRO: NA

Project description from annual agenda:

If requesting July 1 or out of cycle, explain:

This proposal should be effective immediately after council approves amendment to correct inaccuracies in the rule. The rule amendment will not affect courts.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
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REPORT TO THE JUDICIAL COUNCIL

For business meeting on July 20, 2018:

Title	Agenda Item Type
Court Administration: Judicial Sabbaticals	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 10.502	July 23, 2018
Recommended by	Date of Report
Hon. Douglas P. Miller, Chair Executive and Planning Committee	June 27, 2018
	Contact
	Susan McMullan, 415-865-7990 susan.mcmullan@jud.ca.gov

Executive Summary

Judicial sabbaticals are addressed in the Government Code and the California Rules of Court. Current law and practices provide for only unpaid sabbaticals on approval of the Judicial Council. Rule 10.502 of the California Rules of Court includes provisions that are inconsistent with current law and practices. The Executive and Planning Committee recommends amending rule 10.502 to make it consistent with current law and practices and to eliminate outdated provisions on paid sabbaticals and the role of the Judicial Sabbatical Review Committee.

Recommendation

The Executive and Planning Committee recommends that the Judicial Council, effective July 23, 2018, amend rule 10.502 to:

- Eliminate the reference to Government Code section 77213 in subdivision (b) and cross references elsewhere in the rule to the requirements of section 77213;
- Align the rule's language on the purpose of a sabbatical with that in section 68554;
- Eliminate the reference to the Judicial Sabbatical Review Committee and authorize the council's Executive and Planning Committee to evaluate and make recommendations to the council on judicial sabbatical applications; and

- Make stylistic changes and change the order of subdivisions (h) and (i).

The text of the amended rule is attached at pages 6–9.

Relevant Previous Council Action

The Judicial Council, effective January 1, 2003, adopted rule 10.502 (then numbered 6.151). Most recently, it was amended effective January 1, 2016 to make technical changes following the change of the name “Administrative Office of the Courts” to “Judicial Council.”

Analysis/Rationale

Current Government Code section 68554¹ authorizes the Judicial Council to provide for unpaid judicial sabbaticals. Specifically the council may “grant any judge a leave of absence” for up to one year to permit “study, which will benefit the administration of justice and the individual’s performance of judicial duties, upon a finding that the absence will not work to the detriment of the court.”

Former section 77213 established the Judicial Administration Modernization and Efficiency Fund (Mod Fund) and authorized use of money therein for paid judicial sabbaticals. It provided in part as follows:

(b) Moneys deposited into this fund shall be administered by the Judicial Council, subject to appropriation by the Legislature. . . . Moneys in the fund may be expended to implement projects approved by the Judicial Council. Expenditures may be made to vendors or individual trial courts that have the responsibility to implement approved projects. Projects approved by the Judicial Council may include, but are not limited to, the following:

(3) Retain experienced jurists by establishing incentives of enhanced judicial benefits and educational sabbaticals, not to exceed 120 days every five years, as provided for by rules of court adopted by the Judicial Council.

Few paid sabbaticals were granted under this authority and section 77213 was repealed in 2012, when legislation also amended section 77209, which effectively combined the former Mod Fund with the former Trial Court Improvement Fund to create the new State Trial Court Improvement and Modernization Fund as a successor to both.² No monies have been set aside in this fund for paid sabbaticals since the funds merged. The amended statutory language of section 77209 omitted the list of example projects (including judicial sabbaticals) that had been contained in former section 77213. These

¹ If not specified, further references to “section” are the Government Code.

² Senate Bill 1021

statutory changes created uncertainty as to whether the council could grant paid judicial sabbaticals.

Current rule 10.502 sets out the procedures for considering requests for both paid and unpaid judicial sabbatical and includes provisions that are no longer accurate due, in part, to the repeal of former section 77213. To bring the rule into conformity with the statute, this proposal would delete from rule 10.502, current subdivision (b)(1), which addresses paid sabbaticals as follows:

Eligibility

A judge or justice is eligible to apply for a paid sabbatical under Government Code section 77213 if:

- (A) He or she has served for at least seven years as a California judicial officer, including service as a subordinate judicial officer;
- (B) He or she has not taken a sabbatical within seven years of the date of the proposed sabbatical; and
- (C) He or she agrees to continue to serve as a judicial officer for at least three years after the sabbatical.

With this amendment, the rule would provide for unpaid sabbaticals only. Other references in rule 10.502 to section 77213 or to the requirements for a paid sabbatical, which are in subdivisions (c)(2), (f)(1), (g), (h), and (j), would also be deleted from the rule. In addition, minor stylistic changes would be made: Administrator Director of the Courts would be changed to “Administrative Director.” The order of current subdivision (h), on the judge’s report following a sabbatical leave, and subdivision (i), on retirement and benefits, would be switched for improved continuity.

The objective of sabbatical leave set out in subdivision (a) would be shortened and made consistent with section 68554, which provides that a sabbatical is for “study, which will benefit the administration of justice and the individual’s performance of judicial duties.” Accordingly, in subdivision (a) of rule 10.502, the words “teaching, research, or another activity” would be removed from the following sentence:

The objective of sabbatical leave is to facilitate study, teaching, research, or another activity that will benefit the administration of justice and enhance judges’ performance of their duties.

The rule currently contains several references to the Judicial Sabbatical Review Committee. This committee no longer exists and, because of the infrequency of requests for a judicial sabbatical, it is more efficient to transfer the duty to review and make recommendations on such

requests to a council standing committee. The Executive and Planning Committee is the most appropriate committee to take on this role. Subdivision (d), concerning the Judicial Sabbatical Review Committee would be amended to remove references to that committee and its membership and add that the Executive and Planning Committee will make recommendation to the council regarding sabbatical requests with support from the council’s human resources staff. Subdivision (e) would replace “Judicial Sabbatical Review” with “Executive and Planning.”

These changes are necessary to make the rule consistent with statutory changes and current practices concerning judicial sabbaticals. The rule amendment will make clear that only unpaid sabbaticals may be granted and accurately set out the responsibility for reviewing and recommending sabbatical requests.

Policy implications

The policy implications of this change are limited. Amending rule 10.502 to eliminate the ability of a judge or justice is eligible to apply for a paid sabbatical and to narrow the purpose of a sabbatical leave reflect statutory changes.

Comments

This proposal circulated during the winter invitation-to-comment cycle. One comment was submitted, from a trial court, which indicated agreement with the proposal and stated: “Consider proposing a legislative change to Government Code section 68554 to allow for sabbatical leave to not only facilitate study, but for teaching and research as well.” As noted above, the language in the current rule includes the words, “teaching, research, or another activity,” but this language is proposed to be removed to make the rule consistent with section 68554. If that statute were amended to allow broader purposes for a sabbatical, rule 10.502, of course, could be amended accordingly. In response to this suggestion, the Executive and Planning Committee will provide the comment to the council’s Policy Coordination and Liaison Committee for consideration.

Alternatives considered

No alternatives were considered, as the inconsistency between current rule 10.502 and current law and practices cannot be corrected by education, training, guidelines, or best practices.

Fiscal and Operational Impacts

This proposal has no implementation requirements or costs. Amending the rule to provide that paid judicial sabbaticals are not authorized is likely to have a positive operational impact by eliminating ambiguity.

Attachments and Links

1. Cal. Rules of Court, rules 10.502 at pages 5–8
2. Chart of comments, at page 9

Rule 10.502 of the California Rules of Court is amended, effective July 23, 2018, to read:

1 **Rule 10.502. Judicial sabbatical ~~pilot~~ program**

2
3 **(a) Objective**

4
5 Sabbatical leave is a privilege available to jurists by statute. The objective of
6 sabbatical leave is to facilitate study, ~~teaching, research, or another activity~~ that will
7 benefit the administration of justice and enhance judges' performance of their
8 duties.

9
10 **(b) Eligibility**

11
12 ~~(1) A judge or justice is eligible to apply for a paid sabbatical under Government~~
13 ~~Code section 77213 if:~~

14
15 ~~(A) He or she has served for at least seven years as a California judicial~~
16 ~~officer, including service as a subordinate judicial officer;~~

17
18 ~~(B) He or she has not taken a sabbatical within seven years of the date of~~
19 ~~the proposed sabbatical; and~~

20
21 ~~(C) He or she agrees to continue to serve as a judicial officer for at least~~
22 ~~three years after the sabbatical.~~

23
24 ~~(2) Any judge is eligible to apply for an unpaid sabbatical under Government~~
25 ~~Code section 68554.~~

26
27 **(c) Application**

28
29 ~~(1) An eligible~~ judge may apply for a sabbatical by submitting a sabbatical
30 proposal to the Administrative Director ~~of the Courts~~ with a copy to the
31 presiding judge or justice.

32
33 (2) The sabbatical proposal must include:

34
35 ~~(A) The judge's certification that he or she meets the eligibility~~
36 ~~requirements established in (b);~~

37
38 ~~(B) The beginning and ending dates of the proposed sabbatical;~~

39
40 ~~(C)~~ A description of the sabbatical project, including an explanation of how
41 the sabbatical will benefit the administration of justice and the judge's
42 performance of his or her duties; and
43

1 (DC) A statement from the presiding judge or justice of the affected court,
2 indicating approval or disapproval of the sabbatical request and the
3 reasons for such approval or disapproval, forwarded to the ~~Judicial~~
4 ~~Sabbatical Review~~ Executive and Planning Committee with a copy to
5 the judge.

6
7 **(d) ~~Judicial Sabbatical Review Committee~~ Review of applications**

8
9 ~~A Judicial Sabbatical Review~~ The Executive and Planning Committee will be
10 ~~appointed to~~ make recommendations to the Judicial Council regarding sabbatical
11 ~~requests, with support from the council's human resources staff.~~

12
13 (1) — *Membership*

14
15 ~~The committee must include at least one member from each of the following~~
16 ~~groups:~~

17
18 (A) — ~~Administrative Presiding Justices Advisory Committee;~~

19
20 (B) — ~~Trial Court Presiding Judges Advisory Committee;~~

21
22 (C) — ~~Court Executives Advisory Committee;~~

23
24 (D) — ~~Governing Committee of the Center for Judicial Education and~~
25 ~~Research;~~

26
27 (E) — ~~Judicial Service Advisory Committee; and~~

28
29 (F) — ~~California Judges Association (liaison).~~

30
31 (2) — *Staffing*

32
33 ~~The committee will be staffed by the Human Resources Division of the~~
34 ~~Administrative Office of the Courts and may elect its chair and vice chair.~~

35
36 **(e) Evaluation**

37
38 (1) The Administrative Director ~~of the Courts~~ must forward all sabbatical
39 requests that comply with (c) to the ~~Judicial Sabbatical Review~~ Executive and
40 Planning Committee.

1 (2) ~~The Judicial Sabbatical Review~~ Executive and Planning Committee must
2 recommend granting or denying the sabbatical request after it considers the
3 following factors:

4
5 (A) Whether the sabbatical will benefit the administration of justice in
6 California and the judge's performance of his or her duties; and

7
8 (B) Whether the sabbatical leave will be detrimental to the affected court.

9
10 (3) ~~The Judicial Sabbatical Review Committee may recommend an unpaid~~
11 ~~sabbatical if there is insufficient funding for a paid sabbatical.~~

12
13 **(f) Length**

14
15 ~~(1) A paid sabbatical taken under Government Code section 77213 may not~~
16 ~~exceed 120 calendar days. A judge may be allowed to add unpaid sabbatical~~
17 ~~time onto the end of a paid sabbatical if the purpose of the unpaid sabbatical~~
18 ~~is substantially similar to the work of the paid sabbatical.~~

19
20 ~~(2) An unpaid judicial sabbatical taken under Government Code section 68554~~
21 ~~may not exceed one year.~~

22
23 **(g) Ethics and compensation**

24
25 A judge on unpaid sabbatical leave is subject to the California Code of Judicial
26 Ethics and, ~~while on a paid sabbatical, must not accept~~ may receive compensation
27 and reimbursement for expenses for activities performed during that sabbatical
28 leave ~~but may receive reimbursement for the expenses~~ as provided in canon 4H(2)
29 of the Code of Judicial Ethics.

30
31 ~~**(h) Judge's report**~~

32
33 ~~On completion of a sabbatical leave, the judge must report in writing to the Judicial~~
34 ~~Council on how the leave benefited the administration of justice in California and~~
35 ~~on its effect on his or her official duties as a judicial officer.~~

36
37 ~~**(i)(h) Retirement and benefits**~~

38
39 ~~(1) A judge on a paid sabbatical leave under Government Code section 77213~~
40 ~~continues to receive all the benefits of office and accrues service credit~~
41 ~~toward retirement.~~

1 (2)—A judge on unpaid sabbatical leave under Government Code section 68554
2 receives no compensation, and the period of absence does not count as
3 service toward retirement. The leave does not affect the term of office.
4

5 ~~(h)~~**(i) Judge's report**
6

7 On completion of a sabbatical leave, the judge must report in writing to the Judicial
8 Council on how the leave benefited the administration of justice in California and on its
9 effect on his or her official duties as a judicial officer.
10

11 ~~(j)~~—**Judicial assignment replacement**
12

13 ~~Funds must be made available from the Judicial Administration Efficiency and~~
14 ~~Modernization Fund to allocate additional assigned judges to those courts whose~~
15 ~~judges' requests for paid sabbaticals are approved.~~

W18-01**Court Administration: Judicial Sabbaticals** (amend Cal. Rules of Court, rule 10.502)

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

	Commenter	Position	Comment	Response
1.	Superior Court of Los Angeles County	A	Consider proposing a legislative change to GC § 68554 to allow for sabbatical leave to not only facilitate study, but for teaching and research as well.	Because this is a suggestion for possible legislation, the committee will provide the comment to the council's Policy Coordination and Liaison Committee for consideration.

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

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (out of cycle)**

RUPRO Meeting: July 2, 2018

Title of proposal (*include amend/revise/adopt/approve + form/rule numbers*):

Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases (amend Cal. Rules of Court, rules 8.610, 8.613, 8.616, 8.619, and 8.622; adopt rules 4.119, 4.230, 8.608, and 8.611; repeal rule 8.625; adopt forms CR-600 and CR-605; and approve forms CR-601, CR-602, CR-603, and CR-604)

Committee or other entity submitting the proposal:

Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by RUPRO: The working group's charge is available at the "about" tab at:

<http://www.courts.ca.gov/prop66-working-group.htm>.

Project description from annual agenda:

If requesting July 1 or out of cycle, explain:

The working group is requesting that this proposal be circulated for public comment on a shortened special cycle - starting on July 2 and ending on July 23. The working group's goal is to present this proposal to the Judicial Council for adoption at its September meeting.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SP18-11

Title

Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases

Action Requested

Review and submit comments by Monday, July 23

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 8.610, 8.613, 8.616, 8.619, and 8.622; adopt rules 4.119, 4.230, 8.608, and 8.611; repeal rule 8.625; adopt forms CR-600 and CR-605; and approve forms CR-601, CR-602, CR-603, and CR-604

Proposed Effective Date
January 1, 2019

Contact

Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Proposed by

Proposition 66 Rules Working Group
Presiding Justice Dennis M. Perluss, Chair

Michael Giden, 415-865-7977
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Seung Lee, 415-865-5393
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Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing the adoption of several new rules and amendments to several existing rules relating to preparation of the record on appeal in death penalty cases. The working group is also proposing the adoption of two new mandatory forms and the approval of four new optional forms designed to assist in the record preparation process. These proposed rules and forms are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66 by making the record preparation process in death penalty cases more efficient.

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty (capital) cases in the California courts, many of which were focused on reducing the time spent on this review. Among other things, the act calls for the Judicial Council

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.

to adopt, within 18 months of the act’s effective date, “initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.” (Pen. Code, § 190.6(d).)

The act did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown et al.* (S238309). 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. 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 and time frames pertaining to record preparation in capital appeals.

Existing Record Preparation Procedures

The existing procedures for the preparation of the record on appeal in capital cases are established by a combination of state statutes—Penal Code sections 190.7–190.9, which were not modified by the act—California Rules of Court, and practice. The statutes specifically provide for the adoption of rules by the Judicial Council to address record preparation in capital cases:

- Penal Code section 190.7 provides that the Judicial Council may adopt rules “specifically pertaining to the content, preparation and certification of the record on appeal when a judgment of death has been pronounced.”
- Penal Code section 190.8, which addresses preparation and certification of the record in capital cases, provides that it “shall be implemented pursuant to rules of court adopted by the Judicial Council.”

These statutes, rules, and practices address the content of the record and establish a multistep process for preparing and certifying the record in capital cases:

- ***Contents of the record.*** Penal Code section 190.7 generally requires that all papers or other records filed or lodged with the courts and a transcript of all oral proceedings during either the pretrial or trial phase of a capital case must be included in the record on appeal. Rule 8.610 identifies the specific items and oral proceedings that must be included in the clerk’s and reporter’s transcripts in capital cases and addresses the format of the record. To ensure that transcripts of all of the oral proceedings are available, Penal Code section 190.9 requires that “in any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.” This section further requires the court to “assign a court reporter who uses computer-aided transcription equipment” to report these proceedings and requires that the

court reporter “prepare and certify a daily transcript of all proceedings commencing with the preliminary hearing.”

- ***Record of pretrial proceedings.*** Penal Code section 190.9 requires that when the prosecution notifies the trial court that the death penalty is being sought, the court must order the preparation of the record of all the pretrial proceedings. Unless an extension of time is granted, the court is required to certify this record no later than 120 days following the prosecution’s notification. Rule 8.613 implements this statutory procedure by, among other things, requiring counsel representing the parties during the pretrial proceedings to review this record to identify any errors or omissions and to request that the court make corrections or additions to the record. If any corrections or additions are requested, the court is required to hold a hearing, make the necessary changes, and certify this record of the preliminary proceedings as complete and accurate. This record is later incorporated in the full record when the record of the trial proceedings is completed.
- ***Certification of the record for completeness.*** If, following the trial, a death sentence is imposed, Penal Code section 190.8 requires that, within 30 days of the imposition of that sentence, the clerk of the superior court must provide trial counsel with copies of the clerk’s and reporter’s transcripts of the proceedings. Trial counsel are required to certify that they have “reviewed all docket sheets to ensure that the record contains transcripts for any proceedings, hearings, or discussions that are required to be reported and that have occurred in the course of the case in any court, as well as all documents required by this code and the rules adopted by the Judicial Council.” The trial court is required to hold “one or more hearings for trial counsel to address the completeness of the record and any outstanding errors that have come to their attention.” Rules 8.616 and 8.619 implement this statutory procedure by, among other things, requiring a procedure similar to that for the review of the record of the preliminary proceedings: trial counsel are required to review this record to identify any errors or omissions and to request that the court make corrections or additions to the record. Unless an extension of time is granted, the court is required to certify the record for completeness no later than 90 days after imposition of the death sentence.
- ***Certification of the record for accuracy.*** Penal Code section 190.8 provides that when appellate counsel for the defendant is retained or appointed, the trial court is required to send a copy of the record that was certified for completeness to that appellate counsel. The trial court may hold “one or more status conferences for purposes of timely certification of the record for accuracy, as set forth in the rules of court adopted by the Judicial Council.” Rule 8.622 implements this statutory procedure by, among other things, providing that within 90 days after the clerk delivers the record to appellate counsel, any party may request that the court make corrections or additions to the record and that, if such a request is made, the procedures for the court’s consideration are the same as for certifying the record for completeness. Unless an extension of time is granted, the court is required to certify the record for accuracy no later than 120 days after the record was delivered to appellate counsel.
- ***Review of the record by Supreme Court staff.*** Rule 8.622 provides that when the record is certified as accurate, the clerk must promptly send the original to the Supreme Court. Staff in

the Supreme Court clerk's office review the record to ensure that it is complete before it is accepted for filing.

The Proposal

This proposal is intended to help fulfill the Judicial Council's rule-making obligations under Proposition 66 by proposing rule changes and forms designed to make the record preparation process in capital cases more efficient.

Currently, the record on appeal in capital cases is not typically filed in the Supreme Court until approximately six years after the sentence of death is imposed. Close to two thirds of this time elapses between the imposition of the death sentence and the appointment of appellate counsel for capital defendants. As noted above, by statute the certification of the record for accuracy occurs only after appellate counsel is appointed, so the record preparation process does not move forward until that appointment takes place. However, approximately one third of this time, or, on average, approximately two years, elapses between the appointment of appellate counsel and the filing of the record. This is the period when the record is being reviewed and certified for accuracy and reviewed by the Supreme Court clerk's office prior to filing. In the experience of working group members, a substantial number of errors and omissions are identified and need to be corrected during these two stages of the record preparation process. It is also the experience of working group members that it is often more difficult to identify errors or omissions and make necessary corrections and additions at these stages because many years have typically elapsed since the proceedings in the trial court took place: memories have faded and the judges, attorneys, court reporters, and court staff who participated in the proceedings may no longer be available.

The proposal is based on two main premises:

- It is more efficient for necessary items to be identified and included in the record from the outset, rather than having to later identify that these items are missing and have counsel request their inclusion in the record and the court consider whether to grant this request; and
- Counsel participating in the capital pretrial and trial proceedings, the trial court judge, court reporters, and court staff are in the best position during and immediately after the proceedings to identify and include necessary items in the record, and to identify and correct errors in the record.

Within the proposed rules, there are drafters' notes in blue text. These notes identify the source for some of the language in the proposed rules and provide other information relevant to the proposed changes. These notes are published with this proposal to help readers better understand the proposal and will not be included any rules ultimately adopted by the Judicial Council.

Facilitating preparation of a complete and accurate record during the pretrial and trial proceedings

The working group is proposing the adoption of two new rules of court and several forms designed to facilitate the preparation of a complete and accurate record while the pretrial and trial proceedings are taking place. These proposed rules and forms are modeled on Superior Court of Los Angeles County local rule 8.40 and Appendix 8.A, which address record preparation in capital cases.

Mandatory checklists. To provide counsel with a reminder of their many record-related obligations in a capital case, proposed new rules 4.119 and 4.230 of the California Rules of Court would require defense counsel and prosecutors, at both the pretrial and trial stages in a case in which the death penalty might be imposed, to sign and submit to the court a checklist of these obligations. The court can then use this list to check off items that are required to be submitted to the court. Proposed new mandatory forms *Capital Case Attorney Pretrial Checklist* (form CR-600) and *Capital Case Attorney Trial Checklist* (form CR-605) would implement this requirement.

Obligations noted on the proposed forms include reviewing and correcting daily transcripts, ensuring that all exhibits offered are properly marked, complying with rule 2.1040 relating to electronic audio or audio and visual recordings presented to the jury, and preparing and submitting lists of appearances, exhibits, motions, and jury instructions (discussed below). The working group would particularly appreciate comments about whether counsel should be required to sign and submit these checklists. If so, should only primary counsel or all counsel sign and submit these checklists, or should these checklists instead be informational forms? The working group would also appreciate comments about whether any additional obligations should be identified on the proposed forms or whether any items on the proposed forms should be removed.

The proposed new rules would be placed in Title 4 of the California Rules of Court, the Criminal Rules, because they address trial counsel's responsibilities during the trial court proceedings. Separate forms are proposed for pretrial and trial proceedings because there are differences in the underlying procedures for preparation of the record in pretrial and trial proceedings that are reflected on the forms, and because the pretrial information would need to be submitted at a much earlier time in the record preparation process.

Lists of appearances, exhibits, motions, and jury instructions. To help the court and counsel identify documents and oral proceedings that need to be included in the record on appeal in capital cases, proposed new rules 4.119 and 4.230 would require counsel—during both the pretrial and trial stages in a case in which the death penalty might be imposed—to prepare lists of all the court appearances and motions that they make and all the exhibits they offer and, at the trial stage, jury instructions that they offer. By preparing these lists during the course of the proceedings, most of the documents and oral proceedings that are required to be included in the record on appeal will have been identified then and can be included when the record is initially

prepared. Proposed new optional forms *Capital Case Attorney List of Appearances* (form CR-601), *Capital Case Attorney List of Exhibits* (form CR-602), *Capital Case Attorney List of Motions* (form CR-603), and *Capital Case Attorney List of Jury Instructions* (form CR-604) could be used by counsel to comply with these requirements. The working group would appreciate comments on whether these forms should instead be mandatory forms.

These lists would also be available during counsels' and the court's initial review of the record shortly after the proceedings take place, allowing early corrections or additions to the record. The rules would require counsel to submit the lists relating to pretrial proceedings to the court within 21 days after notification by the clerk and the lists relating to trial proceedings within 21 days after imposition of the death sentence. The clerk would then send these lists to counsel when the clerk sends the reporter's transcripts.

The working group would particularly appreciate comments about whether counsel should be required to submit these lists of appearances, exhibits, motions, and jury instructions, about the proposed time frames for submission of these lists, and about proposed requirements for the clerk's notification and distribution responsibilities.

Review of daily transcripts. Penal Code section 190.8(c) provides:

During the course of a trial in which the death penalty is being sought, trial counsel shall alert the court's attention to any errors in the transcripts incidentally discovered by counsel while reviewing them in the ordinary course of trial preparation. The court shall periodically request that trial counsel provide a list of errors in the trial transcript during the course of trial and may hold hearings in connection therewith.

Corrections to the record shall not be required to include immaterial typographical errors that cannot conceivably cause confusion.

Currently, rule 8.619(a), regarding certifying the trial record for completeness, includes the following language that is designed to implement this statutory requirement:

During trial, counsel must call the court's attention to any errors or omissions they may find in the transcripts. The court must periodically ask counsel for lists of any such errors or omissions and may hold hearings to verify them.

Because this provision addresses a procedure that takes place during the trial of a capital case, the working group is proposing that this provision be moved from rule 8.619 and incorporated into proposed new rule 4.230. The working group is also proposing adding a new sentence calling attention to Penal Code section 190.8(c)'s provision regarding immaterial typographical errors. Currently, this provision does not specify a time frame for when counsel must call the court's attention to errors or omissions in a daily transcript. The working group would

particularly appreciate comments about whether the rule should set a specific time frame for counsel to do this.

Contents of the record

The working group is proposing additions and clarifications to the specific list of items that rule 8.610 requires be included in the clerk's transcript in capital cases. Proposed additions to this list include:

- Court-ordered diagnostic or psychological reports required under Penal Code section 1369;
- Visual aids used in presentations to the jury;
- The table correlating juror's names and identifying numbers; and
- Documents filed or lodged under Penal Code sections 987.9 or 987.2.

The working group would particularly appreciate comments about whether any of the proposed additions to the clerk's transcript are unnecessary and whether any other items should be included in the clerk's transcript.

The working group is also proposing that rule 8.622 be amended to provide that, at the time the record is reviewed for accuracy, counsel could request that copies of particular documentary exhibits be included in the clerk's transcript. Currently, rule 8.610(a)(3) provides that all exhibits are considered part of the record on appeal, but that they may only be transmitted to the court at the time oral argument is set, which is after all briefing is completed. The proposed amendment would allow copies of key documentary exhibits to be included in the clerk's transcript, making it easier for counsel to cite to these exhibits in their briefs. The working group would particularly appreciate comments about whether counsel should be required to provide a justification for requesting that documentary exhibits be included in the clerk's transcript at the certification for accuracy stage and, if so, whether the rule should include more specifics about what needs to be shown to justify such a request.

Record review and certification process

Meet and confer. The working group is proposing that the rules regarding the preparation and certification of the record of the pretrial proceedings, certification of the record for completeness, and certification for accuracy all be amended to include provisions requiring counsel to meet and confer regarding errors or omissions from the record. Each of these proposed provisions is slightly different in terms of timing, but all are designed to provide counsel with an opportunity to reach agreement regarding corrections or additions to the record before the court holds its hearing to certify the record. In rule 8.613, regarding the record of the preliminary proceedings, and rule 8.619, regarding certification of the record for completeness, the meet-and-confer session would be required to take place before a request for corrections or additions was filed. In rule 8.622, regarding certification of the record for accuracy, unless otherwise ordered by the

court, the meet-and-confer session would be required after a request for corrections or additions was filed.

The working group would particularly appreciate comments about whether a meet-and-confer requirement will be helpful at each of these stages in the record preparation process and about the timing of the meet-and-confer process.

Requests for corrections or additions. Currently, rules 8.613, 8.619, and 8.622 provide for each party to file a separate request for corrections or additions to the record. The working group is proposing adding a new sentence calling attention to Penal Code section 190.8(c)'s provision regarding immaterial typographical errors. This proposal would also add a provision to these rules encouraging parties to file joint requests. The working group would particularly appreciate comments about whether parties should be required to file a joint request.

Deadlines for review and certification. Currently, consistent with Penal Code section 190.8, rules 8.619 and 8.622 include provisions allowing for extension of the deadlines relating to review and certification of the record for completeness and accuracy. Both of these provisions permit extensions of time when the combined clerk's and reporter's transcripts exceed 10,000 pages and provide for a specified number of additional days for a specified number of additional pages of total record. The working group is proposing that these extensions based on the record size instead be built into the deadlines without the need for making a request. This would save time and resources for both counsel, who would otherwise need to prepare a request for an extension of time, and for the courts, that would otherwise need to consider these requests.

The working group is also proposing that the deadline for the trial judge to certify the record be measured from counsel's submission of a request for corrections or additions, rather than being measured from the imposition of the death sentence or the transmission of the record to appellate counsel. Under the current rule structure, the courts' certification deadline does not take into account any extension of counsel's time frames for reviewing or requesting corrections or additions to the record. In these circumstances, unless the judge receives an extension of time, there will not be sufficient time after submission of a request for corrections or additions for the judge to take the steps required for certification of the record under the rules.

Review of sealed records. The working group is proposing that, at the time appellate counsel review the record for accuracy, they also consider all the sealed records that they are entitled to access to determine whether there are records that no longer need to be sealed. Ordinarily, under rule 8.46, requests to unseal such records would need to be filed in the reviewing court. This proposal would allow such requests in capital cases to be filed in and considered by the trial court. Identifying records that can be unsealed would simplify preparation of the final record on appeal and also simplify the briefing involving such records.

Other proposed changes

New rule regarding juror-identifying information. Rule 8.610(c) currently contemplates that courts will comply with the requirements of rule 8.332, which addresses the removal of juror-identifying information from the record on appeal in noncapital felony cases. However, rule 8.332 does not clearly apply in capital cases. To prevent any confusion, the working group is proposing the adoption of new rule 8.611, which would specifically address the removal of juror-identifying information in the record on appeal in capital cases.

Repeal of rule 8.625. Rule 8.625 addresses the certification of the record in capital cases in which the judgment of death was imposed after a trial that began before January 1, 1997. The record on appeal in all cases that meet this criteria has already been prepared, so this rule is no longer needed. The working group is therefore proposing that this rule be repealed.

Alternatives Considered

The working group considered not proposing any changes to the rules relating to preparation of the record on appeal in capital cases, but concluded that it would help fulfill the Judicial Council's rule-making obligations under Proposition 66 to propose rule changes that might improve the efficiency of this procedure.

The working group also considered whether guidelines, best practices, or additional education or training for judicial officers, court staff, or counsel might be a substitute for some or all of the proposed rule changes or forms. The working group concluded, however, that these other approaches would be helpful supplements to the proposed rule changes and forms, but would not be a substitute for them.

The working group considered a number of different options for specific rule and form language when it was developing this proposal, including the following:

- *Permitting or requiring all documentary exhibits to be included in the clerk's transcript at the time the record is certified for accuracy.* Working group members noted that counsel appointed to represent a petitioner in a death penalty–related habeas corpus proceeding will need to review all of the exhibits from the trial court within a short time frame after their appointment, and that inclusion of the exhibits in the record on appeal would reduce the time needed to obtain copies of these exhibits. The working group ultimately concluded, however, that requiring a justification for inclusion of exhibits in the record on appeal was preferable because inclusion of exhibits that are not relevant to the issues on appeal would make these records even larger, increasing record review time and storage costs.
- *Making the use of a checklist optional or having an informational form, rather than making the submission of the form mandatory.* The working group concluded that a mandatory checklist would be most effective in ensuring that trial counsel are fully informed of and compliant with their record preparation obligations.

- *Making the preparation and submission of lists of appearances, exhibits, motions, and jury instructions optional rather than mandatory.* The working group concluded that making these lists mandatory would be most effective in facilitating the preparation of a complete and accurate record.
- *Not including a requirement for a list of jury instructions.* The working group considered relying on the jury instruction cover sheet that rule 2.1055 requires, rather than requiring counsel to submit prepare a list of written jury instructions submitted to the court. The working group concluded that preparation of this list would be beneficial as a way to cross-check that all cover sheets have been submitted and are complete.
- *Not including meet-and-confer requirements at some or all of the record certification stages.* The working group concluded that such meetings would likely facilitate reaching agreement on needed corrections and additions to the record and so decided to include these requirements at all stages of the record certification process.

Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases, particularly making the superior courts generally responsible for appointing counsel and hearing habeas corpus proceedings in these cases, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. These proposed rule changes and forms are likely to require some initial training for judicial officers and court staff, and they would impose new requirements on trial counsel from counties other than Los Angeles in terms of preparing and submitting the required checklists and lists of appearances, exhibits, motions, and jury instructions. However, it is anticipated that these rule changes and forms will reduce court and counsel costs in the long term by making the record preparation process more efficient.

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?
- Should counsel be required to sign and submit proposed *Capital Case Attorney Pretrial Checklist* (form CR-600) and *Capital Case Attorney Trial Checklist* (form CR-605), and if so, should only primary counsel or all counsel submit these checklists, or should these instead be informational forms?
- Should any additional obligations be identified in proposed *Capital Case Attorney Pretrial Checklist* (form CR-600) and *Capital Case Attorney Trial Checklist* (form CR-605), or should any items on the proposed forms be removed?
- Should counsel be required to submit lists of appearances, exhibits, motions, and jury instructions to the court and serve them on opposing counsel?
- Should use of proposed *Capital Case Attorney List of Appearances* (form CR-601), *Capital Case Attorney List of Exhibits* (form CR-602), *Capital Case Attorney List of*

Motions (form CR-603), and *Capital Case Attorney List of Jury Instructions* (form CR-604) be mandatory or should these be optional forms?

- Are the proposed time frames for submission of these lists to the court appropriate?
- Are the proposed requirements for the clerk to notify counsel that they must submit these lists and to distribute the lists to counsel with the reporter's transcript appropriate?
- Should the rules specify a timeframe for when counsel must call the court's attention to errors or omissions in a daily transcript?
- Are any of the proposed additions to the clerk's transcript unnecessary?
- Should any other items be included in the clerk's transcript?
- Will it be helpful for counsel to meet and confer during the process of certifying the record of the pretrial proceedings, certifying the trial record for completeness, and certifying the trial record for accuracy?
- When should the meet-and-confer process take place at each of these stages?
- Should counsel be required, rather than encouraged, to submit a joint request for corrections or additions to the record rather than separate requests?
- Should counsel be required to provide a justification for requesting that documentary exhibits be included in the clerk's transcript at the certification for accuracy stage and, if so, should the rule include more specifics about what needs to be shown to justify such a request?

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

- Cal. Rules of Court, rules 4.119, 4.230, 8.608, 8.610, 8.611, 8.613, 8.616, 8.619, 8.622, and 8.625, at pages 12–42
- Forms CR-600, CR-601, CR-602, CR-603, CR-604 and CR-605, at pages 43–56
- Link A: [Ballot description and arguments for and against Proposition 66 and text of proposition from November 2016 Official Voter Information Guide, beginning on pages 104 and 212, respectively, of linked document](#)

Rules 4.119, 4.230, 8.608, and 8.611 of the California Rules of Court would be adopted; rules 8.610, 8.613, 8.616, 8.619, and 8.622 would be amended; and rule 8.625 would be repealed, effective January 1, 2019, to read:

Title 4. Criminal Rules

Division 2. Pretrial

Chapter 1. Pretrial Proceedings

DRAFTERS' NOTES ON PROPOSED RULES 4.119 AND 4.230: The Proposition 66 Rules Working Group (working group) is proposing new rules 4.119 and 4.230 to implement requirements similar to those in the Los Angeles superior court local rule 8.40 and the related appendix. To help ensure that the record on appeal in a capital case is complete, the Los Angeles superior court local rule requires counsel in capital cases to prepare lists of appearances, exhibits, motions, and jury instructions. The appendix to the Los Angeles local rule also includes a checklist, divided by phase of the capital proceedings, which restates the requirements that counsel prepare lists of appearances, exhibits, motions, and jury instructions, as well as other requirements relating to capital case record preparation from applicable statutes and California Rules of Court. Counsel are required to sign the checklist and submit it to the court. The court then checks off items as they are completed. In addition, the appendix includes model logs/lists for use by counsel in complying with the local rule requirements.

This proposal includes requirement for a checklist and lists of appearances, exhibits, motions, and jury instructions similar to those used in Los Angeles. Proposed new rules 4.119 and 4.230 have been placed in Title 4 of the California Rules of Court, the Criminal Rules, because they address trial counsel's responsibilities during the trial court proceedings. The proposed rules, like Los Angeles superior court local rule 8.40, separately address the preparation of these lists during the pretrial and trial proceedings. Judicial Council forms for the checklist that could be used by counsel for lists of appearances, exhibits, motions, and jury instructions are also included in the proposal.

Proposed rule 4.119 addresses the submission of the checklist and preparation of lists of appearances, exhibits, and motions during the pretrial proceedings in capital cases. The phrase "cases in which the death penalty may be imposed" in subdivision (a) of this rule is modeled on the language of Penal Code section 190.9 and rule 8.613(b), regarding preparing and certifying the record of preliminary proceedings. Paragraph (c)(3) in rule 4.119 sets the deadline for submitting the lists to the court as no later than 21 days after the clerk sends notice to counsel to submit the lists. This formulation is modeled on California Rules of Court, rule 8.613(d) which sets the deadline for the court reporter to prepare the transcript of the preliminary proceedings in capital cases. Using this deadline is intended to result in these lists being available at the same time as the reporter's transcript so that counsel can review them both as part of reviewing the record of the preliminary proceedings for completeness and accuracy.

1 **Rule 4.119. Additional requirements in pretrial proceedings in capital cases**

2
3 **(a) Application**

4
5 This rule applies only in pretrial proceedings in cases in which the death penalty
6 may be imposed.

7
8 **(b) Checklist**

9
10 Within 10 days of counsel's first appearance in court, primary counsel for each
11 defendant and the prosecution must each sign and submit *Capital Case Attorney*
12 *Pretrial Checklist* (form CR-600).

13
14 **(c) Lists of appearances, exhibits, and motions**

15
16 (1) Primary counsel for each defendant and the prosecution must each prepare
17 the lists identified in (A)–(C):

18
19 (A) A list of that party's appearances during the pretrial proceedings. The
20 list must include the date of each appearance, the department in which
21 it was made, the name of counsel making the appearance, and a brief
22 description of the nature of the appearance. A separate list of Penal
23 Code section 987.9 appearances must be maintained under seal for each
24 defendant.

25
26 (B) A list of all exhibits offered by that party during the pretrial
27 proceedings. The list must indicate whether the exhibit was admitted in
28 evidence, refused, lodged, or withdrawn.

29
30 (C) A list of all motions made by that party during the pretrial proceedings.
31 The list must indicate all motions that are awaiting resolution.

32
33 (2) In the event of any substitution of attorney during the pretrial proceedings,
34 the relieved attorney must provide the lists of all appearances, exhibits, and
35 motions to substituting counsel within five days of being relieved.

36
37 (3) No later than 21 days after the clerk notifies trial counsel that it must submit
38 the lists to the court, counsel must submit the lists to the court and serve a
39 copy of all the lists except the list of Penal Code section 987.9 appearances
40 on all parties. Unless otherwise provided by local rule, the lists must be
41 submitted to the court in electronic form.

1 **Advisory Committee Comment**

2
3 **Subdivision (c)(1).** *Capital Case Attorney List of Appearances* (form CR-601), *Capital Case*
4 *Attorney List of Exhibits* (form CR-602), and *Capital Case Attorney List of Motions* (form CR-
5 603), may be used to comply with the requirements in this subdivision.

6
7 **Subdivision (c)(3).** Rule 8.613(d) requires the clerk to notify counsel to submit the lists of
8 appearances, exhibits, and motions.

9
10
11 DRAFTERS' NOTES ON PROPOSED NEW RULE 4.230: Proposed new rule 4.230
12 addresses the submission of the checklist and preparation of lists of appearances,
13 exhibits, motions, and jury instructions and other counsel responsibilities during the trial
14 in a capital case.

15
16 The first two sentences of subdivision (c) below are taken from current rule 8.619,
17 regarding certifying the trial record for completeness. The working group is proposing
18 that this content be moved from rule 8.619 and incorporated into new rule 4.230
19 because, like the preparation of lists of appearances, etc., it addresses a procedure that
20 is intended to take place during the trial of a capital case.

21
22 The last sentence in subdivision (c) is new and is based on the following sentence in
23 Penal Code section 190.8(c):

24
25 Corrections to the record shall not be required to include immaterial typographical
26 errors that cannot conceivably cause confusion.

27
28 Paragraph (d)(2) below provides that the deadline for submission of the lists to the court
29 is 21 days after imposition of the death judgment. This date is suggested so that the lists
30 can be delivered to counsel by the clerk along with the copies of the clerk's and
31 reporter's transcripts already delivered to counsel by the clerk. This will allow counsel to
32 use the lists when they are reviewing the record for completeness.

33
34 Subdivision (e) would require counsel to provide the court with copies of visual aids used
35 in presentations to the jury so that these can be included in the record on appeal.

36
37 **Division 3. Trials**

38
39 **Rule 4.230. Additional requirements in capital cases**

40
41 **(a) Application**

42
43 This rule applies only in trials in cases in which the death penalty may be imposed.

1
2 **(b) Checklist**
3

4 Within 10 days of counsel's first appearance in court, primary counsel for each
5 defendant and the prosecution must each sign and submit to the court *Capital Case*
6 *Attorney Trial Checklist* (form CR-605).
7

8 **(c) Review of daily transcripts by counsel during trial**
9

10 During trial, counsel must call the court's attention to any errors or omissions they
11 may find in the daily transcripts. The court must periodically ask counsel for lists of
12 any such errors or omissions and may hold hearings to verify them. Immaterial
13 typographical errors that cannot conceivably cause confusion are not required to be
14 brought to the court's attention or corrected.
15

16 **(d) Lists of appearances, exhibits, motions, and jury instructions**
17

18 (1) Primary counsel for each defendant and the prosecution must each prepare
19 the lists identified in (A)–(D).
20

21 (A) A list of that party's appearances. The list must include the date of each
22 appearance, the department in which it was made, the name of counsel
23 making the appearance, and a brief description of the nature of the
24 appearance. A separate list of Penal Code section 987.9 appearances
25 must be maintained under seal for each defendant. In the event of any
26 substitution of attorney at any stage of the case, the relieved attorney
27 must provide a log of all appearances to substituting counsel within five
28 days of being relieved.
29

30 (B) A list of all exhibits offered by that party. The list must indicate
31 whether the exhibit was admitted in evidence, refused, lodged, or
32 withdrawn.
33

34 (C) A list of all motions made by that party.
35

36 (D) A list of all jury instructions submitted in writing by that party. The list
37 must indicate whether the instruction was given, given as modified,
38 refused, or withdrawn.
39

40 (2) No later than 21 days after the imposition of a sentence of death, counsel
41 must submit the lists to the court and serve a copy of all the lists except the
42 list of Penal Code section 987.9 appearances on all parties. Unless otherwise

1 provided by local rule, the lists must be submitted to the court in electronic
2 form.

3
4 **(e) Copies of visual aids**

5
6 Primary counsel must provide the clerk with copies of any visual aids used in
7 presentations to the jury, including PowerPoint or other similar digital or electronic
8 presentations. If a visual aid is oversized, a photograph of that visual aid must be
9 provided in place of the original. For PowerPoint or other similar presentations,
10 counsel must supply both a copy of the presentation in its native format and
11 printouts showing the full text of each slide.

12
13 **Advisory Committee Comment**

14
15 **Subdivision (d).** *Capital Case Attorney List of Appearances (form CR-601), Capital Case*
16 *Attorney List of Exhibits (form CR-602), Capital Case Attorney List of Motions (form CR-603),*
17 *and Capital Case Attorney List of Jury Instructions (form CR-604) may be used to comply with*
18 *the requirements in this subdivision.*

19
20
21 DRAFTERS' NOTE ON DIVISION 2: This proposal includes the creation of a new
22 Division 2 within the Appellate Rules, which would focus on capital appeals and habeas
23 corpus proceedings related to death sentences. The division would begin with the
24 existing rules on capital appeals. The Working Group's companion proposals relating to
25 qualifications of counsel in capital appeals and habeas corpus proceedings and
26 appointment of counsel in capital habeas corpus proceedings include provisions in other
27 chapters and articles within this proposed new Division. This proposal addresses only
28 the rules in Chapter 1, Article 2, relating to the record on appeal.

29
30 **Title 8. Appellate Rules**

31
32 **Division 2. Rules Relating to Death Penalty Appeals and Habeas Corpus**
33 **Proceedings**

34
35 **Chapter 101. Automatic Appeals From Judgments of Death**

36
37 **Article 1. General Provisions * * ***

38
39 **Article 2. Record on Appeal**

40
41 **Rule 8.608. General provisions**

42 **Rule 8.610. Contents and form of the record**

1 **Rule 8.611. Juror-identifying information**

2 **Rule 8.613. Preparing and certifying the record of preliminary proceedings**

3 **Rule 8.616. Preparing the trial record**

4 **Rule 8.619. Certifying the trial record for completeness**

5 **Rule 8.622. Certifying the trial record for accuracy**

6 **Rule 8.625. Certifying the record in pre-1997 trials**

7
8
9 **DRAFTERS' NOTES ON PROPOSED RULE 8.608**

10 The provisions in this rule not new, they would be moved here from current rule 8.600(c),
11 (d) and (e).

12
13 **Rule 8.608. General provisions**

14
15 **(a) Supervising preparation of record**

16
17 The clerk/executive officer of the Supreme Court, under the supervision of the
18 Chief Justice, must take all appropriate steps to ensure that superior court clerks
19 and reporters promptly perform their duties under the rules in this article. This
20 provision does not affect the superior courts' responsibility for the prompt
21 preparation of appellate records in capital cases.

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

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

28
29 **(c) Delivery date**

30
31 The delivery date of a transcript sent by mail is the mailing date plus five days.
32
33

34 **DRAFTERS' NOTES ON PROPOSED AMENDMENTS TO RULE 8.610:**

35 In paragraph (a)(1), the working group is proposing additions to the specific list of items
36 that must be included in the clerk's transcript in capital cases. This is intended to reduce
37 attorney and court resources spent on augmentation motions by including in the record
38 items that are regularly needed in capital appeals. The language of the proposed
39 amendments and new subparagraphs below is based on the following:

- 40 • (D) is modeled on the language of rule 8.320 (b)(4), relating to the clerk's transcript
41 in noncapital felony cases;

- 1 • The proposed amendments to (E) would expand it to require inclusion in the
2 transcript of written communication between the court and parties, and also clarify
3 that written communication includes e-mails and texts;
- 4 • (J) is intended to address inconsistencies that working group members have
5 experienced with the inclusion of transcripts of witness statements in the clerk's
6 transcript.
- 7 • (P) is modeled on the language of rule 8.320(b)(13)(E), relating to the clerk's
8 transcript in noncapital felony cases;
- 9 • (Q) is intended to address inconsistencies that working group members have
10 experienced with the inclusion of visual aids in the clerk's transcript;
- 11 • (R) is intended to make more visible language regarding juror questionnaires, which
12 is now in the "catch-all" provision of current subparagraph (P) by moving it to a
13 separate subparagraph;
- 14 • (S) is intended to address inconsistencies that working group members have
15 experienced with the inclusion of the table correlating jurors' names and identifying
16 numbers in the clerk's transcript;
- 17 • (T) is modeled on the language of rule 8.1222 (b), relating to the clerk's transcript in
18 civil cases; and
- 19 • (U) is intended to address inconsistencies that working group members have
20 experienced with the inclusion of materials relating to defense requests for
21 investigation and expert costs in the clerk's transcript. The advisory committee
22 comment has also been amended to highlight that these documents are confidential
23 and that rules 8.45–8.47 govern the handling of such documents.

24
25 In paragraph (a)(3), the proposed amendment reflects proposed amendments to rule
26 8.622, which would permit documentary exhibits to be included in the clerk's transcript at
27 the time that the record is certified for accuracy. In subdivision (c), the amendment
28 reflects the proposed adoption of rule 8.611, below.

30 **Rule 8.610. Contents and form of the record**

31 32 **(a) Contents of the record**

- 33
34 (1) The record must include a clerk's transcript containing:
 - 35
36 (A) The accusatory pleading and any amendment.
 - 37
38 (B) Any demurrer or other plea.
 - 39
40 (C) All court minutes.

- 1 (D) All instructions submitted in writing, ~~each one~~ and the cover page
2 required by rule 2.1055(b)(2) indicating the party requesting ~~it~~ each
3 instruction, and any written jury instructions given by the court.
4
- 5 (E) Any written communication, including printouts of any e-mail or text
6 messages and their attachments, between the court and the parties, the
7 jury, or any individual juror or prospective juror.
8
- 9 (F) Any verdict.
10
- 11 (G) Any written opinion of the court.
12
- 13 (H) The judgment or order appealed from and any abstract of judgment or
14 commitment.
15
- 16 (I) Any motion for new trial, with supporting and opposing memoranda
17 and attachments.
18
- 19 (J) Any transcript of a sound or sound-and-video recording furnished to
20 the jury or tendered to the court under rule 2.1040, including witness
21 statements.
22
- 23 (K) Any application for additional record and any order on the application.
24
- 25 (L) Any written defense motion or any written motion by the People, with
26 supporting and opposing memoranda and attachments.
27
- 28 (M) If related to a motion under (L), any search warrant and return and the
29 reporter's transcript of any preliminary examination or grand jury
30 hearing.
31
- 32 (N) Any document admitted in evidence to prove a prior juvenile
33 adjudication, criminal conviction, or prison term.
34
- 35 (O) The probation officer's report. ~~and~~
36
- 37 (P) Any court-ordered diagnostic or psychological report required under
38 Penal Code section 1369.
39
- 40 (Q) Any visual aids used in presentations to the jury, including PowerPoint
41 and other similar digital or electronic presentations. If a visual aid is
42 oversized, a photograph of that visual aid must be included in place of

1 the original. For PowerPoint or other similar presentations, printouts
2 showing the full text of each slide must be included.

3
4 (R) Each juror questionnaire, whether or not the juror was selected.

5
6 (S) The table correlating the jurors' names with their identifying numbers
7 required by rule 8.611.

8
9 (T) The register of actions.

10
11 (U) All documents filed under Penal Code section 987.9 or 987.2.

12
13 ~~(P)~~(V) Any other document filed or lodged in the case, ~~including each~~
14 ~~juror questionnaire, whether or not the juror was selected.~~

15
16 (2) The record must include a reporter's transcript containing:

17
18 (A) The oral proceedings on the entry of any plea other than a not guilty
19 plea;

20
21 (B) The oral proceedings on any motion in limine;

22
23 (C) The voir dire examination of jurors;

24
25 (D) Any opening statement;

26
27 (E) The oral proceedings at trial;

28
29 (F) All instructions given orally;

30
31 (G) Any oral communication between the court and the jury or any
32 individual juror;

33
34 (H) Any oral opinion of the court;

35
36 (I) The oral proceedings on any motion for new trial;

37
38 (J) The oral proceedings at sentencing, granting or denying of probation,
39 or other dispositional hearing;

40
41 (K) The oral proceedings on any motion under Penal Code section 1538.5
42 denied in whole or in part;

43

- 1 (L) The closing arguments;
2
3 (M) Any comment on the evidence by the court to the jury;
4
5 (N) The oral proceedings on motions in addition to those listed above; and
6
7 (O) Any other oral proceedings in the case, including any proceedings that
8 did not result in a verdict or sentence of death because the court ordered
9 a mistrial or a new trial.

10
11 (3) All exhibits admitted in evidence, refused, or lodged are deemed part of the
12 record, but, except as provided in rule 8.622, may be transmitted to the
13 reviewing court only as provided in rule 8.634.

14
15 (4) The superior court or the Supreme Court may order that the record include
16 additional material.

17
18 **(b) Sealed and confidential records**

19
20 Rules 8.45–8.47 govern sealed and confidential records in appeals under this
21 chapter.

22
23 **(c) Juror-identifying information**

24
25 Any document in the record containing juror-identifying information must be
26 edited in compliance with rule ~~8.332~~ 8.611. Unedited copies of all such documents
27 and a copy of the table required by the rule, under seal and bound together if filed
28 in paper form, must be included in the record sent to the Supreme Court.

29
30 **(d) Form of record**

31
32 The clerk’s transcript and the reporter’s transcript must comply with rules 8.45–
33 8.47, relating to sealed and confidential records, and rule 8.144.

34
35 **Advisory Committee Comment**

36
37 **Subdivision (a).** Subdivision (a) ~~restates~~ implements Penal Code section 190.7(a).

38
39 **Subdivision (b).** The clerk’s and reporter’s transcripts may contain records that are sealed or
40 confidential. Rules 8.45–8.47 address the handling of such records, including requirements for the
41 format, labeling, and transmission of and access to such records. Examples of confidential records
42 include Penal Code section 1203.03 diagnostic reports, records closed to inspection by court
43 order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11

1 Cal.3d 531, in-camera proceedings on a confidential informant, and defense investigation and
2 expert funding requests (Pen. Code, §§ 987.2 and 987.9; Puett v. Superior Court (1979) 96
3 Cal.App.3d 936, 940, fn. 2; Keenan v. Superior Court (1982) 31 Cal.3d 424, 430).

4
5
6 **DRAFTERS' NOTE ON PROPOSED NEW RULE 8.611:** This proposed new rule is
7 taken from rule 8.332, which is part of the rules regarding the record on appeal in
8 noncapital felony cases. That rule does not clearly apply in capital cases, although rule
9 8.610(c) currently contemplates that courts will comply with its requirements in capital
10 cases. Adding this specific rule for capital cases will make the application of these
11 requirements clearer.

12
13 **Rule 8.611. Juror-identifying information**

14
15 **(a) Application**

16
17 A clerk's transcript, a reporter's transcript, or any other document in the record that
18 contains juror-identifying information must comply with this rule.

19
20 **(b) Juror names, addresses, and telephone numbers**

21
22 (1) The name of each trial juror or alternate sworn to hear the case must be
23 replaced with an identifying number wherever it appears in any document.
24 The superior court clerk must prepare and keep under seal in the case file a
25 table correlating the jurors' names with their identifying numbers. The clerk
26 and the reporter must use the table in preparing all transcripts or other
27 documents.

28
29 (2) The addresses and telephone numbers of trial jurors and alternates sworn to
30 hear the case must be deleted from all documents.

31
32 **(c) Potential jurors**

33
34 Information identifying potential jurors called but not sworn as trial jurors or
35 alternates must not be sealed unless otherwise ordered under Code of Civil
36 Procedure section 237(a)(1).

37
38 **Advisory Committee Comment**

39
40 Rule 8.611 implements Code of Civil Procedure section 237.

1 DRAFTERS' NOTES ON PROPOSED AMENDMENTS TO RULE 8.613:

2 Proposed new paragraph (d)(2) below is intended to provide the trigger for counsel's
3 submission of the lists required by proposed new rule 4.119 above. See drafters' notes
4 accompanying proposed rule 4.119.

5
6 In paragraph (e)(1) below, the proposed additions of the references to transcripts in
7 electronic form are intended to make the language used here consistent with the
8 language used in the other rules on record preparation in capital cases.

9
10 The proposed changes to paragraph (f)(1) below would require the clerk to send copies
11 of the lists prepared by counsel under proposed rule 4.119 to counsel when the clerk
12 sends the reporter's transcript to counsel. Please see the drafters' notes accompanying
13 proposed rule 4.119.

14
15 The proposed changes to paragraph (f)(2), addition of (f)(3), and changes to (g) below
16 are all intended to establish a new meet-and-confer process and also to utilize the lists
17 of appearances, exhibits, and motions required under proposed new rule 4.119 within
18 the process for certifying the record of the pretrial proceedings. Some of the language is
19 modeled on rule 3.724, which establishes a meet-and-confer requirement as part of the
20 rules on management of civil cases. The last sentence in subdivision (g)(1)(B)(i) is new
21 and is based on the following sentence in Penal Code section 190.8(c):

22
23 Corrections to the record shall not be required to include immaterial typographical
24 errors that cannot conceivably cause confusion.

25
26 The proposed changes to subdivision (j) below reflect the fact that, under paragraph (i),
27 all of the copies of the reporter's transcript are in electronic form, so the stricken
28 language in (1) does not seem necessary.

29
30 The proposed changes to subdivision (l) below reflect the fact that, under subdivision (d),
31 it is the clerk that notifies the court reporter to begin preparation of the record.

32
33 The proposed changes to the advisory committee comment below are intended to reflect
34 the proposed repeal of rule 8.625 and the fact that there are no longer any capital cases
35 in which the trial began before January 1, 1997, in which the record has not been
36 certified for accuracy.

37
38 **Rule 8.613. Preparing and certifying the record of preliminary proceedings**

39
40 **(a) Definitions**

41
42 For purposes of this rule:
43

- 1 (1) The “preliminary proceedings” are all proceedings held before and including
2 the filing of the information or indictment, whether in open court or
3 otherwise, and include the preliminary examination or grand jury proceeding;
4
5 (2) The “record of the preliminary proceedings” is the court file and the
6 reporter’s transcript of the preliminary proceedings;
7
8 (3) The “responsible judge” is the judge assigned to try the case or, if none is
9 assigned, the presiding superior court judge or designee of the presiding
10 judge; and
11
12 (4) The “designated judge” is the judge designated by the presiding judge to
13 supervise preparation of the record of preliminary proceedings.
14

15 **(b) Notice of intent to seek death penalty**

16
17 In any case in which the death penalty may be imposed:
18

- 19 (1) If the prosecution notifies the responsible judge that it intends to seek the
20 death penalty, the judge must notify the presiding judge and the clerk. The
21 clerk must promptly enter the information in the court file.
22
23 (2) If the prosecution does not give notice under (1)—and does not give notice to
24 the contrary—the clerk must notify the responsible judge 60 days before the
25 first date set for trial that the prosecution is presumed to seek the death
26 penalty. The judge must notify the presiding judge, and the clerk must
27 promptly enter the information in the court file.
28

29 **(c) Assignment of judge designated to supervise preparation of record of**
30 **preliminary proceedings**

- 31
32 (1) Within five days after receiving notice under (b), the presiding judge must
33 designate a judge to supervise preparation of the record of the preliminary
34 proceedings.
35
36 (2) If there was a preliminary examination, the designated judge must be the
37 judge who conducted it.
38

39 **(d) Notice to prepare transcript and lists**

40
41 Within five days after receiving notice under (b)(1) or notifying the judge under
42 (b)(2), the clerk must do the following:
43

1 (1) Notify each reporter who reported a preliminary proceeding to prepare a
2 transcript of the proceeding. If there is more than one reporter, the designated
3 judge may assign a reporter or another designee to perform the functions of
4 the primary reporter.

5
6 (2) Notify trial counsel to submit the lists of appearances, exhibits, and motions
7 required by rule 4.119.
8

9 **(e) Reporter's duties**

10
11 (1) The reporter must prepare an original and five copies of the reporter's
12 transcript in electronic form and two additional copies in electronic form for
13 each codefendant against whom the death penalty is sought. The transcript
14 must include the preliminary examination or grand jury proceeding unless a
15 transcript of that examination or proceeding has already been filed in superior
16 court for inclusion in the clerk's transcript.

17
18 (2) The reporter must certify the original and all copies of the reporter's
19 transcript as correct.

20
21 (3) Within 20 days after receiving the notice to prepare the reporter's transcript,
22 the reporter must deliver the original and all copies of the transcript to the
23 clerk.
24

25 **(f) Review by counsel**

26
27 (1) Within five days after the reporter delivers the transcript, the clerk must
28 deliver the original transcript and the lists of appearances, exhibits, and
29 motions required by rule 4.119 to the designated judge and one copy of the
30 transcript and each list required by rule 4.119 that is not required to be sealed
31 to each trial counsel. If a different attorney represented the defendant or the
32 People in the preliminary proceedings, both attorneys must perform the tasks
33 required by (2).

34
35 (2) Each trial counsel must promptly:

36
37 (A) Review the reporter's transcript and the lists of appearances, exhibits,
38 and motions to identify any ~~for~~ errors or omissions in the transcript;

39
40 (B) Review the docket sheets and minute orders to determine whether all
41 preliminary proceedings have been transcribed; and
42

1 ~~(C) Consult with opposing counsel to determine whether any other~~
2 ~~proceedings or discussions should have been transcribed; and~~

3
4 ~~(D)~~(C) Review the court file to determine whether it is complete.

5
6 (3) Within 21 days after the clerk delivers the transcript and lists under (1), trial
7 counsel must meet and confer, in person or by telephone, to discuss any
8 errors or omissions in the reporter's transcript or court file identified by trial
9 counsel during the review required under (2) and determine whether any
10 other proceedings or discussions should have been transcribed.

11
12 **(g) Declaration and request for corrections or additions**

13
14 (1) Within 30 days after the clerk delivers the reporter's transcript and lists, each
15 trial counsel must serve and file;

16
17 (A) A declaration stating that counsel or another person under counsel's
18 supervision has performed the tasks required by (f), including meeting
19 and conferring with opposing counsel if ordered by the court; and

20
21 (B) ~~must serve and file~~ Either:

22
23 ~~(A)~~(i) A request for corrections or additions to the reporter's transcript
24 or court file. Immaterial typographical errors that cannot
25 conceivably cause confusion are not required to be brought to the
26 court's attention or corrected; or

27
28 ~~(B)~~(ii) A statement that counsel does not request any corrections
29 or additions.

30
31 (C) Instead of each party filing a separate statement or request for
32 corrections or additions under (B), trial counsel are encouraged to file a
33 joint statement or request.

34
35 (2) If a different attorney represented the defendant in the preliminary
36 proceedings, that attorney must also file the declaration required by (1).

37
38 (3) A request for additions to the reporter's transcript must state the nature and
39 date of the proceedings and, if known, the identity of the reporter who
40 reported them.

41
42 (4) If any counsel fails to timely file a declaration under (1), the designated judge
43 must not certify the record and must set the matter for hearing, require a

1 showing of good cause why counsel has not complied, and fix a date for
2 compliance.
3

4 **(h) Corrections or additions to the record of preliminary proceedings**
5

6 If any counsel files a request for corrections or additions:
7

- 8 (1) Within 15 days after the last request is filed, the designated judge must hold a
9 hearing and order any necessary corrections or additions.
10
- 11 (2) If any portion of the proceedings cannot be transcribed, the judge may order
12 preparation of a settled statement under rule 8.346.
13
- 14 (3) Within 20 days after the hearing under (1), the original reporter's transcript
15 and court file must be corrected or augmented to reflect all corrections or
16 additions ordered. The clerk must promptly send copies of the corrected or
17 additional pages to trial counsel.
18
- 19 (4) The judge may order any further proceedings to correct or complete the
20 record of the preliminary proceedings.
21
- 22 (5) When the judge is satisfied that all corrections and additions ordered have
23 been made and copies of all corrected or additional pages have been sent to
24 the parties, the judge must certify the record of the preliminary proceedings
25 as complete and accurate.
26
- 27 (6) The record of the preliminary proceedings must be certified as complete and
28 accurate within 120 days after the presiding judge orders preparation of the
29 record.
30

31 **(i) Transcript delivered in electronic form**
32

- 33 (1) When the record of the preliminary proceedings is certified as complete and
34 accurate, the clerk must promptly notify the reporter to prepare five copies of
35 the transcript in electronic form and two additional copies in electronic form
36 for each codefendant against whom the death penalty is sought.
37
- 38 (2) Each transcript delivered in electronic form must comply with the applicable
39 requirements of rule 8.144 and any additional requirements prescribed by the
40 Supreme Court, and must be further labeled to show the date it was made.
41
- 42 (3) A copy of a sealed or confidential transcript delivered in electronic form must
43 be placed on a separate disk and clearly labeled as sealed or confidential.

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- (4) The reporter is to be compensated for copies delivered in electronic form as provided in Government Code section 69954(b).
- (5) Within 20 days after the clerk notifies the reporter under (1), the reporter must deliver the copies in electronic form to the clerk.

(j) Delivery to the superior court

Within five days after the reporter delivers the copies in electronic form, the clerk must deliver to the responsible judge, for inclusion in the record:

- (1) The certified original reporter’s transcript of the preliminary proceedings and the copies that have not been distributed to counsel, ~~including the copies in electronic form~~; and
- (2) The complete court file of the preliminary proceedings or a certified copy of that file.

(k) Extension of time

- (1) Except as provided in (2), the designated judge may extend for good cause any of the periods specified in this rule.
- (2) The period specified in (h)(6) may be extended only as follows:
 - (A) The designated judge may request an extension of the period by presenting a declaration to the responsible judge explaining why the time limit cannot be met; and
 - (B) The responsible judge may order an extension not exceeding 90 additional days; in an exceptional case the judge may order an extension exceeding 90 days, but must state on the record the specific reason for the greater extension.

(l) Notice that the death penalty is no longer sought

~~After the presiding judge has ordered preparation of~~ clerk has notified the court reporter to prepare the pretrial record, if the death penalty is no longer sought, the clerk must promptly notify the reporter that this rule does not apply.

Advisory Committee Comment

1 Rule 8.613 implements Penal Code section 190.9(a). Rules 8.613–8.622 govern the process of
2 preparing and certifying the record in any appeal from a judgment of death ~~imposed after a trial~~
3 ~~that began on or after January 1, 1997~~; specifically, rule 8.613 provides for the record of the
4 preliminary proceedings in such an appeal. ~~Rule 8.625 governs the process of certifying the~~
5 ~~record in any appeal from a judgment of death imposed after a trial that began before January 1,~~
6 ~~1997.~~

7
8 **Subdivision (f).** As used in subdivision (f)—as in all rules in this chapter—trial counsel “means
9 both the defendant’s trial counsel and the prosecuting attorney.” (Rule 8.600(e)(2).)

10
11 **Subdivision (i).** Subdivision (i)(4) restates a provision of former rule 35(b), second paragraph, as
12 it was in effect on December 31, 2003.

13
14
15 **DRAFTERS’ NOTES ON PROPOSED AMENDMENTS TO RULE 8.616:**

16 Proposed new paragraph (a)(1)(B) is intended to provide the trigger for counsel’s
17 submission of the lists required by proposed new rule 4.230 above. See drafters’ notes
18 under that proposed rule.

19
20 The changes to paragraph (a)(2) are intended to encourage trial courts to prepare and
21 transmit the clerk’s transcript in electronic format, if possible.

22
23 In paragraph (b)(1), the additions of references to transcripts in electronic form are
24 intended to make the language used here consistent with the language used in the other
25 rules on record preparation in capital cases.

26
27 The changes to subdivision (c) would require the clerk to send copies of the lists
28 prepared by counsel under proposed rule 4.230 to counsel when the clerk sends the
29 reporter’s transcript to counsel. Please see the drafters’ notes accompanying proposed
30 rule 4.230.

31
32 **Rule 8.616. Preparing the trial record**

33
34 **(a) Clerk’s duties**

35
36 (1) The clerk must promptly—and no later than five days after the judgment of
37 death is rendered:—

38
39 (A) Notify the reporter to prepare the reporter’s transcript; and

40
41 (B) Notify trial counsel to submit the lists of appearances, exhibits, and
42 motions required by rule 4.230.

1 (2) The clerk must prepare an original and eight copies of the clerk’s transcript
2 and two additional copies for each codefendant sentenced to death. The clerk
3 is encouraged to send the clerk’s transcript in electronic form if the court is
4 able to do so.
5

6 (3) The clerk must certify the original and all copies of the clerk’s transcript as
7 correct.
8

9 **(b) Reporter’s duties**

10
11 (1) The reporter must prepare an original and five copies of the reporter’s
12 transcript in electronic form and two additional copies in electronic form for
13 each codefendant sentenced to death.
14

15 (2) Any portion of the transcript transcribed during trial must not be retyped
16 unless necessary to correct errors, but must be repaginated and combined
17 with any portion of the transcript not previously transcribed. Any additional
18 copies needed must not be retyped but, if the transcript is in paper form, must
19 be prepared by photocopying or an equivalent process.
20

21 (3) The reporter must certify the original and all copies of the reporter’s
22 transcript as correct and deliver them to the clerk.
23

24 **(c) Sending the record to trial counsel**

25
26 Within 30 days after the judgment of death is rendered, the clerk must deliver one
27 copy of the clerk’s and reporter’s transcripts and one copy of the lists of
28 appearances, exhibits, and motions required by rule 4.230 to each trial counsel.
29 The clerk must retain the original transcripts and the any remaining copies. If
30 counsel does not receive the transcripts within that period, counsel must promptly
31 notify the superior court.
32

33 **(d) Extension of time**

34
35 (1) On request of the clerk or a reporter and for good cause, the superior court
36 may extend the period prescribed in (c) for no more than 30 days. For any
37 further extension the clerk or reporter must file a request in the Supreme
38 Court, showing good cause.
39

40 (2) A request under (1) must be supported by a declaration explaining why the
41 extension is necessary. The court may presume good cause if the clerk’s and
42 reporter’s transcripts combined will likely exceed 10,000 pages.
43

- 1 (3) If the superior court orders an extension under (1), the order must specify the
2 reason justifying the extension. The clerk must promptly send a copy of the
3 order to the Supreme Court.
4

5 **Advisory Committee Comment**
6

7 Rule 8.616 implements Penal Code section 190.8(b).
8
9

10 **DRAFTERS' NOTES ON PROPOSED AMENDMENTS TO RULE 8.619:**

11 Current subdivision (a) addresses activity by counsel during trial. As indicated in the
12 drafters' notes accompanying proposed new rule 4.230, this provision has been
13 incorporated into rule 4.230 because that proposed new rule addresses procedures that
14 are intended to take place during the trial of a capital case.
15

16 The proposed amendments to subdivision (a) and (b)(1) below (current (b) and (c)(1))
17 are intended to implement a proposed new meet-and-confer requirement and also to
18 utilize the lists of appearances, exhibits, and motions required under proposed new rule
19 4.230 within the process for certifying the record for completeness. As with the draft
20 amendments to rule 8.613 above, some of the language is modeled on rule 3.724, which
21 establishes a meet-and-confer requirement as part of the rules on management of civil
22 cases. The last sentence in (b)(1)(B)(i) is new and is based on the following sentence in
23 Penal Code section 190.8(c):
24

25 Corrections to the record shall not be required to include immaterial typographical
26 errors that cannot conceivably cause confusion.
27

28 Proposed new paragraph (b)(2) would build into the deadline for counsel's review of the
29 record the additional time that counsel can currently obtain under (f)(2) by filing a
30 request for an extension of time. The concept is to save the time and expense that would
31 be incurred by counsel in preparing these requests and by the court in considering them
32 in circumstances in which the requests are regularly granted. The language is modeled
33 on rule 8.630(c)(1)(3), which automatically extends the deadline for filing briefs in capital
34 cases with records over 10,000 pages.
35

36 The proposed amendments to paragraph (c)(7) (currently (d)(7)) are intended to make
37 the judge's deadline for certifying the record appropriately reflect any extension of time
38 that clerks or court reporters receive for preparing the record, or that counsel receive for
39 reviewing the record. Currently, the judge's deadline is measured from the imposition of
40 the death sentence, regardless of when the judge actually receives any request for
41 additions or corrections to the record. Under the proposed amendment, it would instead
42 be measured from when the last request for additions or corrections to the record is filed.
43

1 If there are no extensions of time for delivery of the record to counsel or for counsels'
2 review of the record, when the periods for completing these earlier steps and the 30-day
3 period for the judge's consideration of requests for additions or corrections are added
4 together, the total time elapsed will be the same as in current (d)(7)—90 days from
5 imposition of the death penalty. If there are extensions to these earlier deadlines in the
6 certification process, however, either due to the length of the record or for other good
7 cause, under this proposed amendment, the judge's deadline for certification will reflect
8 that because it will be calculated from the filing of requests for additions or corrections.
9 Subdivision (e) (currently (f)) would also continue to permit extension of this and other
10 deadlines for good cause. All of this is consistent with Penal Code section 190.8(d),
11 which provides that the judge must certify the record for completeness:

12
13 [N]o later than 90 days after entry of the imposition of the death sentence
14 unless good cause is shown. However, this time period may be extended
15 for proceedings in which the trial transcript exceeds 10,000 pages in
16 accordance with the timetable set forth in, or for good cause pursuant to
17 the procedures set forth in, the rules of court adopted by the Judicial
18 Council.

19
20 The proposed amendments to subdivision (e) (currently (f)) reflect the proposal that
21 subdivision (b) include an automatic extension of the deadline for reviewing the record
22 when that combined record exceeds 10,000 pages, rather than requiring that an
23 extension request be filed for that purpose.

24
25 The proposed amendments to subdivision (f) (currently (g)) would eliminate the required
26 second copy of the reporter's transcript in paper format. Instead, each recipient would
27 get one copy of the reporter's transcript in electronic format and one copy of the clerk's
28 transcript in either paper or electronic format. As in the proposed amendments to rule
29 8.616, trial courts would be encouraged to prepare and transmit the clerk's transcript in
30 electronic format, if possible.

31
32 **Rule 8.619. Certifying the trial record for completeness**

33
34 **(a) — Review by counsel during trial**

35
36 ~~During trial, counsel must call the court's attention to any errors or omissions they~~
37 ~~may find in the transcripts. The court must periodically ask counsel for lists of any~~
38 ~~such errors or omissions and may hold hearings to verify them.~~

39
40 **(b)(a) Review by counsel after trial**

1 (1) When the clerk delivers the clerk's and reporter's transcripts and the lists of
2 appearances, exhibits, motions, and jury instructions required by rule 4.230 to
3 trial counsel, each counsel must promptly:
4

5 ~~(1)~~(A) Review the docket sheets, ~~and~~ minute orders, and the lists of
6 appearances, exhibits, motions, and jury instructions to determine
7 whether the reporter's transcript is complete; and
8

9 ~~(2)~~ ~~Consult with opposing counsel to determine whether any other proceedings~~
10 ~~or discussions should have been transcribed; and~~
11

12 ~~(3)~~(B) Review the court file to determine whether the clerk's transcript
13 is complete.
14

15 (2) Within 21 days after the clerk delivers the transcripts and lists under (1), trial
16 counsel must meet and confer, in person or by telephone, to discuss any
17 errors or omissions in the reporter's transcript or clerk's transcript identified
18 by trial counsel during the review required under (1).
19

20 **(e)(b) Declaration and request for additions or corrections**
21

22 (1) Within 30 days after the clerk delivers the transcripts, each trial counsel must
23 serve and file:
24

25 (A) A declaration stating that counsel or another person under counsel's
26 supervision has performed the tasks required by ~~(b)(a)~~, including
27 meeting and conferring with opposing counsel; and ~~must serve and file~~
28

29 (B) Either:
30

31 ~~(A)~~(i) A request to include additional materials in the record or to
32 correct errors that have come to counsel's attention. Immaterial
33 typographical errors that cannot conceivably cause confusion are
34 not required to be brought to the court's attention or corrected; or
35

36 ~~(B)~~(ii) A statement that counsel does not request any additions or
37 corrections.
38

39 (C) Instead of each party filing a separate statement or request for
40 corrections or additions under (B), trial counsel are encouraged to file a
41 joint statement or request.
42

1 (2) If the clerk’s and reporter’s transcripts combined exceed 10,000 pages, the
2 time limits stated in (a)(2) and (b)(1) are extended by 3 days for each 1,000
3 pages of combined transcript over 10,000 pages.
4

5 ~~(2)~~(3) A request for additions to the reporter’s transcript must state the nature and
6 date of the proceedings and, if known, the identity of the reporter who
7 reported them.
8

9 ~~(3)~~(4) If any counsel fails to timely file a declaration under (1), the judge must not
10 certify the record and must set the matter for hearing, require a showing of
11 good cause why counsel has not complied, and fix a date for compliance.
12

13 ~~(d)~~**(c) Completion of the record**
14

15 If any counsel files a request for additions or corrections:
16

- 17 (1) The clerk must promptly deliver the original transcripts to the judge who
18 presided at the trial.
19
- 20 (2) Within 15 days after the last request is filed, the judge must hold a hearing
21 and order any necessary additions or corrections. The order must require that
22 any additions or corrections be made within 10 days of its date.
23
- 24 (3) The clerk must promptly—and in any event within five days—notify the
25 reporter of an order under (2). If any portion of the proceedings cannot be
26 transcribed, the judge may order preparation of a settled statement under rule
27 8.346.
28
- 29 (4) The original transcripts must be augmented or corrected to reflect all
30 additions or corrections ordered. The clerk must promptly send copies of the
31 additional or corrected pages to trial counsel.
32
- 33 (5) Within five days after the augmented or corrected transcripts are filed, the
34 judge must set another hearing to determine whether the record has been
35 completed or corrected as ordered. The judge may order further proceedings
36 to complete or correct the record.
37
- 38 (6) When the judge is satisfied that all additions or corrections ordered have been
39 made and copies of all additional or corrected pages have been sent to trial
40 counsel, the judge must certify the record as complete and redeliver the
41 original transcripts to the clerk.
42

- 1 (7) The judge must certify the record as complete within ~~90~~ 30 days after the
2 ~~judgment of death is rendered~~ last request to include additional materials or
3 make corrections is filed, or, if no such request is filed, the last statement that
4 counsel does not request any additions or corrections.
5

6 **~~(e)~~(d) Transcript delivered in electronic form**
7

- 8 (1) When the record is certified as complete, the clerk must promptly notify the
9 reporter to prepare five copies of the transcript in electronic form and two
10 additional copies in electronic form for each codefendant sentenced to death.
11
12 (2) Each copy delivered in electronic form must comply with the applicable
13 requirements of rule 8.144 and any additional requirements prescribed by the
14 Supreme Court, and must be further labeled to show the date it was made.
15
16 (3) A copy of a sealed or confidential transcript delivered in electronic form must
17 be placed on a separate disk and clearly labeled as sealed or confidential.
18
19 (4) The reporter is to be compensated for copies delivered in electronic form as
20 provided in Government Code section 69954(b).
21
22 (5) Within 10 days after the clerk notifies the reporter under (1), the reporter
23 must deliver the copies in electronic form to the clerk.
24

25 **~~(f)~~(e) Extension of time**
26

- 27 (1) The court may extend for good cause any of the periods specified in this rule.
28
29 (2) An application to extend the ~~30-day~~ period to review the record under ~~(e)~~(a)
30 or the period to file a declaration under (b) must be served and filed within
31 that the relevant period. If the clerk's and reporter's transcripts combined
32 exceed 10,000 pages, the court may grant an additional three days for each
33 1,000 pages over 10,000.
34
35 (3) If the court orders an extension of time, the order must specify the
36 justification for the extension. The clerk must promptly send a copy of the
37 order to the Supreme Court.
38

39 **~~(g)~~(f) Sending the certified record**
40

- 41 (1) When the record is certified as complete, the clerk must promptly send one
42 copy of the clerk's transcript and one copy of the reporter's transcript:
43

1 (A) To each defendant’s appellate counsel and each defendant’s habeas
2 corpus counsel: ~~one paper copy of the entire record and one copy of the~~
3 ~~reporter’s transcript in electronic form.~~ If either counsel has not been
4 retained or appointed, the clerk must keep that counsel’s copies until
5 counsel is retained or appointed.

6
7 (B) To the Attorney General, the Habeas Corpus Resource Center, and the
8 California Appellate Project in San Francisco: ~~one paper copy of the~~
9 ~~clerk’s transcript and one copy of the reporter’s transcript in electronic~~
10 ~~form.~~

11
12 (2) The reporter’s transcript must be in electronic form. The clerk is encouraged
13 to send the clerk’s transcript in electronic form if the court is able to do so.
14

15 **(h)(g) Notice of delivery**

16
17 When the clerk sends the record to the defendant’s appellate counsel, the clerk must
18 serve a notice of delivery on the clerk/executive officer of the Supreme Court.
19

20 **Advisory Committee Comment**

21
22 Rule 8.619 implements Penal Code section 190.8(c)–(e).

23
24 Subdivision ~~(e)~~(d)(4) restates a provision of former rule 35(b), second paragraph, as it was in
25 effect on December 31, 2003.

26
27
28 **DRAFTERS’ NOTES ON PROPOSED AMENDMENTS TO RULE 8.622:**

29 Paragraphs (a)(1) and (3) below are intended to implement a proposed meet-and-confer
30 requirement within the process for certifying the record for accuracy. As with the draft
31 amendments to rules 8.613 and 8.619 above, some of the language is modeled on rules
32 3.724 and 3.725, which establish meet-and-confer and case management statement
33 requirements as part of the rules on management of civil cases. In this rule, however,
34 the meet and confer would take place after the filing of a request for additions or
35 corrections to the record. The proposed deadline for this meet-and-confer—10 days after
36 the filing of the request—is designed to ensure that the meeting takes place before the
37 hearing to consider the request. Under 8.619(c)(2) (currently (d)(2)), which 8.622 makes
38 applicable to the correction for accuracy process, that hearing must be set within 15
39 days after the filing of the request for additions or corrections to the record.

40
41 The second sentence in (a)(1)(A) is new and is based on the following sentence in Penal
42 Code section 190.8(c):
43

1 Corrections to the record shall not be required to include immaterial typographical
2 errors that cannot conceivably cause confusion.

3
4 The proposed additions to subparagraph (a)(2)(A) and paragraph (4) would permit the
5 inclusion in the clerk's transcript of documentary exhibits at the request of a party. This is
6 intended to make it easier for counsel to appropriately cite to exhibits in their briefs and
7 for the court to locate such exhibits. The requesting party would be required to indicate
8 the reason that the exhibit needs to be included in the clerk's transcript.

9
10 Proposed new subparagraph (a)(2)(B) below would require counsel to identify any
11 previously sealed records that no longer need to be sealed on appeal and give the trial
12 court the authority to unseal such records even though, under rule 8.46, this is ordinarily
13 the province of the reviewing court. This new procedure is intended to make the record
14 preparation process more efficient by identifying items that can be unsealed before the
15 record is transmitted to the Supreme Court.

16
17 Proposed new paragraph (a)(3), like proposed 8.619(b)(2), would build into the deadline
18 for counsel's review of the record the additional time that counsel can currently obtain
19 under (d)(2) by filing a request for an extension of time. The concept is to save the time
20 and expense that would be incurred by counsel in preparing these requests and by the
21 court in considering them in circumstances in which the requests are regularly granted.
22 The language is modeled on rule 8.630(c)(1)(3) which automatically extends the
23 deadline for filing briefs in capital cases with records over 10,000 pages.

24
25 The proposed amendments to paragraph (b)(4), like proposed 8.619(c)(7) above, are
26 intended to make the judge's deadline for certifying the record appropriately reflect any
27 extension of time that counsel receive for reviewing the record. Currently, the judge's
28 deadline is measured from the delivery of the record to defendant's appellate counsel,
29 regardless of when the judge actually receives any request for additions or corrections to
30 the record. Under the proposed amendment, it would instead be measured from when
31 the last request for additions or corrections to the record is filed. If there are no
32 extensions of time for counsel's review of the record, when the base 90-day period for
33 completing this review and the 30-day period for the judge's consideration of requests
34 for additions or corrections are added together, the total time elapsed will be the same
35 as in current (b)(4)—120 days from delivery of the record to the defendant's appellate
36 counsel. If, however, counsel's deadline for reviewing the record is extended, either due
37 to the length of the record or for other good cause, under this proposed amendment, the
38 judge's deadline for certification will reflect that because it will be calculated from the
39 filing of requests for additions or corrections. Subdivision (d) would also continue to
40 permit extension of this and other deadlines for good cause. All of this is consistent with
41 Penal Code section 190.8(g), which provides that:

42

1 The trial court shall certify the record for accuracy no later than 120 days
2 after the record has been delivered to appellate counsel. However, this
3 time may be extended pursuant to the timetable and procedures set forth
4 in the rules of court adopted by the Judicial Council.
5

6 The amendments to subdivision (d) reflect the proposal that paragraph (a)(3) would
7 include an automatic extension of the deadline for reviewing the record when that
8 combined record exceeds 10,000 pages, rather than requiring that an extension request
9 be filed for that purpose.
10

11 The proposed amendments to subdivision (e) would eliminate the Supreme Court's
12 second copy of the reporter's transcript in paper format and encourage the delivery of
13 the clerk's transcript in electronic form.
14

15 **Rule 8.622. Certifying the trial record for accuracy**

16 **(a) Request for corrections or additions**

17
18
19 (1) Within 90 days after the clerk delivers the record to defendant's appellate
20 counsel;

21
22 (A) Any party may serve and file a request for corrections or additions to
23 the record. Immaterial typographical errors that cannot conceivably
24 cause confusion are not required to be brought to the court's attention
25 or corrected. Items that a party may request to be added to the clerk's
26 transcript include a copy of any exhibit admitted in evidence, refused,
27 or lodged that is a document in paper or electronic format. The
28 requesting party must state the reason that the exhibit needs to be
29 included in the clerk's transcript. Instead of parties filing separate
30 requests for corrections or additions, counsel are encouraged to file a
31 joint request.
32

33 (B) Appellate counsel must review all sealed records that they are entitled
34 to access under rule 8.45 and file an application to unseal any such
35 records counsel determines no longer meet the criteria for sealing
36 specified in rule 2.550(d). Notwithstanding rule 8.46(e), this
37 application must be filed in the trial court and these records may be
38 unsealed on order of the trial court.
39

40 (2) A request for additions to the reporter's transcript must state the nature and
41 date of the proceedings and, if known, the identity of the reporter who
42 reported them. A request for an exhibit to be included in the clerk's transcript
43 must specify that exhibit by number or letter.

1
2 (3) Unless otherwise ordered by the court, within 10 days after a party serves and
3 files a request for corrections or additions to the record, defendant’s appellate
4 counsel and the trial counsel from the prosecutor’s office must meet and
5 confer, in person or by telephone, to discuss the request and any application
6 to unseal records served on the prosecutor’s office.

7
8 (4) If the clerk’s and reporter’s transcripts combined exceed 10,000 pages, the
9 time limits stated in (1), (3), and (b)(4) are extended by 15 days for each
10 1,000 pages of combined transcript over 10,000 pages.

11
12 **(b) Correction of the record**

13
14 (1) If any counsel files a request for corrections or additions, the procedures and
15 time limits of rule 8.619~~(d)~~(c)(1)–(5) must be followed.

16
17 (2) If any application to unseal a record is filed, the judge must grant or deny the
18 application before certifying the record as accurate.

19
20 ~~(2)~~(3) When the judge is satisfied that all corrections or additions ordered have been
21 made, the judge must certify the record as accurate and redeliver the record to
22 the clerk.

23
24 ~~(3)~~(4) The judge must certify the record as accurate within ~~120~~ 30 days after ~~it is~~
25 ~~delivered to appellate counsel~~ the last request to include additional materials
26 or make corrections is filed.

27
28 **(c) Computer-readable Copies of the record**

29
30 (1) When the record is certified as accurate, the clerk must promptly notify the
31 reporter to prepare six copies of the reporter’s transcript in electronic form
32 and two additional copies in electronic form for each codefendant sentenced
33 to death.

34
35 (2) In preparing the copies, the procedures and time limits of rule 8.619~~(e)~~(d)(2)–
36 (5) must be followed.

37
38 **(d) Extension of time**

39
40 (1) The court may extend for good cause any of the periods specified in this rule.

41
42 (2) An application to extend the ~~90-day~~ period to request corrections or additions
43 under (a) must be served and filed within that period. ~~If the clerk’s and~~

1 reporter's transcripts combined exceed 10,000 pages, the court may grant an
2 additional 15 days for each 1,000 pages over 10,000.

- 3
- 4 (3) If the court orders an extension of time, the order must specify the
5 justification for the extension. The clerk must promptly send a copy of the
6 order to the Supreme Court.
- 7
- 8 (4) If the court orders an extension of time, the court may conduct a status
9 conference or require the counsel who requested the extension to file a status
10 report on counsel's progress in reviewing the record.

11

12 **(e) Sending the certified record**

13

14 When the record is certified as accurate, the clerk must promptly send:

- 15
- 16 (1) To the Supreme Court: the corrected original record, including the judge's
17 certificate of accuracy, ~~and a copy of~~ The reporter's transcript must be in
18 electronic form. The clerk is encouraged to send the clerk's transcript in
19 electronic form if the court is able to do so.
- 20
- 21 (2) To each defendant's appellate counsel, each defendant's habeas corpus
22 counsel, the Attorney General, the Habeas Corpus Resource Center, and the
23 California Appellate Project in San Francisco: a copy of the order certifying
24 the record and a copy of the reporter's transcript in electronic form.
- 25
- 26 (3) To the Governor: the copies of the transcripts required by Penal Code section
27 1218, with copies of any corrected or augmented pages inserted.

28

29 **Advisory Committee Comment**

30

31 Rule 8.622 implements Penal Code section 190.8(g).

32

33

34 **DRAFTERS' NOTE:** Rule 8.625 is proposed to be repealed because the records have
35 been certified in all the capital cases in which the trial began before January 1, 1997.

36

37 **Rule 8.625. Certifying the record in pre-1997 trials**

38

39 **(a) Application**

40

41 This rule governs the process of certifying the record in any appeal from a
42 judgment of death imposed after a trial that began before January 1, 1997.

1 **(b) — Sending the transcripts to counsel for review**

2
3 (1) — When the clerk and the reporter certify that their respective transcripts are
4 correct, the clerk must promptly send a copy of each transcript to each
5 defendant’s trial counsel, to the Attorney General, to the district attorney, to
6 the California Appellate Project in San Francisco, and to the Habeas Corpus
7 Resource Center, noting the sending date on the originals.

8
9 (2) — The copies of the reporter’s transcript sent to the California Appellate Project
10 and the Habeas Corpus Resource Center must be delivered in electronic form
11 complying with the applicable requirements of rule 8.144 and any additional
12 requirements prescribed by the Supreme Court, and must be further labeled to
13 show the date it was made.

14
15 (3) — When the clerk is notified of the appointment or retention of each defendant’s
16 appellate counsel, the clerk must promptly send that counsel copies of the
17 clerk’s transcript and the reporter’s transcript, noting the sending date on the
18 originals. The clerk must notify the Supreme Court, the Attorney General,
19 and each defendant’s appellate counsel in writing of the date the transcripts
20 were sent to appellate counsel.

21
22 **(c) — Correcting, augmenting, and certifying the record**

23
24 (1) — Within 90 days after the clerk delivers the transcripts to each defendant’s
25 appellate counsel, any party may serve and file a request for correction or
26 augmentation of the record. Any request for extension of time must be served
27 and filed in the Supreme Court no later than five days before the 90-day
28 period expires.

29
30 (2) — If no party files a timely request for correction or augmentation, the clerk
31 must certify on the original transcripts that no party objected to the accuracy
32 or completeness of the record within the time allowed by law.

33
34 (3) — Within 10 days after any party files a timely request for correction or
35 augmentation, the clerk must deliver the request and the transcripts to the trial
36 judge.

37
38 (4) — Within 60 days after receiving a request and transcripts under (3), the judge
39 must order the reporter, clerk, or party to make any necessary corrections or
40 do any act necessary to complete the record, fixing the time for performance.
41 If any portion of the oral proceedings cannot be transcribed, the judge may
42 order preparation of a settled statement under rule 8.346.

1 (5) ~~The clerk must promptly send a copy of any order under (4) to the parties and~~
2 ~~to the Supreme Court, but any request for extension of time to comply with~~
3 ~~the order must be addressed to the trial judge.~~

4
5 (6) ~~The original transcripts must be corrected or augmented to reflect all~~
6 ~~corrections or augmentations ordered. The clerk must promptly send copies~~
7 ~~of all corrected or augmented pages to the parties.~~

8
9 (7) ~~The judge must allow the parties a reasonable time to review the corrections~~
10 ~~or augmentations. If no party objects to the corrections or augmentations as~~
11 ~~prepared, the judge must certify that the record is complete and accurate. If~~
12 ~~any party objects, the judge must resolve the objections before certifying the~~
13 ~~record.~~

14
15 (8) ~~If the record is not certified within 90 days after the clerk sends the~~
16 ~~transcripts to appellate counsel under (b)(2), the judge must monitor~~
17 ~~preparation of the record to expedite certification and report the status of the~~
18 ~~record monthly to the Supreme Court.~~

19
20 **(d) ~~Sending the certified record~~**

21
22 ~~When the clerk certifies that no party objected to the record or the judge certifies~~
23 ~~that the record is complete and accurate, the clerk must promptly send:~~

24
25 (1) ~~To the Supreme Court: the original record, including the original certification~~
26 ~~by the trial judge.~~

27
28 (2) ~~To each defendant's appellate counsel, the Attorney General, and the~~
29 ~~California Appellate Project in San Francisco: a copy of the order certifying~~
30 ~~the record.~~

31
32 (3) ~~To the Governor: the copies of the transcripts required by Penal Code section~~
33 ~~1218, with copies of any corrected or augmented pages inserted.~~

34
35 **(e) ~~Subsequent trial court orders; omissions~~**

36
37 (1) ~~If, after the record is certified, the trial court amends or recalls the judgment~~
38 ~~or makes any other order in the case, including an order affecting the~~
39 ~~sentence, the clerk must promptly certify and send a copy of the amended~~
40 ~~abstract of judgment or other order — as an augmentation of the record — to~~
41 ~~the persons and entities listed in (d).~~

1
2
3
4
5
6
7
8

~~(2) If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or court order requires to be included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for further court order, the clerk must send the document or transcript as an augmentation of the record to the persons and entities listed in (d).~~

DRAFT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> DRAFT 6/28/18 Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	
CAPITAL CASE ATTORNEY PRETRIAL CHECKLIST	CASE NUMBER:

Instructions: This checklist is designed to be a tool for counsel throughout the pretrial proceedings in death penalty cases to ensure timely compliance with record preparation requirements and to make the certification of the record of the pretrial proceedings in these cases easier and more efficient for both counsel and the court. Primary counsel for each defendant and the prosecution in the pretrial proceedings in a case in which the death penalty may be imposed must review, sign, and file this checklist. The court may, but is not required, to use the right hand column on the filed checklist to monitor whether counsel has filed required documents.

ATTORNEY TASK	FOR COURT USE ONLY
DURING PRETRIAL PROCEEDINGS	
1. File checklist - Within 10 days of your first appearance in court, review, sign, and submit this checklist. (Cal. Rules of Court, rule 4.119(b).)	Checklist submitted <input type="checkbox"/>
2. Ensure all exhibits are marked - Make sure that all exhibits that you offer during the pretrial proceedings are properly marked for identification.	
3. Prepare a list of appearances, exhibits, and motions - Prepare the lists specified in a, b, and c below.	
a. A list of appearances by the party you represent during pretrial proceedings. <ul style="list-style-type: none"> • The list must include the date of each appearance, the department in which it was made, the name of the attorney making the appearance, and a brief description of the nature of the appearance. <i>Capital Case Attorney List of Appearances</i> (form CR-601) may be used to comply with this requirement. • A separate list of Penal Code section 987.9 appearances must be maintained under seal for each defendant. 	
b. A list of all exhibits offered by the party you represent during pretrial proceedings. <ul style="list-style-type: none"> • The list must include all exhibits offered at any pretrial proceedings and must indicate whether the exhibit was admitted in evidence, refused, lodged, or withdrawn. <i>Capital Case Attorney List of Exhibits</i> (form CR-602) may be used to comply with this requirement. (Cal. Rules of Court, rule 4.119(c)(1)(B).) • Make sure that all exhibits that you offer during the pretrial proceedings are properly marked for identification. 	
c. A list of all motions made by the party you represent during the pretrial proceedings. <ul style="list-style-type: none"> • The list must indicate all motions that are awaiting resolution. <i>Capital Case Attorney List of Motions</i> (form CR-603) may be used to comply with this requirement. (Cal. Rules of Court, rule 4.119(c)(1)(C).) 	

<p>PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):</p>	<p>CASE NUMBER:</p>
<p>ATTORNEY TASK</p>	<p>FOR COURT USE ONLY</p>
<p>d. Providing lists to substituting counsel.</p> <ul style="list-style-type: none"> In the event of any substitution of attorney during the pretrial proceedings, the relieved attorney must provide the lists of all appearances, exhibits, and motions to substituting counsel within five days of being relieved. (Cal. Rules of Court, rule 4.119(c)(1)(A).) 	
<p>AFTER COMPLETION OF PRETRIAL PROCEEDINGS</p>	
<p>4. Prosecution's notification of intent to seek death penalty.</p> <ul style="list-style-type: none"> Primary counsel for the prosecution should notify the judge assigned to try the case or, if none is yet assigned, the presiding superior court judge or designee of the presiding judge, about whether the prosecution intends to seek the death penalty. After the presiding judge has ordered preparation of the pretrial record, primary counsel for the prosecution should notify the judge assigned to try the case if the death penalty is no longer being sought. 	
<p>5. Submit and serve completed lists of appearances, exhibits, and motions.</p> <ul style="list-style-type: none"> No later than 21 days after the clerk notifies you to do so, submit the completed lists to the court. Serve a copy of all the completed lists, except the list of Penal Code section 987.9 appearances, on all parties. Unless otherwise provided by local rule, submit the lists to the court in electronic form. (Cal. Rules of Court, rule 4.119(c).) 	
<p>a. The completed list of appearances by the party you represented during pretrial proceedings.</p>	<p>List of appearances submitted <input type="checkbox"/></p>
<p>b. The completed list of all exhibits offered by the party you represented during pretrial proceedings.</p>	<p>List of exhibits submitted <input type="checkbox"/></p>
<p>c. The completed list of all motions filed by the party you represented during the pretrial proceedings.</p>	<p>List of motions submitted <input type="checkbox"/></p>
<p>6. Review reporter's transcript, court file, and lists - When the clerk delivers the reporter's transcript of the pretrial proceedings and the lists to you, you must:</p> <ul style="list-style-type: none"> Review the reporter's transcript and the lists of appearances, exhibits, and motions to identify any errors or omissions in the transcripts; Review the docket sheets and minute orders to determine whether all preliminary proceedings have been transcribed; and Review the court file to determine whether it is complete. (Cal. Rules of Court, rule 8.613(f)(2).) 	
<p>7. Meet and confer - You must meet and confer with opposing counsel, in person or by telephone, within 21 days after the clerk delivers the reporter's transcripts and lists to you to discuss any errors or omissions in the reporter's transcript or court file identified during the review and determine whether any other proceedings or discussions should have been transcribed. (Cal. Rules of Court, rule 8.613(f)(3).)</p>	
<p>8. Declaration and request for corrections or additions/statement - Within 30 days after the clerk delivers the reporter's transcript and lists, each trial counsel must serve and file both of the following:</p>	
<p>a. A declaration stating that counsel or another person under counsel's supervision has performed the tasks required by 8.613(f), including meeting and conferring with opposing counsel if ordered by the court. (Cal. Rules of Court, rule 8.613(g)(1)(A).)</p>	<p>Declaration filed <input type="checkbox"/></p>

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:
TASK	FOR COURT USE ONLY
b. ONE of the following: <ul style="list-style-type: none"> • <i>A request for corrections or additions to the reporter's transcript or court file. A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them, OR</i> • <i>A statement that counsel does not request any corrections or additions. Instead of each party filing a separate statement or request for corrections or additions, trial counsel are encouraged to file a joint statement or request. (Cal. Rules of Court, rule 8.613(g)(1)(B) and (C).)</i> 	Request or statement filed <div style="text-align: center;"> <input type="checkbox"/> </div>

Date:

(TYPE OR PRINT NAME)



(SIGNATURE OF ATTORNEY)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> DRAFT 06/26/18 Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
CAPITAL CASE ATTORNEY LIST OF EXHIBITS <input type="checkbox"/> Pretrial <input type="checkbox"/> Trial	CASE NUMBER:

Instructions: For each exhibit you offer on behalf of your client in a case in which the death penalty may be imposed, provide the exhibit number and a brief description of the exhibit and indicate whether the exhibit was admitted in evidence, lodged, refused, or withdrawn.

Exhibit #	Description	Outcome
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn

(continued on reverse)

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:
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Exhibit #	Description	Outcome
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
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		<input type="checkbox"/> Admitted <input type="checkbox"/> Lodged <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn

Check here if you need more space. Attach a sheet of paper and write "CR-602, List of Exhibits" for a title.

Date:

_____, attorney for _____
 (TYPE OR PRINT NAME)


 (SIGNATURE OF ATTORNEY)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> DRAFT 6/26/18 Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	CASE NUMBER:
CAPITAL CASE ATTORNEY LIST OF MOTIONS <input type="checkbox"/> Pretrial <input type="checkbox"/> Trial	

Instructions: For each motion you make on behalf of your client in a case in which the death penalty may be imposed, provide the date the motion was made, the department in which it was made, and a brief description of the motion. For pretrial motions, check the box if the motion is awaiting resolution.

Date	Court Dept./Div.	Description	Awaiting Resolution
			<input type="checkbox"/>
			<input type="checkbox"/>
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> DRAFT 6/26/18 Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
CAPITAL CASE ATTORNEY LIST OF JURY INSTRUCTIONS	CASE NUMBER:

Instructions: For each jury instruction you submit in writing in a case in which the death penalty may be imposed, provide the instruction number and a brief description of the instruction and indicate whether the instruction was given, given as modified, refused, or withdrawn.

Instruction #	Description	Outcome
		<input type="checkbox"/> Given <input type="checkbox"/> Given as modified <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
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(continued on reverse)

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:
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Instruction #	Description	Outcome
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		<input type="checkbox"/> Given <input type="checkbox"/> Given as modified <input type="checkbox"/> Refused <input type="checkbox"/> Withdrawn
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Check here if you need more space. Attach a sheet of paper and write "CR-604, List of Jury Instructions" for a title.

Date:

_____, attorney for _____
(TYPE OR PRINT NAME)


(SIGNATURE OF ATTORNEY)

<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</p> <p>STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:</p>	<p><i>FOR COURT USE ONLY</i></p> <p>DRAFT</p> <p>06/28/18</p> <p>Not approved by the Judicial Council</p>
<p>PEOPLE OF THE STATE OF CALIFORNIA</p> <p style="text-align: center;">v.</p> <p>Defendant(s):</p>	
<p>CAPITAL CASE ATTORNEY TRIAL CHECKLIST</p>	<p>CASE NUMBER:</p>

Note: Under Penal Code section 1240.1(e)(1), in capital cases, the obligations of defendant's trial counsel, whether retained by the defendant or court-appointed, and the prosecutor include taking all steps necessary to facilitate the preparation and timely certification of the record of all trial court proceedings.

Instructions: This checklist is designed to be a tool for counsel throughout the trial in death penalty cases to ensure timely compliance with record preparation requirements and to make the certification of the record of the trial in these cases easier and more efficient for both counsel and the court. Primary counsel for each defendant and the prosecution in the trial in a case in which the death penalty may be imposed must review, sign, and file this checklist. The court may, but is not required, to use the right hand column on the filed checklist to monitor whether counsel has filed required documents. The court may, but is not required, to use the right hand column on the filed checklist to monitor whether counsel has filed required documents.

ATTORNEY TASK	FOR COURT USE ONLY
DURING TRIAL	
<p>1. File checklist - Within 10 days of your first appearance in court, review, sign, and submit this checklist. (Cal. Rules of Court, rule 4.230 (b).)</p>	<p>Checklist submitted</p> <p style="text-align: center;"><input type="checkbox"/></p>
<p>2. Review daily transcripts and identify errors or omissions - During trial, you are required to call the court's attention to any errors or omissions you find in the daily reporter's transcripts. Immaterial typographical errors that cannot conceivably cause confusion are not required to be brought to the court's attention or corrected.</p>	
<p>3. Ensure all exhibits are marked - Make sure that all exhibits that you offer during the trial are properly marked for identification.</p>	
<p>4. Provide copies of visual aids to the court - If you use any visual aids in presentations to the jury, including PowerPoint or other similar digital or electronic presentations, provide a copy of the visual aid to the court for inclusion in the record on appeal. If a visual aid is oversized, provide a photograph of that visual aid in place of the original. For PowerPoint or other similar digital or electronic presentations, provide the presentation in its native electronic format and a printout showing the full text of all slides.</p>	
<p>5. Comply with rule 2.1040 - If you present or offer into evidence an electronic sound or sound-and-video recording, including a recording of a deposition or other prior testimony, you must comply with Cal. Rules of Court, rule 2.1040. Among other things, this rule requires that you provide a transcript of the electronic recording which, under rule 8.610, must be included in the record on appeal.</p>	
<p>6. Prepare lists of appearances, exhibits, motions, and jury instructions - Prepare the lists specified in a, b, c, and d below.</p>	
<p>a. A list of appearances by the party you represent during the trial.</p> <ul style="list-style-type: none"> • The list must include the date of each appearance, the department in which it was made, the name of the attorney making the appearance, and a brief description of the nature of the appearance. <i>Capital Case Attorney List of Appearances</i> (form CR-601) may be used to comply with this requirement. • A separate list of Penal Code section 987.9 appearances must be maintained under seal for each defendant. 	

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:
ATTORNEY TASK	FOR COURT USE ONLY
<p>b. A list of all exhibits offered by the party you represent during the trial.</p> <ul style="list-style-type: none"> The list must include all exhibits offered during the trial and must indicate whether the exhibit was admitted in evidence, refused, lodged, or withdrawn. <i>Capital Case Attorney List of Exhibits</i> (form CR-602) may be used to comply with this requirement. (Cal. Rules of Court, rule 4.230(d)(1)(B).) Make sure that all exhibits that you offer during the trial are properly marked for identification. 	
<p>c. A list of all motions made by the party you represent during the trial. <i>Capital Case Attorney List of Motions</i> (form CR-603) may be used to comply with this requirement. (Cal. Rules of Court, rule 4.230(d)(1)(C).)</p>	
<p>d. A list of all jury instructions submitted in writing by the party you represent during the trial. The list must indicate whether the instruction was given, given as modified, refused, or withdrawn. <i>Capital Case Attorney List of Jury Instructions</i> (form CR-604) may be used to comply with this requirement. (Cal. Rules of Court, rule 4.230(d)(1)(D).)</p>	
<p>e. Providing lists to substituting counsel. In the event of any substitution of attorney during the trial, the relieved attorney must provide the lists of all appearances, exhibits, motions, and jury instructions to substituting counsel within five days of being relieved. (Cal. Rules of Court, rule 4.230(d)(1)(A).)</p>	
<p>AFTER COMPLETION OF TRIAL IF DEATH PENALTY IS IMPOSED</p>	
<p>Note that under Penal Code section 1240.1(e)(1), in order to expedite certification of the entire record on appeal in all capital cases, the defendant's trial counsel, whether retained by the defendant or court-appointed, and the prosecutor shall continue to represent the respective parties until the record is certified.</p>	
<p>7. Submit and serve completed lists of appearances, exhibits, and motions.</p> <ul style="list-style-type: none"> No later than 21 days after the imposition of a sentence of death, you must submit the lists to the court and serve a copy of all the lists, except the list of Penal Code § 987.9 appearances, on all parties. If the clerk's and reporter's transcripts combined exceed 10,000 pages, this time limit is extended by 3 days for each 1,000 pages of combined transcripts over 10,000 pages. Unless otherwise provided by local rule, submit the lists to the court in electronic form. (Cal. Rules of Court, rule 4.230(d)(2)) 	
<p>a. The completed list of appearances by the party you represent during the trial.</p>	List of appearances submitted <input type="checkbox"/>
<p>b. The completed list of all exhibits offered by the party you represent during the trial.</p>	List of exhibits submitted <input type="checkbox"/>
<p>c. The completed list of all motions made by the party you represent during the trial.</p>	List of motions submitted <input type="checkbox"/>
<p>d. The completed list of all jury instructions submitted in writing by the party you represent during the trial.</p>	List of jury instructions submitted <input type="checkbox"/>
<p>8. Review reporter's transcript, clerk's transcript, and lists - When the clerk delivers the clerk's and reporter's transcript and the lists to you, you must:</p> <ul style="list-style-type: none"> Review the docket sheets, minute orders, and the lists of appearances, exhibits, motions, and jury instructions to determine whether the reporter's transcript is complete; and Review the court file to determine whether the clerk's transcript is complete. (Cal. Rules of Court, rule 8.619(a)(1).) 	

<p>PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):</p>	<p>CASE NUMBER:</p>
<p>ATTORNEY TASK</p>	<p>FOR COURT USE ONLY</p>
<p>9. Meet and confer - Within 21 days after the clerk delivers the transcripts and lists, you must meet and confer, in person or by telephone, with opposing counsel to discuss any errors or omissions in the reporter's transcript or clerk's transcript identified during your review. If the clerk's and reporter's transcripts combined exceed 10,000 pages, this time limit is extended by 3 days for each 1,000 pages of combined transcript over 10,000 pages. (Cal. Rules of Court, rule 8.619(a)(2).)</p>	
<p>10. Serve and file declaration and request for corrections or additions/statement - Within 30 days after the clerk delivers the transcripts and lists to you, each trial counsel must serve and file both of the following (if the clerk's and reporter's transcripts combined exceed 10,000 pages, this time limit is extended by 3 days for each 1,000 pages of combined transcript over 10,000 pages):</p>	
<p>a. A declaration stating that counsel or another person under counsel's supervision has performed the tasks required by 8.613(f), including meeting and conferring with opposing counsel. (Cal. Rules of Court, rule 8.619(b)(1)(A).)</p>	<p>Declaration filed <input type="checkbox"/></p>
<p>b. ONE of the following:</p> <ul style="list-style-type: none"> • A request to include additional materials in the record or to correct errors that have come to counsel's attention. A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them. OR • A statement that counsel does not request any corrections or additions. <p>In lieu of each party filing a separate statement or request for corrections or additions, trial counsel are encouraged to file a joint statement or request. (Cal. Rules of Court, rule 8.619(b)(1)(B) and (C).)</p>	<p>Request or statement filed <input type="checkbox"/></p>
<p>11. Participate in hearing to certify the record for completeness - If any party files a request for corrections or additions to the record, the trial court will set a hearing to consider the request. (Cal. Rules of Court, rule 8.619(c).)</p>	
<p>12. Participate, as necessary, in certification of the record for accuracy.</p> <ul style="list-style-type: none"> • When appellate counsel for the defendant is retained or appointed, the trial court will send that counsel a copy of the record that has been certified for completeness. Within 90 days after that, appellate counsel or any other party may serve and file a request for corrections or additions to the record. If the clerk's and reporter's transcripts combined exceed 10,000 pages, this time limit is extended by 15 days for each 1,000 pages of combined transcripts over 10,000 pages. • If a request for corrections or additions to the record is filed, unless otherwise ordered by the trial court, within 10 days after that request is filed, defendant's appellate counsel and the trial counsel from the prosecutor's office must meet and confer, in person or by telephone, to discuss the request and any application to unseal records served on the prosecutor's office. 	

Date:

(TYPE OR PRINT NAME)



(SIGNATURE OF ATTORNEY)

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (out of cycle)**

RUPRO Meeting: July 2, 2018

Title of proposal (*include amend/revise/adopt/approve + form/rule numbers*):

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

Committee or other entity submitting the proposal:

Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Seung Lee, 415-865-5393, seung.lee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by RUPRO: The working group's charge is stated in the "About" tab at the following link:

<http://www.courts.ca.gov/prop66-working-group.htm>

Project description from annual agenda:

If requesting July 1 or out of cycle, explain:

The working group is requesting that this proposal be circulated for public comment on a shortened special cycle - starting on July 2 and ending on July 23. The working group's goal is to present this proposal to the Judicial Council for adoption at its September meeting.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT SP18-12

Title

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

Action Requested

Review and submit comments by Monday, July 23

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603

Proposed Effective Date
January 1, 2019

Proposed by

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

Contact

Seung Lee,
seung.lee@jud.ca.gov, 415-865-5393

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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

DRAFT

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~~
43

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 casewise~~
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.~~
- 40

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.

40

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.