JUDICIAL COUNCIL
OF CALIFORNIA

RULES AND PROJECTS
COMMITTEE

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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:	Friday, October 19, 2018
Time:	3:00 p.m. – 5:00 p.m.
Location:	Conference call
Public Call-In Number	1-877-820-7831/Access Code: 8254930 (Listen Only)

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

PROP 66 WORKING GROUP (Items 13-16)

Out of Order: Item 13

Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings (adopt rules 8.390 – 8.398; amend rule 8.388; and adopt form HC-200) (Action required – approve for circulation)

Presenter: Hon. Dennis M. Perluss, Heather Anderson, Michael Giden, and Seung Lee

Out of Order: Item 14

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (adopt rules 4.571, 4.572, 4.573, 4.574, 4.575, and 4.57) (Action required – approve for circulation)

Presenter: Hon. Dennis M. Perluss, Heather Anderson, Michael Giden, and Seung Lee

Out of Order: Item 15

Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings (amend rule 4.550; adopt rules 4.550.5, 4.560, 4.561, and 4.562; adopt forms HC-100 and HC-101) (Action required – recommend Judicial Council action)

Presenter: Hon. Dennis M. Perluss, Heather Anderson, Michael Giden, and Seung Lee

Out of Order: Item 16

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; renumber rule 8.495 as 8.720, renumber rule 8.496 as 8.724, renumber rule 8.498 as 8.728, and renumber rule 8.499 as 8.730) (Action required – recommend Judicial Council action)

Presenter: Hon. Dennis M. Perluss, Heather Anderson, Michael Giden, and Seung Lee

CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI) (Items 01-03)

Item 01

Advisory Committee on Civil Jury Instructions Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Martin J. Tangeman and Bruce Greenlee

Item 02

Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms (Action required – recommend Judicial Council action)

Presenter: Bruce Greenlee

Item 03

Jury Instructions: Approve revisions to the Civil Jury Instructions (CACI) (Action required – RUPRO action only)

Presenter: Bruce Greenlee

CALIFORNIA CRIMINAL JURY INSTRUCTIONS (CALCRIM)

Item 04

Advisory Committee on Criminal Jury Instructions Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Peter J. Siggins and Kara Portnow

APPELLATE

Item 05

Appellate Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Louis R. Mauro and Christy Simmons

CIVIL AND SMALL CLAIMS (Items 06-08)

Item 06

Civil and Small Claims Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Ann I. Jones and Anne Ronan

Item 07

Civil Practice and Procedure: Name Change and Gender Change Forms (revise forms NC-100 INFO, NC-121, NC-125, NC-225, NC-400, NC-400 INFO, NC-420, NC-500, NC-500 INFO, and NC-520; and adopt forms NC-510G and NC-530G) (Action required – recommend Judicial Council action)

Presenters: Anne Ronan

Item 08

Protective Orders: Gun Violence Restraining Order Forms (revise forms GV-100-INFO, GV-100, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800-INFO, and EPO-002) (Action required – recommend Judicial Council action)

Presenters: Anne Ronan

CRIMINAL

Item 09

Criminal Law Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Tricia A. Bigelow and Sarah Fleischer-Ihn

FAMILY and JUVENILE

Item 10

Family and Juvenile Law Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Jerilyn Borack, Audrey Fancy, and Tracy Kenny

PROBATE AND MENTAL HEALTH ADVISORY COMMITTEE

Item 11

Probate and Mental Health Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. John H. Sugiyama and Corby Sturges

TRAFFIC ADVISORY COMMITTEE

Item 12

Traffic Advisory Committee Annual Agenda (Action required – RUPRO action only)

Presenters: Hon. Gail Dekreon and Jamie Schechter

JUDICIAL ADMINISTRATION

Item 17

Judicial Council: Judicial Branch Budget Committee (adopt rule 10.15; amend rules 10.10, 10.11, 10.13, and 10.16) (Action required – recommend Judicial Council action)

Presenter: Susan McMullan

III. OTHER BUSINESS

Action by E-Mail (October 22-23, 2018)- Justice Hull has determined, under rule 10.75(o)(1), that prompt action is needed and that RUPRO must act by email between meetings to consider these proposal.

Telephonic Appearances: Change in the Fee Amount (amend Cal. Rules of Court, rule 3.670) (Action required – recommend Judicial Council action)

Summary: The Judicial Branch Budget Committee recommends amending rule 3.670 of the California Rules of Court to increase the fee to appear by telephone in civil cases from $86 to $94, effective January 1, 2019. The new fee would apply to the balance of the four-year term of the master agreement for telephone appearance services that was recently entered into with CourtCall LLC. The fee increase reflects the estimated increase in the Consumer Price Index for All Urban Consumers for the term of the agreement.

Judicial Council: Name Change of Governing Committee of the Center for Judicial Education and Research (amend rule 10.50) (Action required – recommend Judicial Council action)

Summary: The Executive and Planning Committee recommends amending California Rules of Court, rule 10.50 (Governing Committee of the Center for Judicial Education and Research) to change the name of the committee to the Center for Judicial Education and Research Advisory Committee. The

amendment will align the name of the committee with those of other Judicial Council advisory committees.

IV. ADJOURNMENT

Adjourn

Advisory Committee on Civil Jury Instructions
Annual Agenda—2019
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	Hon. Martin J. Tangeman, Justice California Court of Appeal, Second Appellate District
Lead Staff:	Bruce Greenlee, Attorney Legal Services

Committee's Charge/Membership:

Rule 10.58 of the California Rules of Court states the charge of the Advisory Committee on Civil Jury Instructions, which is to make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council civil jury instructions (CACI).

The Advisory Committee on Civil Jury Instructions currently has 22 members. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups:

The committee has three subcommittees (referred to internally as working groups). Each is made up exclusively of committee members. Each working group reviews a third of the proposed meeting agenda before the full committee meeting and makes recommendations to the committee regarding each proposal. The working groups are:

1. Working Group 12
2. Working Group 34
3. Working Group 56

II. COMMITTEE PROJECTS

#	New or One-Time Projects	
1.	**Secondary Sources Process** Transfer process for selecting and updating secondary sources from the committee to the licensee publishers	**Priority 2**
	Project Summary: While retaining the Judicial Council's copyright to Secondary Sources, the responsibility for selecting the sources to be included and for keeping those sources up to date would be given to licensee publishers LexisNexis Matthew Bender and Thomson Reuters (West) under specific guidelines approved by the committee. **Status/Timeline:** For the 2020 full edition of CACI, to be approved at the November 2019 Judicial Council meeting **Fiscal Impact/Resources:** Substantial staff time one time to remove all of the current Secondary Sources from the CACI master files. **Internal/External Stakeholders:** None **AC Collaboration:** None	

#	Ongoing Projects and Activities *[Group projects by priority number.]*	
1.	**Maintenance—Case Law:**	**Priority 1**
	Project Summary: Review new case law affecting jury instructions to determine whether changes to any civil jury instructions are required. Draft and present proposed changes for council approval. **Status/Timeline:** Ongoing with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only RUPRO approval to RUPRO in January, May, July, and November **Fiscal Impact/Resources:** Substantial staff time for research and drafting **Internal/External Stakeholders:** None **AC Collaboration:** None	
2.	**Maintenance—Legislation:**	**Priority 1**
	Project Summary: Review new legislation affecting jury instructions to determine whether changes to any civil jury instructions are required. Draft and present proposed changes for council approval. Make any necessary citation revisions to statutes cited under Sources and Authority **Status/Timeline:** Ongoing, with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only RUPRO approval to RUPRO in January **Fiscal Impact/Resources:** Staff time once a year to review newly-enacted legislation **Internal/External Stakeholders:** None **AC Collaboration:** None	
3.	**New Instructions and Expansion into New Areas**	**Priority 1**

#	Ongoing Projects and Activities *[Group projects by priority number.]*	
	Project Summary: Review suggestions received from jury instruction users, new legislation, and case law; draft and propose new civil jury instructions, including new series of instructions in an entirely new subject area, as appropriate. **Status/Timeline:** Ongoing **Fiscal Impact/Resources:** Substantial staff time for research and drafting **Internal/External Stakeholders:** None **AC Collaboration:** None	
4.	**Maintenance—Sources and Authority**	**Priority 1**
	Project Summary: Add excerpts from new cases to Sources and Authority sections as appropriate once source is final. **Status/Timeline:** Ongoing, with delivery to RUPRO in January, May, July, and November **Fiscal Impact/Resources:** Substantial staff time for case review and drafting **Internal/External Stakeholders:** None **AC Collaboration:** None	
5.	**Maintenance—Comments From Users**	**Priority 1**
	Project Summary: Review comments, suggestions, and complaints received from bench and bar jury instruction users and propose any necessary changes and improvements. **Status/Timeline:** Ongoing, with delivery to Judicial Council at May and November meetings **Fiscal Impact/Resources:** Substantial staff time for research and drafting	

#	Ongoing Projects and Activities *[Group projects by priority number.]*	
	Internal/External Stakeholders: None **AC Collaboration:** None	
6.	**Technical Corrections**	**Priority 1**
	Project Summary: Make any necessary corrections or editing changes to the jury instructions. **Status/Timeline:** Ongoing, with delivery to Judicial Council at its November meeting **Fiscal Impact/Resources:** Modest amount of staff time **Internal/External Stakeholders:** None **AC Collaboration:** None	

III. LIST OF [PREVIOUS YEAR] PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	**Maintenance—Case Law and Legislation:** Releases presented to Judicial Council for approval on May 24, 2018 and to be presented to the Judicial Council on November 24, 2018.
2.	**New Instructions and Expansion into New Areas:** Releases presented to Judicial Council for approval on May 24, 2018 and to be presented to the Judicial Council on November 24, 2018. May release included a new series of instructions on the California False Claims Act.
3.	**Maintenance—Sources and Authority:** Releases presented to RUPRO for approval January, May, and July 2018, and to be presented to RUPRO for approval October 19, 2018
4.	**Maintenance—Comments From Users:** Releases presented to Judicial Council for approval on May 24, 2018 and to be presented to the Judicial Council on November 24, 2018
5.	**Technical Corrections:** Release to be presented to Judicial Council on November 24, 2018

Civil Jury Instructions

#	Position	Court, County, or Law School	Member Name	1st Term Start	1st Term End	Current Term Start	Current Term End	Replaced	Previous	Comments
	Chair	*2nd Dist*	*Hon. Martin J. Tangeman*	*8/14*	*15*	*9/18*	*19*	*H. W. Croskey*	*J. Ward*	
1	Appellate Court Justice	5th Dist	Hon. Donald R. Franson Jr.	11/14	17	9/17	20	H. W. Croskey	J. Ward	
2	Appellate Court Justice	6th Dist	Hon. Adrienne M. Grover	9/18	21	9/18	21	R. Ikola	B. Gaut, S Kane	
4	Appellate Court Justice	3rd Dist	Hon. Elena J. Duarte	11/11	14	9/17	19	R. McAdams	H. Hull, Jr.	
5	Appellate Court Justice	1st Dist	Hon. Marla J. Miller	9/17	20	9/17	20	J. Richman	S. Pollak	
6	Appellate Court Justice	2nd Dist	Hon. Martin J. Tangeman	11/16	19	9/16	19	E. Grimes	R. Silberfeld	seat converted from attorney to appellate
7	Superior Court Judge	Los Angeles	Hon. Amy D. Hogue	9/18	21	9/18	21	JS Wiley Jr	G. Andler	
8	Superior Court Judge	Riverside	Hon James Latting	11/16	19	9/16	19	M. Tangeman	J. Jacobs-May	J. Harvey
9	Superior Court Judge	Sacramento	Hon. Judy H. Hersher	2/13	15	9/18	21	J. Tigar	S. Kane	
10	Superior Court Judge	San Diego	Hon. Robert P. Dahlquist	11/10	13	9/16	19	E. Grimes	C. Kuhl	
11	Superior Court Judge	Santa Clara	Hon. Mary Arand	9/17	20	9/17	20	M. Marlow	M. Orfield	
12	Superior Court Judge	San Bernardino	Hon. Janet M. Frangie	11/11	14	9/17	19	L. O'Malley Taylor		
13	Superior Court Judge	San Francisco	Hon. Suzanne R. Bolanos	11/14	17	9/17	20	H. Hopp	D. Becton-Smith	
14	Lawyer whose primary area of practice is civil law	DOJ San Francisco	Ms. Melinda Pilling	9/17	20	9/17	17	J. Eisenberg	L. Herr, T. Bridges	Public Agency
15	Lawyer whose primary area of practice is civil law	San Francisco	Mr. Robert A. Goodin	11/03	06	9/18	21			Plaintiff
16	Lawyer whose primary area of practice is civil law	San Francisco	Mr. Michael A. Kelly	11/03	05	9/17	19			Plaintiff
18	Lawyer whose primary area of practice is civil law	San Francisco	Ms. A. Marisa Chun	9/18	21	9/18	21	R. Seabolt		Business
19	Lawyer whose primary area of practice is civil law	San Francisco	Mr. Todd M. Schneider	11/04	07	9/17	20			Plaintiff
20	Lawyer whose primary area of practice is civil law	Los Angeles	Ms. Christine Spagnoli	11/03	04	9/16	19			Plaintiff
21	Lawyer whose primary area of practice is civil law	Los Angeles	Mr. Julian W. Poon	11/12	15	9/18	21	R. Warren		Defense
23	Lawyer whose primary area of practice is civil law	Los Angeles	Ms. Mary Christine Sungaila	11/14	17	9/17	20	New Seat 2014		Defense
24	Lawyer whose primary area of practice is civil law	Los Angeles	Mr. Nicolas P. Connon	9/17	20	9/17	20	M. Hawkins	New Seat 2014	Defense
25	Law School Professor whose primary area of expertise is civil law	Stanford	Prof. Janet C. Alexander	9/18	21	9/18	21	M. Johns	P. Tiersma	
	Discontinued Seats	**Discontinued Seats**								
	New Superior Court Judge	Placer	Hon. Charles D. Wachob	11/07	08	11/07	08	H. Hopp		
	Lawyer whose primary area of practice is civil law	Alameda	Mr. Tyler Pon	11/03	05	11/05	08			
3	Appellate Court Justice	2nd Dist	Hon. Victoria M. Chavez	11/07	10	11/13	16	G. Hastings	I. Ruvalo	discontinued 11/16
17	Lawyer whose primary area of practice is civil law	San Francisco	Mr. Joseph P. McMonigle	11/10	13	11/13	16	E. Matthai		discontinued 11/16
22	Lawyer whose primary area of practice is civil law	Los Angeles	Mr. John E. Porter	11/07	10	11/13	16			discontinued 11/16

Membership (Rule 10.58): Committee shall include at least one member from each of the following categories:
Appellate court justice;
Trial court judge;
Lawyer whose primary area of practice is civil law; and
Law school professor whose primary area of expertise is civil law

Note: A majority of the members must be judicial officers.

Item number: 02

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: Otober 19, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)

Committee or other entity submitting the proposal:
Advisory Commitee on Civil Jury Instructions

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO:
Project description from annual agenda: Maintaining and expanding CACI (the committee's ongoing project)

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 33 is the second CACI release for 2018. Release 32 was approved by the Judicial Council May 2018.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 28 new, revised, and revoked CACI instructions to the council, the advisory committee also requests that RUPRO give final approval to 34 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 29–30, 2018

Title
Jury Instructions: New, Revised, Revoked, and Renumbered Civil Jury Instructions (Release 33)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (CACI)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
November 30, 2018

Date of Report
October 1, 2018

Contact

Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, revoked, and renumbered civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official 2019 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective November 30, 2018, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 18 instructions: CACI Nos. 206, 435, 450C, 1730, 1802, 2400, 2401, 2404, 2430, 3066, 3210, 3211, 3220, 3244, 3704, 3903J, 4550, and 4551;

2. Addition of 4 new instructions: CACI Nos. 1208, 2023, 2528, and 2705;

3. Merging of CACI No. 2402 into 2401, with the revocation of 2402.

4. Renumbering of CACI No. 2407 as 3963, of CACI No. 2433 as 3903P, and of CACI No. 3963 as 3965.

A table of contents and the proposed new, revised, and renumbered civil jury instructions are attached at pages 39–135.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 33 of *CACI*. The council approved *CACI* release 32 at its May 2018 meeting.[2]

Analysis/Rationale

A total of 28 instructions are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 35 additional instructions under a delegation of authority from the council to RUPRO.[3]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant additions and changes recommended to the council.

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] The committee now also issues two releases annually in January and July for online only delivery. These online-only releases—, Release Numbers 31A and 32A for 2018—are limited to nonsubstantive technical changes and the like as described in note 3 below.

[3] At its October 20, 2006 meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

New instructions

CACI No. 1208, *Component Parts Rule.* The committee proposes a new instruction on the product liability of a component parts manufacturer, distributor, or supplier. The basic rule is that a component parts provider is not liable for injuries caused by the product into which the part is integrated unless (1) the component part itself is defective; or (2) (a) the defendant may have substantially participated in the integration of the component into the design of the end product, (b) the integration of the component caused the end product to be defective, and (c) the defect in the product causes the harm.[4] The committee has been considering this proposal for several years, but it was put on hold awaiting the California Supreme Court opinion in *Ramos v. Brenntag Specialties Inc.* In *Ramos*, the court held that the component parts rule does not apply if the injury is caused by the component itself when it is being used as intended before integration into another product.[5]

On revisiting the proposal, the committee decided to limit the instruction to the second exception. There was considerable discussion with regard to the burden of proof. While the component parts rule is an affirmative defense,[6] the committee eventually came to agree that the plaintiff has the burden of avoiding the defense by proving one of the exceptions. Otherwise, the defense would be in the position of having to prove that either the component or the integrated end product was *not* defective, and this is contrary to the general principles of strict product liability.

CACI No. 2023, *Failure to Abate Artificial Condition on Land Creating Nuisance.* Last release, a commenter called the committee's attention to a federal district court case from the Eastern District of California[7] in which the court, addressing California law on nuisance, stated that there were potential claims for nuisance under the Restatement Second of Torts, sections 838 and 839. Section 838 provides for liability if the defendant has a right of possession in land and consents or unreasonably permits a third party to create a nuisance on the land. Section 839 provides for liability if the defendant unreasonably fails to abate a nuisance when it is in possession of land.

The committee found no California case addressing liability under section 838. However, section 839 was applied in *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com. (Leslie Salt).*[8] On this basis, the committee proposes new CACI No. 2023 supported by Restatement Second of Torts, section 839 and *Leslie Salt.*

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[4] *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508.

[5] *Id.* at p. 504.

[6] See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183; see also *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1006, fn. 6.

[7] *Coppola v. Smith* (E.D.Cal. 2013) 935 F.Supp.2d 993.

[8] (1984) 153 Cal.App.3d 605, 618–622.

CACI No. 2528, *Failure to Prevent Sexual Harassment by Nonemployee.* The recent case of *M.F. v. Pacific Pearl Hotel Management LLC*[9] addressed employer liability under the Fair Employment and Housing Act (FEHA) for harassment by a nonemployee.[10] In response, the committee proposes adding new instruction CACI No. 2528 to the FEHA series to address this situation and others in which nonemployees, such as customers or salespersons, come onto the premises and harass employees.

CACI No. 2705, *Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee.* Recently, the California Supreme Court issued its long-awaited decision in *Dynamex Operations W. v. Superior Court (Dynamex)*[11] greatly restricting the circumstances under which an employer may properly classify a worker as an independent contractor rather than an employee under California's wage orders. The court held that the employer had the burden of proving that the worker satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[12]

Whether the three *Dynamex* factors can be issues of fact to be presented to a jury is not clear from the opinion. The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor.[13] But because the employer must prove all three factors, if any single factor can be found against the employer as a matter of law because there are no undisputed facts, the case will not reach a jury. However, should there be proof or disputed facts on all three factors, the committee proposes this new instruction because of the importance and prominence of the issue.

In response to *Dynamex,* the committee has also made some additions to the Directions for Use to CACI No. 3704, *Existence of "Employee" Status Disputed,* in the Vicarious Responsibility series. In *Dynamex,* the court found merit in the concerns "regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors."[14] CACI No. 3704 is such an instruction. And while the court's concerns in *Dynamex* focused on

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[9] (2017) 16 Cal.App.5th 693.

[10] See Gov. Code, § 12940(j).

[11] (2018) 4 Cal.5th 903.

[12] *Id.* at pp. 955–956.

[13] *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342.

[14] *Dynamex, supra,* 4 Cal.5th at p. 956.

the wage and hour context, the committee decided that the language should be noted in the Directions for Use to CACI No. 3704.

Revised instructions

CACI No. 435, *Causation for Asbestos-Related Cancer Claims*. In the last release, the council approved revisions to CACI No. 430, *Causation: Substantial Factor,* in response to the recent case of *Petitpas v. Ford Motor Co. (Petitpas)*[15] A conforming change to CACI No. 435 added a cross-reference to the discussion in CACI No. 430.

CACI No. 435 provides that the plaintiff must prove that exposure to asbestos from the defendant's *product* was a substantial factor causing the illness. Thus, the instruction is limited to defendants who put asbestos into the stream of commerce; that is, manufacturers and suppliers. Those who don't make or supply an asbestos-containing product are not within the instruction.

Numerous commenters from the asbestos plaintiff bar pointed out that CACI No. 435 was incomplete or inaccurate in its limitation to manufacturers and suppliers of asbestos. In the view of the commenters, CACI No. 435 should be given in all cases of asbestos exposure regardless of the status of the defendant. They contended that there is no medical or scientific reason why asbestos causation should depend on whether the defendant was a manufacturer or supplier as opposed to someone who exposed the plaintiff to asbestos in some other way, such as a premises owner or a construction project contractor. Comments were also received from the asbestos defense bar asserting that CACI No. 435 should not be given with regard to defendants other than manufacturers or suppliers.

The committee had not considered this issue in the last release as it was not part of the proposal. Therefore, it was placed on the agenda for this current release. After considerable research and consideration, the committee concluded that there was no clear answer in the case law. But the committee considered the issue an important one that should be flagged for bench and bar. Therefore, an addition to the Directions for Use was approved that presented the issue but labeled it as "not settled."

On posting for public comment, numerous comments were received from the asbestos plaintiff bar taking issue with the characterization of "not settled."[16] These commenters all expressed the view that it has long been the rule that there is a single standard for asbestos causation, which applies regardless of the nature of the defendant. Many cases were cited in the comments. The committee reconsidered the issue in light of the comments and cases cited but remains

[15] (2017) 13 Cal.App.5th 261, 298–299.

[16] A single comment was received from the asbestos defense side, also objecting to the "not settled" conclusion. But in the view of this commenter, it is settled that CACI No. 435 applies *only* to manufacturers and suppliers.

unconvinced that the cases settled the issue. The proposed revision presented for council approval continues to consider the issue as unsettled.

CACI No. 435 is based on *Rutherford v. Owens-Illinois, Inc. (Rutherford),* which addresses exposure to asbestos from "defendant's defective asbestos-containing products."[17] The commenters' claim that *Rutherford* applies to all defendants is based on a single word in the opinion. At one point, the court refers to "a product produced, distributed, or *installed* by a particular defendant."[18] The court's reference to installers is proposed as authority that the holding applies beyond manufacturers and suppliers. But the problem with this theory is that the language is dicta. And since the defendant in the case was a manufacturer, there is no discussion (nor any need for discussion) of asbestos causation for other categories of defendants.

Beyond *Rutherford,* among the many cases presented by the plaintiff bar in support of their position, a few offer some support by implication. In *Casey v. Perini Corp.*[19] and *Whitmire v. Ingersoll-Rand Co.*[20] the courts do cite *Rutherford* and appear to apply its causation standard to defendants who were not manufacturers or suppliers. But the status of the defendant was not an issue in either case. There is no analysis, nor anything resembling a holding that *Rutherford* is not limited to manufacturers and suppliers. And in *Petitpas,* the court noted that the trial court, over opposition, gave CACI No. 435 with regard to a premises defendant.[21] But again, there was no analysis or holding. Nor did the committee find any other case with such a holding. Thus, the committee confirmed its decision to present the issue as unsettled.

CACI Nos. 2400, 2401, 2402, 2404, 2407, 2430, and 2433 (Wrongful Termination series). An attorney from a law firm labor and employment group presented a number of proposals for revisions to and revocations of instructions in the Wrongful Termination series. Most of his proposals addressed things like duplication, inconsistencies, and potential inconsistencies in the series. The committee proposes that many of them be adopted.

The attorney proposed combining CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Essential Factual Elements*, and CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*. His point was that constructive discharge could be incorporated into 2401 with the new title *Breach of Employment Contract—Unspecified Term—**Actual or Constructive Discharge**—Essential Factual Elements* and then 2402 could be revoked. He pointed out that CACI No. 2510, *"Constructive Discharge" Explained*, defines constructive discharge and can be given with CACI No. 2401. This approach would eliminate some inconsistency that currently exists

[17] (1997) 16 Cal.4th 953, 982–983.

[18] *Id.* at p. 975.

[19] (2012) 206 Cal.App.4th 1222, 1236–1239.

[20] (2010) 184 Cal.App.4th 1078, 1084.

[21] *Petitpas, supra*, 13 Cal.App.5th at p. 290.

between CACI Nos. 2402 and 2510 with regard to constructive discharge. The committee agreed and proposes this combination and revocation.

The attorney pointed out that with regard to damages for wrongful termination, the measure of damages for lost earnings is the same whether the claim is for breach of contract, violation of public policy, or for discrimination under the Fair Employment and Housing Act. CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages,* is for use only for the second claim. The attorney noted that for other claims, a general instruction from the Damages series is often given. If wrongful termination is alleged based on multiple theories, the jury could get different instructions for the same damages.

The attorney proposed moving CACI No. 2433 to the Damages series and making it applicable to all claims against an employer for lost income. The committee agreed with this approach and proposes new CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*. This new instruction is essentially CACI No. 2433 with the part of the instruction that refers to noneconomic damages removed.[22]

The attorney made a similar point with regard to CACI No. 2407, *Affirmative Defense—Employee's Duty to Mitigate Damages*. CACI Nos. 3961 and 3962 in the Damages series address mitigation of damages in general for past and future lost earnings. CACI No. 2407 presents some variations applicable to termination of employment. But again, it should apply regardless of the basis of the claim for wrongful termination and lost earnings. The committee proposes moving 2407 to the Damages series as CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages,* without any substantive changes.[23]

Revoked instruction

No instruction is proposed to be revoked for substantive reasons. CACI Nos. 2402, 2407, and 2433 will be revoked and the numbers will be gone, but as explained above, 2402 is being consolidated with 2401, and 2407 and 2433 are being moved to the Damages series.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from July 23 through August 31, 2018. Comments were received from 22 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. Nineteen comments were received on asbestos causation, all but one from the asbestos plaintiff bar. Other

[22] CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* can be given for noneconomic damages.

[23] The committee proposes numbering this instruction as 3963 to group the three mitigation of damages instructions together. Current CACI No. 3963, *No Deduction for Workers' Compensation Benefits Paid,* would be renumbered as 3965.

than CACI No. 435 and asbestos causation, discussed above, no instruction garnered a particularly large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 9–38.

Alternatives considered

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval; therefore, the advisory committee did not consider any alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2019 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments and the committee's responses, at pages 9–38
2. *CACI* instructions at pages 39–135

Instruction	Commentator	Comment	BG Proposed Response
206, *Evidence Admitted for Limited Purpose*	Association of Southern California Defense Counsel, by David P. Pruett, Carroll, Kelly, Trotter, Franzen, McBride & Peabody	ASCDC supports the proposed revisions to CACI No. 206 as an improvement upon the instruction that focuses on the rule. We believe removing the aspects of the instruction regarding a judge's prior explanation of admission for limited purpose amplifies the rule, regardless of the juror's recollection of how the judge previously described the rule.	No response is required.
		ASCDC also supports the proposed reference to *Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1060-1061, in the Sources and Authority as that citation confirms the vitality of the rule.	No response is required.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We prefer the current instruction, which explicitly states in active voice that the court ("I") previously explained that certain evidence was admitted for a limited purpose. We believe this helps to remind the jury of a specific admonition. The statement that "certain evidence was admitted for a limited purpose" is less definite, more abstract, and does not clearly state that evidence was admitted for a limited purpose only if the court expressly so stated during trial.	The trial judges on the committee report that often the judge does not actually explain during the trial that "certain evidence was admitted for a limited purpose"; in those cases the current wording would not be accurate.
		We would modify the first sentence in the Directions for Use for greater clarity: "It is recommended that the judge, when reading this instruction, remind the jury of the limited purpose to which the evidence applies and of the admonition made at the time of the limiting request ~~call attention to the purpose to which the evidence relates~~."	As the judge might not have addressed any limited-purpose evidence during the trial, it would not be a reminder.
435. *Causation for Asbestos-Related Cancer Claims*	Association of Southern Defense Counsel, by David K Schultz	The proposed addition to the "Directions For Use" is not accurate—which will foster uncertainty and protracted litigation in the trial and appellate courts—because it erroneously suggests that there is a conflict concerning whether CACI 430 or 435 should be applied in asbestos cases based on *Whitmire v. Ingersoll-Rand Co.* (2010) 184	Neither *Petitpas* nor *Whitmire* really addresses the causation standard for defendants other than manufacturers and suppliers. The comment states that in *Petitpas* "the trial judge commented that '[C]ounsel has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a

Instruction	Commentator	Comment	BG Proposed Response
		Cal.App.4th 1078 and *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261. *Petitpas* establishes that 435 does not apply to defendants other than manufacturers or suppliers. Because *Whitmire* involved a pre-trial motion for summary judgment, it obviously did not involve the issue of whether a jury should be instructed under CACI 430 or 435. Moreover, in *Petitpas,* the same court did not in any way suggest or state that its decision was in conflict with its prior decision in *Whitmire*. Nor did the plaintiffs in *Petitpas* argue that *Whitmire* should be read as supporting their position concerning which jury instruction should be given. The appellate court in *Petitpas* noted that, when jury instructions were argued in the trial court, the trial judge commented that "[C]ounsel has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a premises defendant." (*Petitpas, supra,* 13 Cal.App.5th at 291.) The court also discussed that, on appeal, "plaintiffs have presented us with no authority supporting their argument" that CACI 430 is inapplicable to claims asserted against a defendant "that is not a manufacturer or supplier." (*Id.* at 299.)	premises defendant;' " This statement is not correct. (13 Cal.App.5th at p. 291.) That sentence was spoken by counsel for the premises defendant. The trial court in *Petitpas* did give CACI No. 435 with regard to the premises defendant. (13 Cal.App.5th at p. 290.) So in no way can it be said that "*Petitpas* establishes that 435 does not apply to defendants other than manufacturers or suppliers." But because *Petitpas* does not support the defense on this point, the committee saw that the proposed sentence comparing *Petitipas* as a case favoring the defense with *Whitmire* as a case favoring the plaintiff's position could not remain as constructed. The committee has removed this parenthetical and replaced it with the following sentence: "However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant] ; see also Casey v. Perini Corp. (2012) 206 Cal. App. 4th 1222, 1236–1239 [142 Cal.App.4th 678] [Rutherford causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].)"
	Waters, Kraus, & Paul, El Segundo, by Michael B. Gurien	The *Rutherford* causation standard is not limited to claims against manufacturers, distributors, or suppliers of asbestos-containing products (i.e., product liability defendants). It is applicable to all types of defendants in asbestos-injury cases, including contractors, premises owners, and any other type of defendant, as it is the	Jury instructions must be based on settled law. If the law is unsettled and the uncertainty will affect an instruction, in many cases, the committee sees its proper role of alerting bench and bar to the status of the issue via the Directions for Use.

Instruction	Commentator	Comment	BG Proposed Response
		standard for "[c]ausation specific to asbestos cases." (*Petitpas, supra,* 13 Cal.App.5th at p. 298.) Because the proposed revisions to the Directions for Use to CACI No. 435 suggest otherwise, particularly the revision stating that it is "not settled" whether the *Rutherford* causation standard applies to defendants who are "not manufacturers or suppliers of asbestos-containing products," the revisions are misleading and will likely result in confusion and misapplication of the law.	As will be noted in its responses to the many comments below, the committee disagrees with the view expressed in this and other comments, that the law with regard to the applicability of CACI No. 435 to defendants other than manufacturers and suppliers is settled. The committee agrees with the language in *Petitpas* that the ASCDC misattributes above to the trial judge but actually was spoken by counsel for the premises liability defendant. The language is quoted in the opinion: "[C]ounsel [for plaintiff] has cited no authority that would extend 435, which is specifically for manufacturers and suppliers of asbestos-containing products, to a premises defendant." The committee also finds no authority sufficient to extend CACI No. 435 to all defendants. There is no case in which the court was faced with having to decide and hold that *Rutherford* applies to all defendants regardless of status. No court has looked at that issue and stated as a holding that there is a single causation standard for asbestos; that that standard is stated in *Rutherford*; and that 435 applies in every case of asbestos exposure regardless of the status of the defendant.
		Nowhere in *Rutherford* did the court indicate or suggest that the causation standard it articulated was limited to asbestos-injury claims against manufacturers or distributors of asbestos-containing products, or that a different standard should apply to asbestos-injury claims against defendants who are not product manufacturers or distributors, such as contractors or premises owners who	The comment is correct in noting what *Rutherford* does not say. But the failure to state that something is true does not establish that it is false.

Instruction	Commentator	Comment	BG Proposed Response
		expose others to asbestos through their acts or omissions involving the use of asbestos or asbestos-containing products in their work or on their premises.	
		The court's reference to "a product produced, distributed, or *installed* by a particular defendant," (ibid., italics added), indicates that it was not confining or limiting its causation analysis to manufacturers and distributors of products, but was also addressing causation as to other types of defendants, including defendants who install asbestos-containing products.	The reference at p. 975 of *Rutherford* to products "produced, distributed or *installed* by a particular defendant" is only this sentence: "Apart from the uncertainty of the causation, at a much more concrete level uncertainty frequently exists whether the plaintiff was even exposed to dangerous fibers from a product produced, distributed or installed by a particular defendant." The first problem is that the word "installed" may not have the fixed meaning that the comment attributes to it, someone other than a manufacturer or supplier. The second problem is that even if the court intended the attributed meaning, the sentence is dicta. The defendant in *Rutherford* was a manufacturer. But the biggest problem is that there in no analysis of causation with regard to different classes of defendants. The committee does not believe that one word in *Rutherford* is sufficient to make all defendants subject to *Rutherford's* causation standard.
		For purposes of causation, it does not matter whether the defendant who exposed the plaintiff to asbestos was a product manufacturer or distributor, an installer, contractor, or premises owner, or some other type of defendant, as the asbestos fibers and resulting disease do not distinguish between, or vary in their behavior and effect depending on, the type of defendant involved, and because the requirements of exposure and disease causation are the same as to all defendants. Regardless of the type of defendant, the plaintiff must prove that he or	There is no authority that establishes this view as the law.

Instruction	Commentator	Comment	BG Proposed Response
		she was exposed to asbestos by that defendant, whether from a product the defendant manufactured, distributed, or used in its work, premises the defendant owned, possessed, or controlled, or in some other way, and must further prove that the exposure was a substantial factor in causing his or her disease.	
		Since *Rutherford,* several published California appellate decisions have applied the Rutherford causation standard to asbestos-injury claims against defendants who "are not manufacturers or suppliers of asbestos-containing products." These decisions include (in addition to *Whitmire*, *Casey,* and *Kesner,* discussed below):	The comment is correct in noting that the *Rutherford* standard has been applied in a few cases, including *Whitmire* and *Casey,* to defendants other than manufacturers and suppliers. But "applied" does not mean "held." None of these cases actually address and analyze the issue.
		Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261. In *Petitpas,* the Court of Appeal cited and applied the *Rutherford* causation standard in its review of a nonsuit granted in favor of a premises liability defendant (Rossmoor Corporation) on claims alleging direct and secondary ("take-home") exposure to asbestos from the defendant's construction sites. (*Id.* at pp. 267, 278-279, 285-290.)	The court in *Petitpas* cited *Rutherford* in upholding the nonsuit granted to premises defendant Rossmoor. So again, implicitly once could conclude that *Rutherford* and CACI No. 435 apply to premises liability defendants. But as noted above, there is no analysis in the opinion as to why 435 is appropriate for premises defendants. Nor is there any holding in the case to that effect.
		Ganoe v. Metalclad Insulation Corp. (2014) 227 Cal.App.4th 1577. In *Ganoe,* plaintiffs claimed that the decedent was exposed to asbestos at his workplace from insulation work by the defendant insulation contractor (Metalclad Insulation Corporation). (Id. at pp. 1578-1581.) The defendant moved for summary judgment based on causation, arguing "that plaintiffs had no evidence that Ganoe was exposed to asbestos for which [the defendant] was responsible." (*Id.* at p. 1579.) The trial court agreed and granted the motion; the Court of Appeal reversed. (*Id.* at pp. 1578-1579, 1581.) In addressing causation, although it did not expressly cite *Rutherford,* the Court of Appeal did cite and discuss the causation analysis in *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, where the court analyzed causation under the	The status of the defendant in *Ganoe* is not clear, but the claim was apparently that the plaintiff "worked with or around … asbestos-containing products supplied, installed or removed by [defendant]." That language could be broad enough to implicate all defendants, but again, there is no holding or analysis that helps the plaintiffs. *McGonnell* cites *Rutherford* but is of even less help. Summary judgment was affirmed because there was "no evidence decedent had been exposed to *asbestos-containing products manufactured by defendants*."

Instruction	Commentator	Comment	BG Proposed Response
		Rutherford standard. (*Ganoe, supra,* 227 Cal.App.4th at pp. 1585-1586; *McGonnell, supra,* 98 Cal.App.4th at p. 1103.)	
		The comment cites several pre-*Rutherford* cases that are alleged to support the plaintiff position. *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409 and *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, disapproved on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 3 refer to the defendant's *conduct* rather than the defendant's asbestos-containing product. In *Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245, the court said that there must be proof that the defendant's asbestos products *or activities* were present at plaintiff's work site.	To the extent that language in any of these cases supports the plaintiff position, the committee does not believe that language in pre-*Rutherford* cases can support a current jury instruction.
	Consumer Attorneys of California, by James P. Nevin, Brayton Purcell, Novato	We urge the committee to reject the proposed changes to the Directions for Use as they do not accurately state California law. The proposed additions seek to incorporate one view in an area of law that is, at best, under commentary and debate, and must be analyzed by a trial court on a case-by-case basis on the specific facts involved. As such, it is not appropriate to present in settled, uniform, and omnibus jury instructions. The existing language' of the Directions for Use should remain unchanged at the present time.	The committee is not certain what the comment means. Does "under commentary and debate" mean "unsettled?" If so, that would support the committee's conclusion that the law "is not settled."
		In *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261,298–301, the court declined to rule that the trial court's giving of both CACI 430 and CACI 435 was error, finding both that the Directions for Use were confusing, and finding the error harmless. This *minority view* is the sole basis for the proposed additional language in the Directions for Use, which would have the affect (sic) of suggesting the *Petitpas'* court's opinion as some statement of California law on this point. It is not.	As noted above, the proposed parenthetical comparing *Petitpas* and *Whitmire* has been replaced.

Instruction	Commentator	Comment	BG Proposed Response
		In *Whitmire v. lngersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084, the same court, without any indication of confusion or harmless error, unambiguously and correctly applied the asbestos causation standard (as set forth in CACI 435) to the contractor defendant Bechtel Corporation. This finding was in full accord with the asbestos causation standard set forth by the California Supreme Court in *Rutherford v. Owens Illinois, Inc.* (1997) 16 Cal.4th 953, and its progeny, none of which sought to carve out any exception for a defendant who is not a manufacturer or supplier. See, e.g., *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990; *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659; *Izell v. Union Carbide Corp*. (2014) 231 Cal.App.4th 962; and *Davis v. Honeywell International, Inc.* (2016) 245 Cal.App.4th 477.	While all of the comment's description of Whitmire is true, the court provided no analysis of why *Rutherford* applies to all defendants. None of the other four cases cited are on point. All four involved manufacturer and supplier defendants. There was no reason for the courts to consider other defendants.
		Since *Rutherford*, there have been at least fifty-five (55) published and unpublished California appellate decisions involving defendants who are not manufacturers or suppliers, and again none of those decisions observed or suggested the requested amendment to the Directions For Use of CACI 435, nor did they hold or carve out any exception regarding CACI 435. (The comment then cites 53 of these cases in three categories: Contractors; Premises; and Take Home.)	Nineteen of the cases are published; the commenter provided incorrect citations for two; and two were superseded by a grant of review. The theory of the comment seems to be that because none of the cases said that *Rutherford* does NOT apply to all defendants, that means that *Rutherford* applies to all defendants; i.e., silence establishes the authority of what is not said. But not one of these cases analyzes causation with regard to all defendants. Many of them have nothing to do with asbestos causation. Only two of the cases even cite *Rutherford*. In *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, the California Supreme Court expressly declined to address causation. The other case does apply the *Rutherford* standard to a general contractor. (See *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th

Instruction	Commentator	Comment	BG Proposed Response
			1222.) But the court does not analyze the issue, and there is no express statement that *Rutherford* applies to all defendants and why. Because *Casey* is two years newer than *Whitmire,* the committee decided to use *Casey* instead of *Whitmire* in the Directions for Use as an example of a case in which Rutherford was cited for a defendant who was not a manufacturer or supplier.
	Baron & Budd, Dallas TX, by Kathryn Pryor	In *Rutherford* the court applied "percentages of fault" (16 Cal.4th 953 at 962) to non-asbestos product manufacturers, including the plaintiff and each employer that contributed to the exposure. [*Id.*] Neither the "plaintiff" nor the "employers" were asbestos-product manufacturers, yet the *Rutherford* causation standard applies to allow the jury to allocate a percentage of contribution to them where their negligence contributes to the risk of the plaintiff's development of an asbestos-related cancer. Therefore, the proposed revision to CACI No. 435 would contravene the standard as set forth in *Rutherford* by the California Supreme Court.	It is not disputed that those other than manufacturers or suppliers may be liable for asbestos exposure. That is not the issue. The issue is whether the *Rutherford* causation standard can vary depending on the status of the defendant. The fact that a defendant other than a manufacturer or supplier may be liable for a share of comparative fault does not establish that the same causation requirement applies to it.
	Dean Omar Branham, Dallas Tx, by Charles Branham and Jessica Dean (two comments making essentially the same points)	In using the term "defendant's asbestos-containing products," the Supreme Court meant asbestos fibers emitted as a result of defendant's tortious conduct.	The committee must rely on what the Supreme Court opinion says, not on conjecture as to what it meant.
		If the Navy "installs" asbestos insulation on its ships, by definition it is not manufacturing or supplying asbestos-containing products. [See, e.g. *AOB* at 29-30]. Yet it is well-settled that the Navy is properly allocated fault in an asbestos-cancer case, even though the Navy is not an asbestos-product manufacturer. [See *Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 270 (Navy properly allocated fault in an asbestos cancer case)].	The two points made in the comment are both addressed above: *Rutherford's* use of "installed" and the comparative fault point. *Collins* does allocate fault to the Navy, but there is no discussion of causation. *Rutherford* is not cited. (The comment provides no full citation for "AOB.")
		Decades of case law apply the *Rutherford* causation standard to allocate liability to all parties whose	*Taylor,* like *Collins* addressed above, only establishes the undisputed proposition hat defendants other than

Instruction	Commentator	Comment	BG Proposed Response
		negligence or fault contributes to the plaintiff's risk of developing asbestos cancer, and not just "asbestos product manufacturers and suppliers:" (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 (fault for plaintiff's asbestos-related injuries properly allocated to both manufacturer of asbestos-containing products and to Navy as plaintiff's former employer); *Collins, supra,* 185 Cal.App.4th at 270, 274; (following *Taylor*); *Bockrath v. Aldrich Chem. Co, Inc.* (1999) 21 Cal.4th 71, 79-80 (holding that *Rutherford* causation standard applies to non-asbestos chemicals that cause multiple myeloma); *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664 (holding that in asbestos case, a carpenter employed by an independent contractor that installed scaffolding for workers who replaced asbestos insulation in an oil refinery facility may sue the refinery owners for injuries caused by exposure to asbestos, when it is claimed that only the refinery owner knew the carpenter was being exposed to a hazardous substance). Pursuant to *Bockrath,* the *Rutherford* causation standard applies to those cases "presenting complicated and possibly esoteric medical causation issues . . ." [*Id.* at 79], and not just to cases involving asbestos-product manufacturers.	manufacturers and suppliers can be liable for asbestos exposure. *Rutherford* is not cited, and causation is not addressed. In *Bockrath,* while the plaintiff sued 55 defendants, the California Supreme Court construed the pleading as alleging that "each defendant *manufactured* a chemical product that, as used or foreseeably misused, caused injury." (emphasis added) While the case addresses causation after *Rutherford,* there is no discussion of any variations depending on the status of the defendants. *Kinsman* did involve an asbestos claim against a property owner. But the opinion is about owner liability for injuries to an employee of an independent contractor. The case has little to do with asbestos.
	Gori Julian & Associates, Torrance, by Rebecca A. Cucu	The comment reiterates points made by others: The court's use of "installed" in *Rutherford*; point, the allocation of comparative fault to defendants other than manufacturers and suppliers; and the claim that "decades of well-settled case law" leave the issue settled.	These points are addressed above in response to other comments. See response to comments of Waters Kraus, Baron and Budd, and Dean Omar Branham.
		In any asbestos-related case involving both product manufacturers and nonmanufacturers, the finder of fact must evaluate each entity's contribution to an indivisible injury. Applying a "but for" causation standard to the nonproduct manufacturers would absolve each such entity	The comment seems to be well off point. It would seem to be settled that the optional "but for" sentence of CACI No. 430, *Causation: Substantial Factor,* does not apply in asbestos. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3.) The issue is

Instruction	Commentator	Comment	BG Proposed Response
		of fault, due to the fact that it is not possible to determine which fibers caused the disease.	not what standard does not apply; the issue is what standard does apply.
	Trey Jones, Law Office of Trey Jones	The suggestion that *Petitpas v. Ford Motor Company* found that it was "not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants" is terribly misleading. First, it ignores the *Petitpas* court's acknowledgment that the correct instruction is CACI 435 – "CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* noted, more specific instructions also must be given in a mesothelioma case." (*Petitpas. supra,* at 299). It would be more correct to say that the court found that it was harmless error to give 430 in that particular case because 435 was also given. The suggested citation in CACI to pages 298-299 stops before the three-page harmless error analysis beginning at page 300. If *Petitpas* found that a court should give both 430 and 435 in an asbestos case, then why did it also go through an extensive harmless error analysis on that very issue?	The committee agrees with much of the comment. The committee has removed the "Compare" parenthetical from the Directions for Use so that it does not imply that *Petitpas* suggests that 435 should not be given for defendants other than manufacturers and suppliers.
		The proposed revision will be used to suggest that 430, and not 435, should both be given if a defendant is not an asbestos product manufacturer.	That is the position of the defense. But by calling the issue "not settled," the committee is in no way suggesting that the defense is right.
		Giving CACI No. 430 will then introduce the concept of "but for" causation in asbestos case and cases that involve multiple causes of an indivisible injury. The Supreme Court has repeatedly held that "but for" causation is an impossible standard for cases involving multiple exposures from different sources resulting in the same injury, beginning with *Rutherford*.	There is no case that holds or even suggests that the "but for" sentence from CACI No. 430 should be given in an asbestos case. It was not given in *Petitpas*.
		This change will result in giving both instructions for identical exposures. For example, a case involving asbestos exposure from pipe covering would result in giving 430 and 435 if one defendant manufactured the pipe covering and another defendant negligently ripped	That is what happened in *Petitpas*. While the committee sees the point of the comment (excepting the characterization as "absurd"), it is up to a court to resolve the matter.

Instruction	Commentator	Comment	BG Proposed Response
		off the same pipe covering in the plaintiff's presence. Same product, same toxin, same exposure, but two different causation standards. This is an absurd result.	
	Jeffrey A. Kaiser, Kaiser Gornick, Walnut Creek	The proposed additional language may be read as suggesting that CACI 435 should not be given in an asbestos cancer case. However, there is no case supporting that position.	There is nothing that suggests that CACI No. 435, an instruction specifically to be given in an asbestos cancer case, should not be given in an asbestos cancer case.
		Petitpas does not create any conflict over whether CACI No. 435 should be given with regard to defendants other than manufacturers and suppliers.	This point is addressed above in response to the comment of Trey Jones.
		The concern that the "but for" sentence of CACI No. 430 will be given.	This point is addressed above in response to the comment of Gori Julien and Associates.
		The first sentence of the Directions for Use should be modified to read: "This instruction should be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product <u>and/or as a result of the defendant's conduct."</u>	The comment takes the position that the issue is, in fact, settled. For the many reasons expressed above, the committee disagrees.
		If the committee traces back the origins of the Directions for Use language in 435 it will find that the sentence was added at the request of 3M. The notes indicated there may be defendants in asbestos cancer cases who are entitled to the "but for" instruction in CACI 430. It is not clear on what basis 3M, a respirator defendant, would be entitled to this instruction as no authority was apparently provided at the time. Regardless, other defendants try to advantage of the Directions for Use language to get a CACI 430 instruction including the bracketed "but for language". In particular, premises defendants in asbestos cancer cases repeatedly have done so.	3M did submit a comment on CACI No. 430 last release, but no language adopted by the committee in either CACI No. 430 and 435 came from 3M. There are no "notes" that indicate that there may be defendants who are entitled to the "but for" instruction from CACI No. 430. There is not the vaguest hint anywhere that that could be the case.
	Kazan, McClain, Satterley & Greenwood, by Laurel Halbany	The proposed comments misstate the law as set forth by our Supreme Court in *Rutherford*. *Rutherford* does not hold that it only applies to asbestos manufacturers and suppliers. On the contrary, *Rutherford* confirmed that its holding applies to all parties who contribute to the risk of	As noted above, the fact that *Rutherford* did not hold something does not confirm that it did hold something else. There is no such confirmation in *Rutherford,* on page 985 or anywhere else.

Instruction	Commentator	Comment	BG Proposed Response
		the asbestos disease, including the plaintiff and the employer. [*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 985]	
		Should the proposed revisions guide courts and counsel to the "but-for" causation standard in CACI 430 for all parties except asbestos "manufacturers or suppliers," this will have the perverse effect of absolving responsible parties from any liability whatsoever. Premises owners, employers, the Navy, and the plaintiff himself would be accorded no liability under the jury's Proposition 51 analysis of comparative fault, thereby upending the Legislature's express purpose that "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault . . ." [Cal. Civ. Code § 1431.2].	To reach the conclusion posited by the comment, two logical leaps are required, neither of which is valid. First, the statement that x may be unsettled does not in any way imply that y is the law, when x and y are minimally related. Second, there is no authority that the "but for" sentence of 430 should ever be given with regard to any asbestos defendant. In fact, the authority is all to the contrary.
		The comment repeats arguments addressed above as to why the issue is settled; the inclusion of "installed" in *Rutherford;* the fact that defendants other than manufacturers and suppliers be allocated a percent under comparative fault; the cases previously addressed.	These points are addressed above
		Bettencourt v. Hennessy Indus., Inc. (2012) 205 Cal.App.4th 1103, 1122-1123 rejected defendant brake grinder's argument that plaintiffs must prove but-for causation for a brake grinder who contributed to the plaintiff's asbestos disease, and instead held the *Rutherford* standard applies.	*Bettencourt,* like *Whitmire* and *Casey,* is a case in which the court did apply the *Rutherford* standard to a defendant other than an asbestos manufacturer or supplier. But like *Whitmire* and *Casey,* there was no analysis of why *Rutherford* applies to all who bring the plaintiff into contact with asbestos.
		The Honorable John J. Kralik, now sitting as the presiding asbestos judge for all cases in Los Angeles Superior Court joint coordinated proceedings (JCCP 4674) similarly followed this logic in refusing to apply the CACI 430 instruction in an asbestos cancer case involving a faulty respirator that allowed the plaintiff to breath asbestos (not an asbestos product):	No matter how wise his words may be, Judge Kralik was not writing an appellate opinion.

Instruction	Commentator	Comment	BG Proposed Response
		I'll tell you, I don't think that the whole—the whole method and scheme of *Rutherford* doesn't work unless everybody is subject to the same rule. And what *Rutherford* does, is it gives you an opportunity to push off liability on other parties, including Mr. Tyler, who's not a manufacturer of anything relating to asbestos. So everybody—it doesn't—the system doesn't work unless everybody's judged by the same standard. [*Tyler v. American Optical Corporation* (LASC Case No. BC588866), Reporter's Transcript on Appeal, at 28RT.3494:26-3495:6	
	The Lanier Law Firm, Houston TX, by Mark A. Linder	[Makes many of the same points made by the Texas commentators above.]	See responses above to comments of Baron & Budd and Dean Omar Branham.
		Because *Rutherford* and CACI 435 look to whether an exposure or series of exposures was a legal cause of one's indivisible cancer, it would be improper to give any instruction other than CACI 435 in an asbestos cancer case.	The trial court in *Petitpas* gave CACI No. 430 because one defendant was a premises owner, and the appellate court found no error requiring reversal.
		To the extent the proposed revision to CACI 435 includes citation to *Petitpas,* it must be noted that in *Petitpas*, both CACI 430 and 435 were given. In other words, there is no authority for insinuating that CACI 430 alone might constitute a proper instruction in a case in which a defendant other than a manufacturer or supplier is the only remaining tortfeasor.	The committee gleans no "insinuation" that CACI 430 alone might constitute a proper instruction in a case in which a defendant other than a manufacturer or supplier is the only remaining tortfeasor.
	Maune Reichle Hartley French & Mudd, Oakland, by Marissa Y. Uchimura	Makes many of the same points made by other commentators above.	No further responses are necessary.
		The Supreme Court in *Rutherford* created a specific causation standard for cases involving asbestos-related cancer because of the scientific impossibility of determining which specific asbestos fibers actually caused enough damage to set the final disease process underway. (*Id.* at 976-977.) Requiring a plaintiff to show that a specific exposure actually caused the development of	If this argument is ever adopted as the holding of an appellate opinion, the committee will respond appropriately.

Instruction	Commentator	Comment	BG Proposed Response
		cancer to begin, reasoned the *Rutherford* court, would hold a plaintiff to a burden that is "medically impossible to sustain…because of the irreducible uncertainty regarding the cellular formation of an asbestos-related cancer." (*Id.* at 977.) This medical impossibility is the same regardless of whether the exposure is to asbestos from a product manufactured by a product defendant or to asbestos installed or disturbed by a premises or contractor defendant. Applying a different causation standard to nonmanufacturer or supplier defendants undermines the fundamental rationale underlying *Rutherford.*	
	Timothy Pearce, Pearce Lewis, San Francisco	[The comment makes only points already addressed.]	No further responses are necessary.
	Ronald J. Shingler, Shinglerlaw, Walnut Creek	[Makes many of the same points made by other commentators above.]	No further responses are necessary.
		If you adopt a "but for" test for all non-manufacturer defendants, then it will be impossible to find a nonmanufacturer defendant liable in ANY case where there is more than one defendant. All the non-manufacture defendants would have to do is point to each other and assert that liability cannot be asserted against any of them under the but for standard because the plaintiff was exposed to asbestos from sources other than any single nonmanufacturer. The problem with this approach, as recognized by *Rutherford,* is if you have 20 defendants and every one of those defendants assert the but for standard, they are relieved of liability even though they all contributed to fiber burden that ultimately lead to disease.	The committee agrees with the comment and with the many cases that have so held but finds it irrelevant to the matter at issue.
	Simmons Hanly Conroy, San Francisco, by Deborah Rosenthal	[Makes some of the same points made by other commentators above.]	No further responses are necessary.
		Injecting discussion into the Use Notes about unsettled aspects of appellate law, provides no guidance. On the contrary, it obfuscates an otherwise straightforward and well-settled subject and sets bad precedent for overloading	The committee finds that the issue of asbestos causation is not a "straightforward and well-settled subject." Nor is it a collateral issue. When unsettled issues in the law are directly germane to the

Instruction	Commentator	Comment	BG Proposed Response
		Use Notes with law-review style debate about collateral issues.	applicability of a jury instruction, the committee sees its proper role as identifying the issue for bench and bar.
	Simon Greenstone Panatier, Los Angeles, by Lisa M. Barley	[Makes only points already addressed.]	No further responses are necessary.
	Simon Greenstone Panatier, Los Angeles, by Nectaria Belantis	[Makes only points already addressed.]	No further responses are necessary.
	Weitz & Luxenberg, Los Angeles, by Benno Ashrafi	[Makes only points already addressed.]	No further responses are necessary.
1208, *Component Parts Rule*	Kazan, McClain, Satterley & Greenwood, by Laurel Halbany	While the proposed Directions for Use mention that a component-parts defendant may be liable if the component itself was defective, the instruction itself completely omits this element. As phrased, CACI 1208 incorrectly tells jurors that there is no liability for a component part which is itself defective.	The Directions for Use make it clear that the instruction is only for use with the second exception to the component parts defense; integration making the new product defective. If the claim is that the component itself is defective, it is just like any other product liability claim for a defective product.
		While the Directions for Use agree that the component-parts doctrine is a defense, CACI 1208 incorrectly attempts to shift the burden of proof to plaintiffs. The component-parts doctrine is unquestionably a defense which may be raised by a products defendant. [*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183 (component parts doctrine is a "defense" which protects manufacturers and sellers of component parts from liability to users of finished products); Romine v. Johnson Controls, Inc. (2014) 224 Cal.App.4th 990, 1006 fn. 6 ("The California Supreme Court has not determined whether the component parts defense is limited to fungible	The committee considered and debated this point extensively. It concluded, unanimously, that even though the component parts rule is an affirmative defense, the plaintiff must have the burden of proof to avoid the rule via one of the exceptions. Otherwise, the defense would be in the position of having to prove that its product is *not* defective, and that would be contrary to the principles of product liability law.

Instruction	Commentator	Comment	BG Proposed Response
		products.".] Further, it is well-established California law that a defendant raising an affirmative defense bears the burden of proving that defense; plaintiffs are not required to first disprove the defense. [*Major v. R.J. Reynolds Tobacco Company* (2017) 14 Cal.App.4th 1179, 1201; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.] CACI 1208's instruction that "the plaintiff has the burden of avoiding the defense by proving one of the exceptions" cites no supporting authority which might distinguish it from this well-established rule.	
1730. *Slander of Title—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The word "disparagement," appearing for the first time in element 6, refers to the defendant's statement or other conduct that cast doubt on plaintiff's title. We believe a more explicit reference to that statement or conduct is preferable, as in element 5 and earlier in element 6. We would also insert the word "plaintiff's" before "title" for greater clarity. Accordingly, we propose: 6. "That [*name of plaintiff*] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/e.g., deed]/ [or] by incurring legal expenses necessary to remove the doubt cast by the ~~disparagement~~ [statement/e.g., deed] and to clear plaintiff's title."	The committee agreed that the word "disparagement" should not be introduced in the new text for element 6. The committee saw no need to add "plaintiff's" to "title" at the end of the element. Thee format requires that it be "[*name of plaintiff*]'s," not just "plaintiff's." There is no benefit to adding extra words.
2023. Failure to Abate Artificial Condition on Land Creating Nuisance	Orange County Bar Association, by Niki Miliband, President	The change from "publication" to "publicly disclosed' should not be made. There is no authority cited for the proposed change Of all the privacy claims (intrusion into private affairs, public disclosure of private facts, false light in the public eye, appropriation/use of name or likeness, stalking, recording of confidential information, and distribution of explicit materials), false light is the only one which deals with an untruth. For this reason, false light claims always pattern, and often constitute, defamation claims. Per Civil	The committee sees no problem with the proposed change. It is not the word "publication" In Civil Code sections 35 and 46 that connotes falsity; it the modifier "false." The committee feels free to adopt a plain-language translation of "publication."

Instruction	Commentator	Comment	BG Proposed Response
		Code section 44, defamation is effected by either libel or slander. The definition of libel at Civil Code section 45, and of slander at Civil Code section 46, indicate that committing either involves the "false and unprivileged **publication**" of allegedly offensive information or material (emphasis added).	
		The Directions for Use include the following statement: For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660 [262 Cal.Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].) The holding in *Warfield,* however, is not squarely directed to a false light case. Based on some seeming confusion in pleading, the court appeared to recast Warfield's false light claim as a claim for disclosure of private facts (emphasis added). Having done this, the court then decided the case based on an analysis of the elements of a cause of action for public disclosure of private facts. It concluded the relevant portion of its opinion with the observation that, "as a written communication to interested club members, the statement [in the subject membership newsletter] would appear to be privileged under the provisions of Civil Code section 47, subdivision 3 [now subdivision c]." This observation makes clear that the court was not addressing a false light claim wherein there are no facts to be disclosed, only a published untruth difficult to see as ever privileged or the subject of legitimate interest.	While it's not clear, it appears that the comment advocates deleting the "but see" citation to *Warfield*. The committee agrees with the comment's view of *Warfield* and has removed the citation. The court did recast the claim as one for public disclosure of private facts. And the court did invoke the common interest privilege. The only treatment of what constitutes a public disclosure is the single statement that "the required threshold allegation of a general public disclosure is absent." The committee agreed that this is insufficient authority to constitute a "but see."

Instruction	Commentator	Comment	BG Proposed Response
2023. *Failure to Abate Artificial Condition on Land Creating Nuisance*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The second sentence of this instruction states that the plaintiff must prove the following elements "in addition to proving that the condition created a nuisance." We believe a prior instruction using the term "nuisance" and explaining its elements is necessary for the jury to understand the term "nuisance" as used in this instruction. CACI No. 2020, *Public Nuisance—Essential Factual Elements*, uses the term "nuisance," but CACI No. 2021, *Private Nuisance—Essential Elements,* does not. We suggest modifying the first paragraph of CACI No. 2021 as follows: [*Name of plaintiff*] claims that [*name of defendant*] ~~interfered with [*name of plaintiff*]'s use and enjoyment of [his/her] land~~ created a nuisance.	No changes to CACI No. 2021 are proposed for this release, so the comment is outside of the scope of matters that may be addressed. The comment may be placed on the agenda for the next release cycle.
		We understand the last sentence in the Directions for Use to mean that when this instruction is given with CACI No. 2021 element 3 of that instruction should be deleted. We would modify the sentence for greater clarity and to avoid any misunderstanding that this instruction should be substituted in the place of (i.e. replace) element 3: "For private nuisance, ~~this instruction replaces~~ delete element 3 of CACI No. 2021."	The committee sees no greater clarity. "Delete" does not make it clear that the new instruction gives the intent element for CACI No. 2021.
	Orange County Bar Association, by Nikki P. Miliband President	As written, Element No. 2 improperly suggests that "an unreasonable risk of nuisance" is actionable. To avoid this concern, we suggest replacing Element No. 2 with the following new Element No. 2: "2. That [*name of defendant*] knew or should have known of the condition that resulted in the nuisance or that there was an unreasonable risk of the nuisance that resulted."	The committee assumes that the commenter's intent was to say that the element suggests that a "reasonable" (not an unreasonable) risk is actionable. Assuming that is the case, the committee finds the proposed revised element to be awkwardly phrased.
2401. *Breach of Employment*	California Employment Lawyers	CELA supports the proposed modifications to CACI 2401 which accomplishes combining the actual and constructive	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements and 2402, *Breach of Employment Contract – Unspecified Term – Constructive Discharge - Essential Factual Elements*	Association, by David deRobertis	breach of employment contract instructions (2401 and 2402) into one instruction (new 2401).	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the proposed new language "[by forcing [*name of plaintiff*] to resign]" in the introductory paragraph, and believe the instruction should provide the same specificity with respect to an actual discharge: "[*Name of plaintiff*] claims that [name of defendant] breached their employment contract [by [discharging [*name of plaintiff*]]/forcing [*name of plaintiff*] to resign]"	The committee finds the proposed revision to use more words than necessary to convey the same meaning.
		In element 4, we would insert the language "by forcing [*name of plaintiff*] to resign" for greater clarity: "That [*name of defendant*] [constructively] discharged [name of plaintiff] by forcing [*name of plaintiff*] to resign [e.g., without good cause]; and"	If constructive discharge is alleged, it will be developed in CACI No. 2510. There is no need to include more words than needed here.
		We believe the reference in the Directions for Use to the need to modify elements 4 and 5 for adverse employment actions other than discharge should be to elements 2 and 4.	The comment is correct, and this error has been corrected.
	Orange County Bar Association, by Nikki P. Miliband President	The combination of CACI 2401 and 2402 is potentially confusing to jurors and unwarranted by existing law. To combine these forms is potentially confusing, causes additional work in crafting this instruction to fit those cases or results in counsel creating their own, which potentially leads to error. It also forces jurors to review and understand this instruction in the context of CACI 2510, *"Constructive Discharge" explained*.	The committee is concerned with presenting the law of constructive discharge in two different instructions; CACI No. 2402 and 2510. Currently, the two instructions have some differences. By combining 2401 and 2402 and then relying solely on 2510 for the law of constructive discharge, inconsistencies and potential inconsistencies are avoided. Future maintenance is facilitated because possible changes in the law of constructive discharge need be addressed only in 2510.
		The elimination of the language "by the discharge/demotion" in element no. 5 is confusing because it leaves it open to interpretation of the jurors, rather than explaining the harm was caused by the discharge/demotion.	The committee has simply modified the instruction to conform to standards with regard to the elements for harm and substantial factor causation.

Instruction	Commentator	Comment	BG Proposed Response
2404, *Breach of Employment Contract—Unspecified Term—"Good Cause" Defined*	California Employment Lawyers Association, by David deRobertis	CELA objects to the use, within CACI 2404, of the phrase: "An employer has substantial but not unlimited discretion regarding personnel decisions[, particularly with respect to an employee in a sensitive or confidential managerial position]." CELA acknowledges that this phrase was pulled from *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 330. That, however, does not justify its inclusion in a jury instruction. Indeed, case law strongly disfavors instructions consisting of language pulled verbatim from published appellate decisions as this "practice [is] often criticized as tending to produce instructions which are repetitive, misleading and inaccurate statements of the law as to the particular case." (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 4 79, 487; see *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675.)	The committee disagrees that "case law strongly disfavors" using language from court opinions for jury instructions." It is true that sometimes it is unwise if the court's language is in legalese or otherwise unduly wordy. But jury instructions come from the law, primarily from cases and statutes.
		The problem is compounded by the fact that there is no definition given to the jury to determine what constitutes "an employee in a sensitive or confidential managerial position." Literally, nothing defines, or provides any guidance regarding, what constitutes a "sensitive or confidential managerial position." It thus leaves the jury to utterly speculate as to what positions do or do not qualify as "sensitive or confidential managerial positions." Without any legal guidance on this point, it is confusing to include this phrase in the instruction and it merely invites jury speculation on whether this undefined phrase applies to the facts of a given case.	The committee does not believe that it is necessary to define "a sensitive or confidential managerial position." This language is in brackets, meaning that it will not be given unless whether the plaintiff might have a sensitive or confidential managerial position is a disputed issue in the case. If so, the point will be extensively argued by both sides.
	California Lawyers Association, Litigation Section, Jury Instructions	We believe the proposed new language "An employer has substantial but not unlimited discretion regarding personnel decisions" provides no useful guidance to the jury, raises more questions than it answers, and should be stricken. The existing instruction explains the scope of the employer's discretion, without using the potentially	The language "substantial but not unlimited discretion" is not new; it is in the instruction now, in the last paragraph. The committee shared some of the commentator's concerns with the language in its current location. But by moving it up to precede the explanation of what is NOT good cause, the

Instruction	Commentator	Comment	BG Proposed Response
	Committee, by Reuben A. Ginsberg, Chair	unfamiliar word "discretion," and this new gloss on that is not helpful.	committee believes that the concerns are adequately addressed. As a general principle, the employer has substantial discretion to terminate someone's employment. But that discretion is not unlimited, and the limitations are then presented. But to aid clarity, "However," has been added to the second sentence.
		We believe the instruction should refer to the employer's substantial discretion regarding managerial employees using plainer language than "discretion": "[An employer ~~has substantial but not unlimited discretion regarding personnel decisions[, particularly~~ must be allowed a substantial scope for the exercise of subjective judgment with respect to an employee in a sensitive or confidential managerial position]."	The committee does not find "a substantial scope for the exercise of subjective judgment with respect to an employee …" to be plain language.
2430. *Wrongful Discharge in Violation of Public Policy—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed changes which ensure the instruction captures both the "causal nexus" requirement (element 3) and the causation of damages element (proposed new element 5). CELA further supports the new proposed "Directions for Use" which make clear that in reality this element should not be contested in typical termination cases.	No response is necessary.
		The "Directions for Use" should note that the trial court must give CACI No.430, *Causation: Substantial Factor*, to define "substantial factor." "Substantial factor" is a term of art defined in CACI 430. Thus, the "Directions for Use" should point this out. (Note: This same "Direction for Use" should be given in connection with CACI Instructions 2431, 2432, 2440, 2441, 2442, 2500, 2502, 2505, 2520, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2527, 2528, 2540, 2541, 2546, 2547, 2560, 2570, 2600, 2620, 2630, 2710, 2711, 2730, 2732, 2743, all of which include the concept of "substantial factor" in terms of the causation of harm element.)	As the comment notes, there are many instructions that have a substantial factor causation element; the ones noted in the comment for employment law and many more for virtually every Essential Factual Elements instruction. Adding a cross reference to CACI No. 430 to each one would be burdensome on everyone in the CACI production process. The committee believes that CACI No. 430 is so well known to bench and bar that cross references are not needed.
		We agree with the proposed revisions to this instruction.	No response is necessary.

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	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	In light of the new reference to "substantial factor," we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.	See response to CELA above.
		We believe the language reference in the second paragraph of the Directions for Use "causation between the public policy and the discharge" should state "causation between the public policy violation and the discharge."	The committee made the proposed revision.
	Orange County Bar Association, by Nikki P. Miliband President	Agree as modified. Propose removing second and third sentences of 3rd paragraph ("It is unlikely this element will be contested in termination cases…."). What does this portion of the directions add? These sentences do not seem to be helpful because they do not provide meaningful direction. There is no need to suggest this to practitioners; there is a damages instruction to cover this (CACI 3903P).	The committee agreed and removed this language.
2510. *"Constructive Discharge" Explained*	California Employment Lawyers Association, by David deRobertis	The proposed new language, "To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position;" is taken from *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247. But the existing CACI 2510 has been used for years with success without this additional language being required. This language fails to accurately, completely and appropriately capture the foregoing concepts for the following reasons.	The language currently appears at the end of 2402. In combining CACI Nos.2401 and 2402, the committee looked for any language in 4102 on constructive discharge that would be lost in the merger. This language was found moved into 2510. Presumably existing 2402 has also been used for years with success with this language included.
		First, the proposed language requires the jury to find "unusually or repeatedly offensive" misconduct in all cases. But, *Turner* recognized that "single, trivial, or isolated acts of [misconduct]" are only insufficient "[i]n general." *Turner, supra,* 7 Cal.4th at 1247. *Turner* acknowledged that "[i]n some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employee, or an employer's ultimatum that an employee commit a crime, may constitute a	But the committee agreed with this comment. To be accurate, the sentence would have to be qualified with In general." And then it would have address the "single intolerable incident" exception.

Instruction	Commentator	Comment	BG Proposed Response
		constructive discharge."' *Turner, supra,* 7 Cal.4th at 1247 fn. 3.	
		Second, *Turner* also made clear that the "unusually 'aggravated' or amount to a 'continuous pattern"' standard is not an independent requirement beyond proving intolerable working conditions; rather, ultimately, "[t]he essence of the test is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiffs position 'would have felt compelled to resign."' (*Turner, supra,* 7 Cal.4th at 1247.) That is, the ultimate requirement is simply proving that the working conditions were such "that a reasonable employee in plaintiff's position 'would have felt compelled to resign."' (*Ibid.*) CELA submits that it is improper and unnecessary to further instruct that "[t]o be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]' s position."	The fact that the "ultimate requirement" may be x does not necessarily mean that the jury shouldn't be instructed on y and z if y and z will assist in finding x.
		Third, the proposed language sets forth a comparative inquiry, but the comparison is never actually made. By this we mean, the proposed language that "the adverse working conditions must be unusually or repeatedly offensive" begs the question of "unusually" compared to what? To suggest something must be "unusually ... offensive" but not given any context into what is considered a usual level of offensiveness is confusing rather than enlightening. CELA is concerned that this language, without any context to compare it to, will impose an improper barrier to constructive termination cases.	The committee was not swayed by this argument. The committee doubts that "a usual level of offensiveness" can be defined.
		Fourth, CELA is concerned that this instruction's requirement of "unusually or repeatedly offensive" misconduct in all cases will create an artificial barrier to proving some legitimate constructive termination cases. For example, an employer's failure to provide a reasonable	Looking at the language from *Turner* (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247.), the committee concluded that the apparent attempt in CACI No. 2402 to shorten and summarize the language is not adequate.

Instruction	Commentator	Comment	BG Proposed Response
		accommodation can give rise to a constructive termination, such as where the effect of denying the accommodation is to cause additional injury to the employee who is required to work in violation of restrictions. In such a case, the failure to provide the reasonable accommodation (itself, a personnel action) should be a sufficient basis for a constructive termination claim. (See, e.g., *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821-824; cf. *Colores v. Board of Trustees of Calif. State Univ*. (2003) 105 Cal.App.4th 1293, 1310-1311 (constructive discharge shown in part from evidence that employer's conduct aggravated underlying medical condition that was made worse by stress). But, under this instruction, an employer could improperly argue that the underlying failure to provide a reasonable accommodation is not an "unusually or repeatedly offensive" conduct because it was simply a mere personnel decision regarding whether or not to accommodate.	"Unusually or repeatedly offensive" seems to be a translation of "unusually 'aggravated' or amount to a 'continuous pattern' … ." The committee finds that effort to be problematic at best. And the instruction does not include that "[i]n general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim." If *Turner* is to be fully presented, whether that language should be included must be considered. Therefore, CACI No. 2510 is being removed from the release and returned for further consideration in the next release cycle.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We find the proposed new language somewhat unclear and suggest modifying it for greater clarity. We would refer to "an unusually offensive incident" and "repeated offensive conduct" rather than "adverse working conditions" that were "unusually or repeatedly offensive." We also believe the new language should be optional because in many cases instructing the jury on this point would not help the jury to understand whether the working conditions were intolerable under the standard set forth in element 1 (i.e. so intolerable that a reasonable person in plaintiff's position would have no reasonable alternative but to resign). Accordingly, we suggest: ~~"To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [name of plaintiff]'s position.~~ [Working conditions may be intolerable because of an unusually	Because the instruction is being removed from the release, the comment is moot here. The comment will be considered in the next release cycle.

Instruction	Commentator	Comment	BG Proposed Response
		offensive incident or because of repeated offensive conduct.]”	
	Consumer Attorneys of California, by Jacqueline Serna, Legislative Counsel	We object to the addition of the following language: "To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in plaintiff's position." This change would set the burden too high for constructive discharge. To prove a constructive termination, plaintiff must show that a reasonable person in plaintiff's position would have considered the conduct severe or pervasive. (*Oncale v. Sundower Offshore Servs., Inc.* (1998) 523 U.S. 75; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872 [objective standard is reasonable woman if plaintiff is female, reasonable man standard if male.].) Although situations may exist in which the employee's decision to resign is unreasonable as a matter of law, "[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]" (*Vasquez v. Franklin Mgmt. Real Estate Fund, Inc.* (2013) 222 Cal. App. 4th 819, 827; Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1056; accord, Scotch v. Art Institute of California (2009) 173 Cal.App.4th 986, 1022.)	Because the instruction is being removed from the release, the comment is moot here. The comment will be considered in the next release cycle.
2528, *Failure to Prevent Sexual Harassment by Nonemployee*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed new CACI 2528	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions	We would identify the nonemployee by name in the introductory paragraph and element 2 for greater clarity: “[*Name of plaintiff*] claims that [*name of defendant*] failed to take reasonable steps to prevent harassment by a nonemployee, [*name of person*].	The committee agreed that identifying the nonemployee by name in element 2 is a good idea. The committee does not think that it need be done in the opening paragraph.

Instruction	Commentator	Comment	BG Proposed Response
	Committee, by Reuben A. Ginsberg, Chair	"2. That while in the course of employment, [*name of plaintiff*] was subjected to sexual harassment by a nonemployee, [*name of person*];"	
		Language in elements 2 and 3 seems to assume the plaintiff was an employee. We would add language to the Directions for Use to suggest modifying those elements if the plaintiff was not an employee: "If the plaintiff was not an employee, the references to the course of employment and employees in elements 2 and 3 should be modified."	The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract. Unpaid interns and volunteers have been added to element 1. A sentence has been added to the Directions for Use to advise modifications to elements 2 and 3 if the plaintiff has a status other than an employee.
		We suggest the Advisory Committee consider citing the following secondary sources: 41 Cal. Jur. 3d Labor § 82, Sexual harassment under Fair Employment and Housing Act—Employer's obligation to ensure workplace free of sexual harassment California Civil Practice, Employment Litigation § 2:95, Matters to consider in bringing civil action for violation of FEHA"	The future of Secondary Sources is uncertain in light of the difficulties involved in keeping them updated.
2705, *Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed CACI 2705 as accurately reflecting the California Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Other CACI instructions based on wage order violations (CACI No. 2701, *Nonpayment of Minimum Wages—Essential Factual Elements*, CACI No. 2072, *Nonpayment of Overtime Compensation—Essential Factual Elements*) do not use the language "wage order violations." That language in this instruction would be unfamiliar to lay jurors. We would eliminate that language and specify the particular wage order violation: [*Name of defendant*] claims that [he/she/it] is not liable for any ~~wage order violations~~ nonpayment of [minimum wages/overtime pay] because [*name of plaintiff*] was not [his/her/its] employee, but rather an independent contractor.	Minimum wage and overtime are not the only two wage order violations to which *Dynamex* applies. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 913–914 [California wage orders impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions such as minimally required meal and rest breaks].) So just limiting the instruction to 2701 and 2702 violations would not be appropriate. But the committee did modify the language to "[*specify alleged wage order violations, e.g., failure to pay minimum wage*]."
		We believe the Directions for Use should cross-reference the CACI instructions based on wage order violations with which this instruction may be given: CACI Nos. 2701 and 2702.	The proposed cross reference would suggest that *Dynamex* applies to just minimum wage and overtime violations, which, as noted above, is not the case.
3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements,* and 3211, *Breach of Implied Warranty of*	Association of Southern Defense Counsel, by Allison W. Meredith, Horvitz & Levy, Burbank	ASCDC supports the committee's proposed revisions to CACI Nos. 3210 and 3211. The addition of two elements to each instruction—requiring the jury to find that the plaintiff was harmed, and that the breach of the implied warranty was a substantial factor in causing the harm—are consistent with the requirements of claims for breach of the implied warranty of merchantability and breach of the implied warranty of fitness for a particular purpose. (E.g., *Guitierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1247; Civ. Code, § 1791.1, subd. (d).) The revisions will therefore more clearly instruct the	No response is necessary.

Instruction	Commentator	Comment	BG Proposed Response
Fitness for a Particular Purpose—Essential Factual Elements		jury on all the elements they must find in order for plaintiff to prevail on a breach of implied warranty claims.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the proposed revisions to these two instructions.	No response is necessary.
		In light of the new reference to "substantial factor," we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor.*	Addressed above in response to the similar comment from the California Employment Lawyers Associaton (CELA).
3244, *Civil Penalty—Willful Violation*	Association of Southern Defense Counsel, by Allison W. Meredith, Horvitz & Levy, Burbank	The proposed new paragraph in the "Directions for Use" section states, correctly, that an automobile buyer may seek penalties under both subdivision (c) and subdivision (e) of Civil Code section 1794 but may not recover two penalties for the same violation. (See Civ. Code, § 1794(e)(5).) However, the revised paragraph is somewhat unclear insofar as it does not specify the circumstances under which a penalty can be awarded under subdivision (e). As written, that paragraph might suggest that CACI No. 3244 could be used for subdivision (e) penalties as well as subdivision (c) penalties. ASCDC therefore recommends the following modification to the proposed "Directions for Use" paragraph: An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness **for violations of the Tanner Consumer Protection Act, if the manufacturer failed to maintain a third-party dispute resolution process** ~~under some circumstances~~. (See Civ. Code, §**§ 1793.22(d)**, 1794(e).) However, a buyer who recovers a civil penalty for a willful violation	The committee sees nothing in the new added paragraph might "suggest that CACI No. 3244 could be used for subdivision (e) penalties." The committee does not find the proposed replacement for "under some circumstances" to be complete or helpful. The nonwillful violation of 1794(e) has more requirements than just a failure to have a third-party dispute resolution process. There is also a notice requirement. The committee did agree that adding a sentence to the Directions for Use on the need for a special instruction if nonwillful penalties are sought is a good idea and made the revision.

Instruction	Commentator	Comment	BG Proposed Response
		under Civil Code section 1794, subdivision (c) may not also recover a second civil penalty **under Civil Code section 1794, subdivision (e)** for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133]; see also *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (Suman II) [setting forth instructions to be given on retrial].) **A special instruction will need to be crafted for cases in which the consumer seeks a civil penalty for violation of the Tanner Consumer Protection Act.**	
3704, *Existence of "Employee" Status Disputed*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed clarifications within the "Directions for Use" to CACI 3704 as accurately reflecting the purpose of the *Borello* test following our Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.	No response is necessary.
3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*	California Employment Lawyers Association, by David deRobertis	CELA supports moving what was previously CACI 2433 into the damages section by renumbering it as CACI 3903P. Moreover, CELA supports the proposed text of this instruction. Finally, CELA supports the changes to the "Directions for Use" making clear it applies to all employment cases.	No response is necessary.
		The title should be changed from "*Damages from Employer for Wrongful Discharge (Economic Damage)*" to *"Damages from Employer for Wrongful Discharge (Past and Future Lost Earnings*)" to accurately reflect the instruction's content. This instruction relates specifically and exclusively to lost past and future earnings from the Defendant employer. This instruction is not a generalized "economic damage" instruction and thus, the title should appropriately reflect this. There could be economic damages in employment cases other than merely lost past and future wages, earnings and/or benefits, and these	All of the 3903# instructions have (Economic Damage) as a parenthetical. There is no suggestion that any of these instructions are the only economic damages that can be recovered.

Instruction	Commentator	Comment	BG Proposed Response
		economic damages do not fit into this instruction. Therefore, the title should be changed to make clear that this instruction only applies to lost earnings, wages and/or benefits rather than all types of recoverable economic damages in an employment case.	
3963, *Affirmative Defense—Employee's Duty to Mitigate Damages*	California Employment Lawyers Association, by David deRobertis	CELA supports the moving of prior CACI 2407 into the damages section by renumbering it as CACI 3963. Moreover, CELA supports the changes to the "Directions for Use" making clear it applies to all employment cases.	No response is necessary.
All others except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
All others except as noted above	Orange County Bar Association, by Nikki P. Miliband President	Agree	No response is necessary

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206. Evidence Admitted for Limited Purpose

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003; Revised May 2018, November 2018

Directions for Use

It is recommended that the judge call attention to the purpose to which the evidence applies.

-If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].) It is recommended that the judge call attention to the purpose to which the evidence applies.

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.

- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)

- "The effect of the statute—here, the municipal code section—is to make certain hearsay evidence admissible *for a limited purpose,* i.e., supplementing or explaining other evidence. This triggers the long-standing rule codified in Evidence Code section 355, which states, 'When evidence is admissible … for one purpose and is inadmissible … for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' In the absence of such a request, the evidence is ' "usable for any purpose." ' (*Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1060-1061 [202 Cal.Rptr.3d 890], original italics.)

- Courts have observed that "[w]Where the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)

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- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings─Trial (2d ed.) §§ 4.106, 13.26 (Cal CJER 2010)

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435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff*] may prove that exposure to asbestos from [*name of defendant*]'s product was a substantial factor causing [his/her/[*name of decedent*]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.

New September 2003; Revised December 2007, May 2018, November 2018

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. This instruction is based on *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], which addresses only exposure to asbestos from "defendant's defective asbestos-containing products." Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant] ; see also *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th 1222, 1236–1239 [142 Cal.App.4th 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor,* with regard to whether CACI No. 430 may also be given.

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes,* may also be given.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and

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should also be given.” (*Rutherford, supra, v. Owens-Illinois, Inc.* (1997) 16 Cal.4th at pp.953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)

- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

- “[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- “Contrary to defendant’s assertion, the California Supreme Court’s decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.-Rptr.-2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that ‘the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,’ ‘demonstrates how the “substantial factor” test subsumes the traditional “but for” test of causation.’ Defendant argues that *Viner* required plaintiffs to show that defendant’s product ‘independently caused [plaintiff’s] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.’ *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that ‘plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant’s particular product were the ones, or among the ones, that actually produced the malignant growth.’ ” *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff’s risk or probability of developing cancer.” (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- “ ‘A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.’ Plaintiffs bear the burden of ‘demonstrating that exposure to [defendant’s] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff’s] risk of developing cancer.’ ‘Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].’ Therefore, ‘[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.’ ” (*Whitmire v. Ingersoll-Rand Co.* (2010)

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184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- “Further, ‘[t]he mere “possibility” of exposure’ is insufficient to establish causation. ‘[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden’ of persuasion.” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- “To support an allocation of liability to another party in an asbestos case, a defendant must ‘present evidence that the aggregate dose of asbestos particles arising from’ exposure to that party's asbestos ‘constituted a substantial factor in the causation of [the decedent's] cancer.’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- “ ‘[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,’ our Supreme Court has held that a plaintiff ‘need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.’ Rather, a ‘plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.’ ” (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- “Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff’s asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff’s injury. [Citations.] ‘Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.’ [Citation.] ” (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- “In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.” ’ But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

- “Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure.” (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- “We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not

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create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’ The *Rutherford* court agreed with the *Lineaweaver* court that ‘the reference to “medical probability” in the standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence.” [Citation.]’ The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor.” (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- “Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the ‘every exposure’ and ‘insignificant exposure’ camps, and recognizes that the conflict is one for the jury to resolve.” (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- “[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]’s statement that it ‘takes significant exposures’ to increase the risk of disease. This statement uses the plural ‘exposures’ and also requires that those exposures be ‘significant.’ The use of ‘significant’ as a limiting modifier appears to be connected to [expert]’s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum.” (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- “Nor is there a requirement that ‘specific words must be recited by [plaintiffs'] expert.’ [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent.” (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

- “We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

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Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

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450C. Negligent Undertaking

[*Name of plaintiff*] **claims that** [*name of defendant*] **is responsible for** [*name of plaintiff*]**'s harm because** [*name of defendant*] **failed to exercise reasonable care ~~to protect~~in rendering services to** [*name of third person*]**. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. That [*name of defendant*]**, voluntarily or for a charge, rendered services to~~for the protection of~~** [*name of third person*]**;**

2. That these services were of a kind that [*name of defendant*] **should have recognized as needed for the protection of** [*name of plaintiff*]**;**

3. That [*name of defendant*] **failed to exercise reasonable care in rendering these services;**

4. That [*name of defendant*]**'s failure to exercise reasonable care was a substantial factor in causing harm to** [*name of plaintiff*]**; and**

5. [(a) That [*name of defendant*]**'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant*]**'s services were rendered to perform a duty that** [*name of third person*] **owed to third persons including** [*name of plaintiff*]**;]**

[or]

[(c) That [*name of plaintiff*] **suffered harm because [**[*name of third person*]/ **[or]** [*name of plaintiff*]**] relied on** [*name of defendant*]**'s services.]**

New June 2016; Revised November 2018

Directions for Use

This instruction presents the theory of liability known as the "negligent undertaking" rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz,* the court said that negligent undertaking is "sometimes referred to as the 'Good Samaritan' rule," by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding's acts increased the risk to the person aided or the person aided relied on the person aiding's acts. (*Paz, supra,* 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency.*) It is perhaps more accurate to say that negligent undertaking is another application of the Good Samaritan rule. CACI No. 450A is for use in a case in which the person aided is

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the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in ~~acting to aid~~performing services to one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.

- "[T]he [Restatement Second of Torts] section 324A theory of liability--sometimes referred to as the "Good Samaritan" rule--is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking." (*Paz, supra,* 22 Cal.4th at p. 553, original italics.)

- "Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages." (*Paz, supra,* 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)

- "Section 324A is applied to determine the 'duty element' in a negligence action where the defendant has ' "specifically … undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' The negligent undertaking theory of liability applies to personal injury and property damage claims, but not to claims seeking only economic loss." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- "[U]nder a negligent undertaking theory of liability, the scope of a defendant's duty presents a jury issue when there is a factual dispute as to the nature of the undertaking. The issue of 'whether [a defendant's] alleged actions, if proven, would constitute an "undertaking" sufficient … to give rise to an actionable duty of care is a legal question for the court.' However, 'there may be fact questions "about precisely what it was that the defendant undertook to do." That is, while "[t]he 'precise nature

and extent' of [an alleged negligent undertaking] duty 'is a question of law … "it depends on the nature and extent of the act undertaken, a question of fact." ' " [Citation.] Thus, if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], " 'an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits' " [citation], and summary judgment is precluded. [Citations.]' (see CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)" (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27-28 [228 Cal.Rptr.3d 731], internal citations omitted.)

- "To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: '(a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.' " (*Lichtman, supra,* 16 Cal.App.5th at p. 926.)

- "The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so." (*Lichtman, supra,* 16 Cal.App.5th at p. 927.)

- "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. Section 324A integrates these two basic principles in its rule." (*Paz. supra,* 22 Cal.4th at pp. 558−559.)

- "[T]he 'negligent undertaking' doctrine, like the special relationship doctrine, is an exception to the 'no duty to aid' rule." (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- "A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the

store who is walking down the aisle. B Company is subject to liability to C." (Restat 2d of Torts, § 324A, Illustration 1.)

Secondary Sources

4 Witkin, California Procedure (~~4th~~ 5th ed. ~~1996~~2008) Pleadings, § ~~553~~594

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1205–1210~~1060–1065~~

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2][d], [5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

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1208. Component Parts Rule

[*Name of defendant*] [manufactured/distributed/supplied] [a/an] [*component part*], which was then integrated into [a/an] [*end product*]. [*Name of defendant*] may be liable for harm caused by a defective [*end product*] if [*name of plaintiff*] proves that (1) [*name of defendant*] substantially participated in the integration of its [*component part*] into the design of the [*end product*] and (2) as a result of the integration of the [*component part*] into the [*end product*], the [*end product*] was defective under the instruction(s) you have been given on [manufacturing defect/design defect/failure to warn].

New November 2018

Directions for Use

Give this instruction if the component parts rule is at issue. This rule generally relieves a component parts manufacturer, distributor, or supplier of liability for injuries caused by a defect in the product into which the component was integrated. However, there are two exceptions to the rule so that a component-parts defendant may nevertheless be found liable. First, the component itself may have been defective; or second, (a) the defendant may have substantially participated in the integration of the component into the design of the end product, (b) the integration of the component caused the end product to be defective, and (c) the defect in the product causes the harm. (*Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508 [203 Cal.Rptr.3d 273, 372 P.3d 200].) While the component parts rule is labelled a defense, (see *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183 [202 Cal.Rptr.3d 460, 370 P.3d 1022]; see also *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1006 fn. 6 [169 Cal.Rptr.3d 208].), the plaintiff has the burden of avoiding the defense by proving one of the exceptions.

This instruction is for use under the second exception. To prove that the end product was defective or lacked a required warning, the plaintiff must prove a manufacturing or design defect, or a failure to warn, as with any other strict product liability claim, using CACI No. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements,* CACI Nos. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements,* or 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements* (or both), or CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. The plaintiff has the same burden if the claim is that the component itself was defective or lacked a required warning.

The component parts rule does not apply if the injury is caused by the component when it is being used as intended before integration into another product. (See *Ramos, supra,* 63 Cal.4th at p. 504.)

Sources and Authority

- "Another defense protects manufacturers and sellers of component parts from liability to users of finished products incorporating their components. Under the component parts doctrine, the supplier of a product component is not liable for injuries caused by the finished product unless (1) the component itself was defective and caused injury or (2) the supplier participated in integrating the component into a product, the integration caused the product to be defective, and that defect

caused injury.” (*Webb, supra,* 63 Cal.4th at p. 183.)

- “In *Webb* [*supra*], we explained that the component parts doctrine… and as accurately reflected in section 5 of the Restatement Third of Torts, Products Liability—applies (1) when a supplier provides a component or raw material that is not itself defective (by virtue of a manufacturing, design, or warning defect), (2) the component or raw material is changed or transformed when incorporated through the manufacturing process into a different finished or end product, and (3) an end user of the finished product is allegedly injured by a defect in the finished product.” (*Ramos, supra,* 63 Cal.4th at pp. 507–508, internal citations omitted.)

- “[T]he component parts doctrine provides protection to the supplier of the component or raw material, subjecting that entity to liability for harm caused by a product into which the component has been integrated only if the supplier “(b)(1) … substantially participates in the integration of the component into the design of the product; and [¶] (2) the integration of the component causes the product to be defective … ; and [¶] (3) the defect in the product causes the harm.” (*Ramos, supra,* 63 Cal.4th at p. 508.)

- “ ‘Component parts are products, whether sold or distributed separately or assembled with other component parts.’ ‘Product components include raw materials, bulk products, and other constituent products sold for integration into other products.’ Component manufacturers and suppliers, as sellers of ‘products,’ are subject to products liability. ‘Like manufacturers, suppliers, and retailers of complete products, component manufacturers and suppliers are “an integral part of the overall producing and marketing enterprise,” and may in a particular case “be the only member of that enterprise reasonably available to the injured plaintiff,” and may be in the best position to ensure product safety.’ ” (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 33 [192 Cal.Rptr.3d 158], internal citations omitted.)

- “[T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. … ‘Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and [*sic*] intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.’ Thus, cases have subjected claims made against component suppliers to two related doctrines, the ‘raw material supplier defense’ and ‘the bulk sales/sophisticated purchaser rule.’ Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards.” (*Artiglio, supra,* 61 Cal.App.4th at p. 837.)

- “[T]he protection afforded to defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead, as here, itself allegedly causes injury when used in the manner intended by the product supplier.” (*Ramos, supra,* 63 Cal.4th at p. 504.)

- "The Restatement further explains 'Product components include raw materials. … Thus, when raw materials are contaminated or otherwise defective within the meaning of § 2(a), the seller of the raw material is subject to liability for harm caused by such defects.' California courts have generally adopted the component parts doctrine as it is articulated in the Restatement." (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1219 [194 Cal.Rptr.3d 243], internal citation omitted.)

- "The California Supreme Court has not determined whether the component parts defense is limited to fungible products." (*Romine, supra,* 224 Cal.App.4th at p. 1006, fn. 6.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1617, 1666

Draft—Not Approved by Judicial Council

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her] by [making a statement/taking an action] that cast doubts about [*name of plaintiff*]'s ownership of [*describe real or personal property, e.g., the residence located at [address]*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [made a statement/[*specify other act, e.g., recorded a deed*] that cast doubts about [*name of plaintiff*]'s ownership of the property;**

2. **That the [statement was made to a person other than [*name of plaintiff*]/[*specify other publication, e.g., deed became a public record*]];**

3. **That [the statement was untrue and] [*name of plaintiff*] did in fact own the property;**

4. **That [*name of defendant*] [knew that/acted with reckless disregard of the truth or falsity as to whether] [*name of plaintiff*] owned the property;**

5. **That [*name of defendant*] knew or should have recognized that someone else might act in reliance on the [statement/*e.g., deed*], causing [*name of plaintiff*] financial loss;**

6. **That [*name of plaintiff*] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/*e.g., deed*]/ [or] by incurring legal expenses necessary to remove the doubt cast by the [statement/*e.g., deed*] and to clear title];**

7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New December 2012; Revised May 2018; November 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 [220 Cal.Rptr.3d 408].) If this element presents an issue for the jury, an instruction on it must be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the

statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (See *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)

- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1253

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th

645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- “One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.” (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- “Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss.” (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- “In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property.” (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)

- “While it is true that an essential element of a cause of action for slander of title is that the plaintiff suffered pecuniary damage as a result of the disparagement of title, the law is equally clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damage in such cases.” (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1032 [141 Cal.Rptr.3d 109], internal citations omitted; see Rest.2d Torts, § 633, subd. (1)(b).)

- “Although attorney fees and litigation expenses reasonably necessary to remove the memorandum from the record were recoverable, those incurred merely in pursuit of damages against … defendants were not.” (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865-866 [237 Cal.Rptr. 282].)

- “Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code.” (*Albertson, supra,* 46 Cal.2d at pp. 378–379, internal citations omitted.)

- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- "Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: 'A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.' Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land

or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts § 747

6 Witkin, Summary of California Law (11th ed. 2017) Torts § 1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

Draft—Not Approved by Judicial Council

1802. False Light

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] ~~publicized~~ publicly disclosed information or material that showed [*name of plaintiff*] in a false light;**

2. **That the false light created by the disclosure~~publication~~ would be highly offensive to a reasonable person in [*name of plaintiff*]'s position;**

3. **[That there is clear and convincing evidence that [*name of defendant*] knew the ~~publication~~ disclosure would create a false impression about [*name of plaintiff*] or acted with reckless disregard for the truth;]**

   [*or*]

   [That [*name of defendant*] was negligent in determining the truth of the information or whether a false impression would be created by its ~~publication~~disclosure;]

4. **[That [*name of plaintiff*] was harmed; and]**

   [*or*]

   [That [*name of plaintiff*] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]

5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised November 2017, May 2018, November 2018

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

False light claims are subject to the same constitutional protections that apply to defamation claims. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 696, fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required if the plaintiff is a public figure. (See *Brown v. Kelly Broadcasting Co.*

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(1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708, 771 P.2d 406].) Give the first option for element 3 if the ~~publication~~ disclosure involves a public figure. Give the second option for a private citizen, at least with regard to a matter of private concern. (See *id.* at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, an instruction on false light would be superfluous and therefore need not be given. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802]; see also *Briscoe, supra,* 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39].)

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code].' ' " (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- "Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove

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only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages … .” (*Khawar, supra,* 19 Cal.4th at p. 274.)

- “The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy.” (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- “[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.” (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456].)

- “We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required.” (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts §§ 20:12–20:15 (Thomson Reuters)

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2023. Failure to Abate Artificial Condition on Land Creating Nuisance

[*Name of plaintiff*] claims that [*name of defendant*] unreasonably failed to put an end to an artificial condition on [*name of defendant*]'s land that was a [public/private] nuisance. To establish this claim, in addition to proving that the condition created a nuisance, [*name of plaintiff*] must also prove all of the following:

1. **That [*name of defendant*] was in possession of the land where the artificial condition existed;**

2. **That [*name of defendant*] knew or should have known of the condition and that it created a nuisance or an unreasonable risk of nuisance;**

3. **That [*name of defendant*] knew or should have known that [[*name of plaintiff*]/the affected members of the public] did not consent to the condition; and**

4. **That after a reasonable opportunity, [*name of defendant*] failed to take reasonable steps to put an end to the condition or to protect [[*name of plaintiff*]/the public] from the nuisance.**

New November 2018

Directions for Use

This instruction is based on the Restatement Second of Torts, section 839 (see *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618–622 [200 Cal.Rptr. 575]), which applies to both public and private nuisances. (Rest. 2d Torts, § 839, comment (a).) For a private nuisance, select the plaintiff in elements 3 and 4.

Give this instruction with either CACI No. 2020, *Public Nuisance—Essential Factual Elements,* or CACI No. 2021, *Private Nuisance—Essential Factual Elements.* For public nuisance, modify element 1 of CACI No. 2020 to replace "created a condition" with "allowed a condition to exist." For private nuisance, this instruction replaces element 3 of CACI No. 2021.

Sources and Authority

- Under the common law, liability for a public nuisance may result from the failure to act as well as from affirmative conduct. Thus, for example, section 839 of the Restatement Second of Torts declares that 'A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land [such as the placement of fill], if the nuisance is otherwise actionable [e.g., prohibited by statute], and [para.] (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and [para.] (b) he knows or should know that it exists without the consent of those affected by it, and [para.] (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.'" (*Leslie Salt Co., supra,* 153 Cal.App.3d at pp. 619–620.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 160

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 1045

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1230, 1300 (2018)

2400. Breach of Employment Contract—Unspecified Term—"At-Will" Presumption

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that [*specify the nature of the alleged agreement, e.g., the employee would be discharged only for good cause*].

New September 2003; Revised June 2006, November 2018

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- At-Will Employment. Labor Code section 2922.

- Contract of Employment. Labor Code section 2750.

- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc*. (1997) 52 Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

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- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that … the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, § ~~231~~238

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2-4:4, 4:65 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4-8.14

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.11, 249.13, 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, §§ 100.20–100.23 (Matthew Bender)

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2401. Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached their employment contract [by forcing [*name of plaintiff*] to resign]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [*name of defendant*] promised, by words or conduct, to ~~[~~discharge~~/demote]~~ [*name of plaintiff*] [*specify the nature of the alleged agreement, e.g., only for good cause*];**

3. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

4. **That [*name of defendant*] [constructively] ~~[~~discharged~~/demoted]~~ [*name of plaintiff*] [*e.g., without good cause*]; ~~and~~**

5. **That [*name of plaintiff*] was harmed~~ by the [discharge/demotion]~~; and**

6. **That [*name of defendant*]'s breach of contract was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised November 2018

Directions for Use

~~In cases where constructive discharge is alleged, use CACI No. 2402 instead of this one.~~

~~The e~~Element 3 ~~of~~ on substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

~~See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.~~

An employee may be "constructively" discharged if the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person would have had no reasonable alternative except to resign. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32

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Cal.Rptr.2d 223, 876 P.2d 1022].) If constructive rather than actual discharge is alleged, include "by forcing [*name of plaintiff*] to resign" in the introductory paragraph and "constructively" in element 4, Then also give CACI No. 2510, *"Constructive Discharge" Explained*.

Elements ~~4~~2 and ~~5~~4 may be modified for adverse employment actions other than discharge, for example demotion. The California Supreme Court has extended the implied contract theory to encompass ~~demotions or~~ adverse employment actions~~other similar employment decisions~~ that violate the terms of an implied contract. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) See CACI No. 2509, *"Adverse Employment Action" Explained.*~~As a result, the bracketed language regarding an alleged wrongful demotion may be given, or other appropriate language for other similar employment decisions, depending on the facts of the case.~~

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage)*. See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Sources and Authority

- At-Will Employment. Labor Code section 2922.

- Contractual Conditions Precedent. Civil Code section 1439.

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an ... [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

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- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing *constructive* discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for *wrongful discharge*." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], original italics, internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245-1246, internal citation omitted.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254, original

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italics.)

- ~~Civil Code sections 1619-1621 together provide as follows: "A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct."~~

- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-FoxFilm Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2, 4:8, 4:15, 4:65, 4:81, 4:105, 4:270–4:273 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4–8.20B

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.90, 249.43, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.66 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10, 50.11, 50.350 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.28, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)

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2402. Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached their employment contract by forcing [*name of plaintiff*] to resign. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**

2. **That [*name of defendant*] promised, by words or conduct, to discharge [*name of plaintiff*] only for good cause;**

3. **That [*name of plaintiff*] substantially performed [his/her] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**

4. **That [*name of defendant*] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign;**

5. **That [*name of plaintiff*] resigned because of the intolerable conditions; and**

6. **That [*name of plaintiff*] was harmed by the loss of employment.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position.

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

Sources and Authority

- At-Will Employment. Labor Code section 2922.

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- ~~Contractual Conditions Precedent. Civil Code section 1439.~~

- ~~“Where there is no express agreement, the issue is whether other evidence of the parties’ conduct has a ‘tendency in reason’ to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)~~

- ~~The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See’s Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)~~

- ~~“Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for wrongful discharge.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)~~

- ~~“The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore ‘subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that ... the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer’s dissatisfaction with the employee’s services or the existence of some “cause” for termination.’ ” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)~~

- ~~“In *Foley*, we identified several factors, apart from express terms, that may bear upon ‘the existence and content of an ... [implied-in-fact] agreement’ placing limits on the employer’s right to discharge an employee. These factors might include “‘the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.” ’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336-337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)~~

- ~~Civil Code sections 1619-1621 together provide as follows: “A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct.”~~

- ~~“ ‘Good cause’ or ‘just cause’ for termination connotes ‘ “a fair and honest cause or reason,” ’ regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer’s interest in operating its business efficiently and profitably and the employee’s interest in continued employment. Care must be exercised so as not to interfere with the employer’s legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are ‘trivial, capricious, unrelated to business needs or goals, or pretextual.’~~

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~~Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)~~

- ~~"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1245-1246, internal citation omitted.)~~

- ~~"In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)~~

- ~~"Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)~~

- ~~"In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)~~

- ~~"[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)~~

- ~~"In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)~~

- ~~"The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254.)~~

- ~~"The general rule is that the measure of recovery by a wrongfully discharged employee is the amount~~

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~~of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)~~

~~***Secondary Sources***~~

~~3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§223–227~~

~~Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:2, 4:65, 4:81, 4:105, 4:405–4:407, 4:409–4:410, 4:270–4:273, 4:420, 4:422, 4:440 (The Rutter Group)~~

~~1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.1–8.21~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)~~

~~21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)~~

~~California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)~~

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2404. Breach of Employment Contract—Unspecified Term—"Good Cause" Defined

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Good cause exists when an employer's decision to ~~[~~discharge~~/demote]~~ an employee is made in good faith and based on a fair and honest reason. An employer has substantial but not unlimited discretion regarding personnel decisions[, particularly with respect to an employee in a sensitive or confidential managerial position]. However, ~~G~~good cause does not exist if the employer's reasons for the ~~[~~discharge~~/demotion]~~ are trivial, arbitrary, inconsistent with usual practices, ~~[~~or~~]~~ unrelated to business needs or goals, ~~[~~or if the stated reasons conceal the employer's true reasons~~]~~.

In deciding whether [*name of defendant*] had good cause to ~~[~~discharge~~/demote]~~ [*name of plaintiff*], you must balance [*name of defendant*]'s interest in operating the business efficiently and profitably against the interest of [*name of plaintiff*] in maintaining employment.

~~**[If [*name of plaintiff*] had a sensitive managerial position, then [*name of defendant*] had substantial, though not unlimited, discretion in [discharging/demoting] [him/her].]**~~

New September 2003; Revised November 2018

Directions for Use

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Include the bracketed language in the opening paragraph if the defense alleges that the plaintiff was in a sensitive or confidential managerial position~~Only read the last bracketed phrase in the first paragraph in cases where there is an issue involving pretext~~.

~~The last optional paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350–351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].) Note that the term "confidential position" has not been defined by California case law.~~

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give CACI No. 2405, *Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

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- "If the evidence is uncontradicted and permits only one conclusion, then the issue [of good cause] is legal, not factual. Where, however, as here, the evidence is contradicted, the issue is one for the trier of fact to decide." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299], disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394 fn. 2 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. … Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (Pugh I) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz, supra,* 24 Cal.4th at pp. 350–351.)

- " '[G]ood cause' in [the context of wrongful termination based on an implied contract] is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329-330, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 219–221, 244~~208, 209, 231~~

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:270–4:273, 4:300 (The Rutter Group)

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1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 6:19 (Thomson Reuters)

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~~2407. Affirmative Defense—Employee's Duty to Mitigate Damages~~
(*Renumbered as CACI No. 3923, November 2018*)

~~**[*Name of defendant*] claims that if [*name of plaintiff*] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [*name of defendant*] must prove all of the following:**~~

~~**1. That employment substantially similar to [*name of plaintiff*]'s former job was available to [him/her];**~~

~~**2. That [*name of plaintiff*] failed to make reasonable efforts to seek [and retain] this employment; and**~~

~~**3. The amount that [*name of plaintiff*] could have earned from this employment.**~~

~~**In deciding whether the employment was substantially similar, you should consider, among other factors, whether:**~~

~~**(a) The nature of the work was different from [*name of plaintiff*]'s employment with [*name of defendant*];**~~

~~**(b) The new position was substantially inferior to [*name of plaintiff*]'s former position;**~~

~~**(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff*]'s former job;**~~

~~**(d) The new position required similar skills, background, and experience;**~~

~~**(e) The job responsibilities were similar; [and]**~~

~~**(f) The job was in the same locality; [and]**~~

~~**(g) [*insert other relevant factor(s)*].**~~

~~**[In deciding whether [*name of plaintiff*] failed to make reasonable efforts to retain comparable employment, you should consider whether [*name of plaintiff*] quit or was discharged from that employment for a reason within [his/her] control.]**~~

~~*New September 2003; Revised February 2007, December 2014*~~

~~Directions for Use~~

~~This instruction may be given when there is evidence that the employee's damages could have~~

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been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., California Practice Guide: Employment Litigation, ¶ 17:492 (Rutter Group).

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived … ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra,* 55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have

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~~earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502-1503.)~~

- ~~"The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra,* 221 Cal.App.4th at p. 1432.)~~

- ~~"There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn., supra,* 30 Cal.App.3d at pp. 253–254, internal citations omitted.)~~

- ~~"The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao, supra,* 229 Cal.App.4th at p. 454.)~~

- ~~"[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)~~

~~***Secondary Sources***~~

~~Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)~~

~~1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)~~

~~21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)~~

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2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

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[*Name of plaintiff*] claims [he/she] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [*specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was employed by [*name of defendant*];**

2. **That [*name of defendant*] discharged [*name of plaintiff*];**

3. **That [*insert alleged violation of public policy, e.g., "*[*name of plaintiff*]*'s refusal to engage in price fixing"*] was a substantial motivating reason for [*name of plaintiff*]'s discharge;**

4. **That [*name of plaintiff*] was harmed; and**

45. **That the discharge was a substantial factor in caused causing [*name of plaintiff*] harm.**

New September 2003; Revised June 2013, June 2014, December 2014, November 2018

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that there are two causation elements. First, there must be causation between the public policy violation and the discharge (element 3). this This instruction uses the term "substantial motivating reason" to express this causation element. between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Element 5 then expresses a second causation requirement; that the plaintiff was harmed as a result of the wrongful discharge.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*, should be given instead. See also CACI No. 2510,

"Constructive Discharge" Explained.

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1093 [4 Cal.Rptr.2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained.*

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).*

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra,* 1

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Cal.4th at pp. 1090-1091, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- " [T]here is a 'fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment

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can be brought against an employer of any size.” (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- “To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase ‘substantial motivating reason’ to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff ‘cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].’ ” (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- “It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA.” (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- “If claims for wrongful termination in violation of public policy must track FEHA, it necessarily follows that jury instructions pertinent to causation and motivation must be the same for both. Accordingly, we conclude the trial court did not err in giving the instructions set forth in the CACI model jury instructions.” (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323 [200 Cal.Rptr.3d 315].)

- “Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails.” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- “FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy.” (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)t

- “Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge.” (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- “[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held ‘[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies.’ ” (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- “California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy.” (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- “ ‘Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace “whistleblowers,” who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry

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to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra,* 231 Cal.App.4th at p. 1355.)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 235

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims),* ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.58 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

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~~2433. Wrongful Discharge in Violation of Public Policy—Damages~~
(Renumbered as CACI No. 3903P and Revised November 2018)

~~**If you find that [*name of defendant*] [discharged/constructively discharged] [*name of plaintiff*] in violation of public policy, then you must decide the amount of damages that [*name of plaintiff*] has proven [he/she] is entitled to recover, if any. To make that decision, you must:**~~

~~**1. Decide the amount that [*name of plaintiff*] would have earned up to today, including any benefits and pay increases; [and]**~~

~~**2. Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [*name of defendant*] was reasonably certain to continue; [and]**~~

~~**3. [Add damages for [*describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"*] if you find that [*name of defendant*]'s conduct was a substantial factor in causing that harm.]**~~

~~**In determining the period that [*name of plaintiff*]'s employment was reasonably certain to have continued, you should consider such things as:**~~

~~**(a) [*Name of plaintiff*]'s age, work performance, and intent regarding continuing employment with [*name of defendant*];**~~

~~**(b) [*Name of defendant*]'s prospects for continuing the operations involving [*name of plaintiff*]; and**~~

~~**(c) Any other factor that bears on how long [*name of plaintiff*] would have continued to work.**~~

~~*New September 2003*~~

~~Directions for Use~~

~~This instruction should be followed by CACI No. 2407, *Employee's Duty to Mitigate Damages,* in cases where the employee's duty to mitigate damages is at issue.~~

~~Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).* See punitive damages instructions in the damages section (CACI No. 3940 et seq.).~~

~~Sources and Authority~~

- ~~Standard for Punitive Damages. Civil Code section 3294(a).~~

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- ~~Employer Liability for Punitive Damages. Civil Code section 3294(b).~~

- ~~A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)~~

- ~~"The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)~~

- ~~"A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)~~

- ~~"[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)~~

- ~~In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .'" (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)~~

- ~~In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510].)~~

~~***Secondary Sources***~~

~~Chin et al., California Practice Guide: Employment Litigation ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)~~

~~1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64–~~

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~~5.67~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)~~

~~21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)~~

~~10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59 (Matthew Bender)~~

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2528. Failure to Prevent Sexual Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [*name of defendant*] failed to take reasonable steps to prevent sexual harassment by a nonemployee. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/was an unpaid [intern/volunteer] for [*name of defendant*]/was a person providing services under a contract with [*name of defendant*]];**

2. **That while in the course of employment, [*name of plaintiff*] was subjected to sexual harassment by [*name*], who was not an employee of [*name of defendant*];**

3. **That [*name of defendant*] knew or should have known that the nonemployee's conduct placed employees at risk of sexual harassment;**

4. **That [*name of defendant*] failed to take immediate and appropriate [preventive/corrective] action;**

5. **That the ability to take [preventive/corrective] action was within the control of [*name of defendant*];**

6. **That [*name of plaintiff*] was harmed; and**

7. **That [*name of defendant*]'s failure to take immediate and appropriate steps to [prevent/put an end to] the sexual harassment was a substantial factor in causing [*name of plaintiff*]'s harm.**

New November 2018

Directions for Use

Give this instruction on a claim against the employer for failure to prevent sexual harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a coemployee (see Gov. Code, § 12940(k)), only sexual harassment is covered. (Gov. Code, § 12940(j)(1). If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).

- Prevention of Discrimination and Harassment. Government Code section 12940(k).

- "The FEHA provides: 'An employer may … be responsible for the acts of nonemployees, with respect to sexual harassment of employees … , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' … ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)

- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment … ." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)

- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)

- "The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 363, 370

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1019, 1028, 1035

Draft—Not Approved by Judicial Council

2705. Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant's Employee

[*Name of defendant*] claims that [he/she/it] is not liable for [*specify wage order violations, e.g., failure to pay minimum wage*] because [*name of plaintiff*] was not [his/her/its] employee, but rather an independent contractor. To establish this defense, [*name of defendant*] must prove all of the following:

a. That [*name of plaintiff*] is [under the terms of the contract and in fact] free from the control and direction of [*name of defendant*] in connection with the performance of the work that [*name of plaintiff*] was hired to do;

b. That [*name of plaintiff*] performs work for [*name of defendant*] that is outside the usual course of [*name of defendant*]'s business; and

c. That [*name of plaintiff*] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [*name of defendant*].

New November 2018

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by a California wage order. The wage orders, which are constitutionally-authorized, quasi-legislative regulations that have the force of law, impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (*Id., supra,* 4 Cal.5th at p. 916.)

Under the wage orders, "to employ" has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In *Dynamex*, the Supreme Court found no need to address definition (a) on exercising control. It acknowledged that definition (c), the common law test, could be used, but held that the controlling test was definition (b), "to suffer or permit to work." It then defined this test, known as the ABC test, as involving the three factors of the instruction. (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 916–917.)

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342.) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex Operations W. supra,* 4 Cal.5th at p. 963.) The court may

address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.

Include the bracketed language in element 1 if there is a contract between the parties covering the work at issue.

Sources and Authority

- The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex Operations W., supra,* 4 Cal.5th at pp.955–956.)

- "[W]e conclude that there is no need in this case to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 943.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex Operations W., supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage

and hour context.” (*Dynamex Operations W., supra,* 4 Cal.5th at p. 954.)

- “Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.” (*Dynamex Operations W., supra,*4 Cal.5th at pp.959–960, internal citations omitted.)

- “A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.” (*Dynamex Operations W., supra,* 4 Cal.5th at p. 962.)

- “The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. ‘The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.’ ” (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342-343 [221 Cal.Rptr.3d 1].)

- “It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.” (*Dynamex Operations W., supra,* 4 Cal.5th at p. 963, italics added.)

- “An entity that controls the business enterprise may be an employer even if it did not ‘directly hire, fire or supervise’ the employees. Multiple entities may be employers where they ‘control different aspects of the employment relationship.’ ‘This occurs, for example, when one entity

(such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Compensation—Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Draft—Not Approved by Judicial Council

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **[That by threats, intimidation or coercion, [*name of defendant*] caused ~~made threats of violence against [*name of plaintiff*] causing~~ [*name of plaintiff*] to reasonably believe that if [he/she] exercised [his/her] right [*insert right, e.g., "to vote"*], [*name of defendant*] would commit violence against [[him/her]/ [or] [his/her] property] and that [*name of defendant*] had the apparent ability to carry out the threats;]**

   [*or*]

   [That [*name of defendant*] acted violently against [[*name of plaintiff*]/ [and] [*name of plaintiff*]'s property] [to prevent [him/her] from exercising [his/her] right [~~*insert right*~~*e.g., to vote*]/to retaliate against [*name of plaintiff*] for having exercised [his/her] right [~~*insert right*~~*e.g., to vote*]];]

[2. That [*name of defendant*] intended to deprive [*name of plaintiff*] of [his/her] enjoyment of the interests protected by the right [*e.g., to vote*];]

~~2~~3. That [*name of plaintiff*] was harmed; and

~~3~~4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012; Revised November 2018

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"];

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City and County of San Francisco v. Ballard (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element ~~2~~ 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages,* and CACI No. 3068, *Ralph Act—Damages and Penalty,* to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.

- Remedies Under Bane Act. Civil Code section 52.

- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was

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intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra,* 203 Cal.App.4th at p. 956.)

- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

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- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender*, *supra*, ~~*v. County of Los Angeles* (2013)~~ 217 Cal.App.4th at p. ~~968,~~ 981 ~~[159 Cal.Rptr.3d 204]~~, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)

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- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)

- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' … . The first is a purely legal determination. Is the … right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that … right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra,* 17 Cal.App.5th at p. 803.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § ~~895~~989 et seq.

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:38 (The Rutter Group) (The Bane Act)

California Civil Practice: Civil Rights Litigation, §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.27 (Matthew Bender)

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3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

[*Name of plaintiff*] claims that the [*consumer good*] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] bought a[n] [*consumer good*] [from/manufactured by] [*name of defendant*];**

2. **That at the time of purchase [*name of defendant*] was in the business of [selling [*consumer goods*] to retail buyers/manufacturing [*consumer goods*]]; ~~and~~**

3. **That the [*consumer good*] [*insert one or more of the following:*]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label.]

4. **That [*name of plaintiff*] was harmed; and**

5. **That [*name of defendant*]'s breach of the implied warranty was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2005, December 2014, November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof of notice is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (See Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

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Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a).
- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purpose" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- "Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, '[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.' " (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [228 Cal.Rptr.3d 699] [citing this instruction], internal citations omitted.)
- "[T]he buyer of consumer goods must plead he or she was injured or damaged by the alleged breach of the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1247.)
- "Unless specific disclaimer methods are followed, an implied warranty of merchantability

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accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects … are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)

- "[Defendant] suggests 'the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand, supra,* 226 Cal.App.4th at p. 1546.)

- "[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not "fit for the ordinary purposes for which such goods are used" and, thus, breached the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at pp. 1247–1248.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

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Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ ~~70,~~ 71, 72

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.42 (Matthew Bender)

5 California Civil Practice Business Litigation, §§ 53:5–53:7 (Thomson Reuters)

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3211. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed because the [*consumer good*] was not suitable for [his/her] intended use. This is known as a "breach of an implied warranty." To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] bought a[n] [*consumer good*] [from/manufactured by/distributed by] [*name of defendant*];**

2. **That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] intended to use the [*consumer good*] for a particular purpose;**

3. **That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] was relying on [his/her/its] skill and judgment to select or provide a [*consumer good*] that was suitable for that particular purpose;**

4. **That [*name of plaintiff*] justifiably relied on [*name of defendant*]'s skill and judgment; and**

5. **That the [*consumer good*] was not suitable for the particular purpose;**

6. **That [*name of plaintiff*] was harmed; and**

7. **That [*name of defendant*]'s breach of the implied warranty was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] was not suitable for its intended use;

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d

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583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods-see Civil Code sections 1791(g)-(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

Sources and Authority

- "Implied Warranty of Fitness" Defined. Civil Code section 1791.1(b).

- Remedies for Breach of Warranty of Fitness. Civil Code section 1791.1(d).

- Waiver of Warranty of Fitness. Civil Code section 1792.3.

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).

- Measure of Damages. Civil Code section 1794(b).

- Manufacturer's Implied Warranty of Fitness. Civil Code section 1792.1.

- Retailer's or Distributor's Implied Warranty of Fitness. Civil Code section 1792.2(a).

- Damages for Nonconforming Goods. California Uniform Commercial Code section 2714(1).

- Damages for Breach of Warranty. California Uniform Commercial Code section 2714(2).

- "The Consumer Warranty Act makes ... an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers. ... An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)

- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. ... The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith*, *supra*, 173 Cal.App.3d at p. 25, internal

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citations omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ ~~72,~~ 73, 74

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.33–3.40

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][b] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.64 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

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3220. Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant*] is not responsible for any harm to [*name of plaintiff*] if [*name of defendant*] proves that the [*specify defect in the* any [defect[s] in the [*consumer good*]/] [failure to match any the [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [*consumer good*] after it was sold.

New September 2003; Revised February 2005, November 2018

Sources and Authority

- Unauthorized or Unreasonable Use. Civil Code section 1794.3.

- "The Song-Beverly Act provides that a breach of the warranty of merchantability occurs when a good becomes unfit for the ordinary purpose for which it is used. An exception occurs when the defect or nonconformity is caused by the buyer's unauthorized or unreasonable use under Civil Code section 1794.3. 'It is a "familiar" and "longstanding" legal principle that " '[w]hen a proviso … carves an exception out of the body of a statute or contract those who set up such exception must prove it.' " [Citations.]' Defendant, as the party claiming the exemption from the Song-Beverly Act, had the burden to prove the exemption. … Plaintiff alleged the vehicle became unfit and presented uncontradicted evidence that the vehicle had ceased functioning; to avail itself of Civil Code section 1794.3, defendant had to allege and prove that, notwithstanding the unfitness, the Song-Beverly Act did not apply due to plaintiff's improper use or maintenance." (*Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 10-11 [188 Cal.Rptr.3d 578], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th 11th ed. 20052017) Sales, §§ 321, 322314, 315

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:59 (Thomson Reuters)

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3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff*] claims that [*name of defendant*]'s failure to [*describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities*] was willful and therefore asks that you impose a civil penalty against [*name of defendant*]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing violations in the future.

If [*name of plaintiff*] has proved that [*name of defendant*]'s failure was willful, you may impose a civil penalty against [him/her/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff*]'s actual damages.

"Willful" means that [*name of defendant*] knew of [his/her/its] legal obligations and intentionally declined to follow them. However, a violation is not willful if you find that [*name of defendant*] reasonably and in good faith believed that the facts did not require [*describe statutory obligation, e.g., repurchasing or replacing the vehicle*].

New September 2003; Revised February 2005, December 2005, December 2011, May 2018, November 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness under some circumstances. (See Civ. Code, § 1794(e).) However, a buyer who recovers a civil penalty for a willful violation may not also recover a second civil penalty for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133].) A special instruction will be needed for the nonwillful violation. (See *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (*Suman II*) [setting forth instructions to be given on retrial].)

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

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- Civil Penalty for Willful Violation. Civil Code section 1794(c).

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'" (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them."].)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

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- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra,* 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan, supra,* 23 Cal.App.4th at pp. 184–185, internal citation omitted.)

- "Thus, when the trial court concluded that subdivision (c)'s requirement of willfulness applies also to subdivision (e), and when it, in effect, instructed the jury that subdivision (c)-type willfulness is the sole basis for awarding civil penalties, the court ignored a special distinction made by the Legislature with respect to the seller of new automobiles. In so doing, the court erred. The error was prejudicial because it prevented the jurors from considering the specific penalty provisions in subdivision (e) and awarding such penalties, in their discretion, if they determined the evidence warranted such an award." (*Suman, supra,* 23 Cal.App.4th at p. 11.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

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44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206*, Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

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3704. Existence of "Employee" Status Disputed

[*Name of plaintiff*] must prove that [*name of agent*] was [*name of defendant*]'s employee.

In deciding whether [*name of agent*] was [*name of defendant*]'s employee, the most important factor is whether [*name of defendant*] had the right to control how [*name of agent*] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [*name of defendant*] exercised the right to control.

In deciding whether [*name of defendant*] was [*name of agent*]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [*name of defendant*] was the employer of [*name of agent*]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.

(a) [*Name of defendant*] supplied the equipment, tools, and place of work;

(b) [*Name of agent*] was paid by the hour rather than by the job;

(c) [*Name of defendant*] was in business;

(d) The work being done by [*name of agent*] was part of the regular business of [*name of defendant*];

(e) [*Name of agent*] was not engaged in a distinct occupation or business;

(f) The kind of work performed by [*name of agent*] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [*name of agent*] does not require specialized or professional skill;

(h) The services performed by [*name of agent*] were to be performed over a long period of time; [and]

(i) [*Name of defendant*] and [*name of agent*] believed that they had an employer-employee relationship[./; and]

(j) [*Specify other factor*].

New September 2003; Revised December 2010, June 2015, December 2015, November 2018

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Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is primarily intended to address thefor employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc.*, *supra,* *v. Department of Industrial Relations* (1989) 48 Cal.3d at pp.341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Id.* at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.

- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.

- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)

- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello &*

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Sons, Inc., supra, 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard

for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex Operations W., supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only

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in the result of the work, and not the means by which it is achieved.” (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- “ ‘[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .’ ” (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- “Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor.” (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- “[W]hen a statute refers to an ‘employee’ without defining the term, courts have generally applied the common law test of employment to that statute.” (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- “[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee.” (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:
  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

  (d) the skill required in the particular occupation;

  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

  (f) the length of time for which the person is employed;

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(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 2–~~42~~45

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.41 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

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3903J. Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* "10."] **The harm to** [*name of plaintiff*]**'s** [*item of personal property, e.g., automobile*]**.**

To recover damages for harm to personal property, [*name of plaintiff*] **must prove the reduction in the** [*e.g., automobile*]**'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both,** [*name of plaintiff*] **is entitled to the lesser of the two amounts.]**

[However, if you find that the [*e.g., automobile*] **can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value before the harm and its lesser value after the repairs have been made; plus (2) the reasonable cost of making the repairs. The total amount awarded may not exceed the** [*e.g., automobile*]**'s value before the harm occurred.]**

To determine the reduction in value if repairs cannot be made, you must determine the fair market value of the [*e.g., automobile*] **before the harm occurred and then subtract the fair market value immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller are fully informed of the condition and quality of the** [*e.g., automobile*]**.**

New September 2003; Revised December 2011, June 2013, December 2015, November 2018

Directions for Use

Do not give this instruction if the property had no monetary value either before or after injury. (See *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1560 [126 Cal.Rptr.3d 581] [CACI No. 3903J has no application to prevent proof of out-of-pocket expenses to save the life of a pet cat].) See CACI No. 3903O, *Injury to Pet (Economic Damage)*.

An insurer may draft around this rule in the policy by limiting recovery to either cost of repair or diminution in value, but not both. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)

Give the optional second paragraph if the property can be repaired, but the value after repair may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

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Sources and Authority

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280].)

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego,* the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices. In *Quint v. Dimond,* it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics Inc., supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases

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in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra,* 28 Cal.2d at p. 600, internal citations omitted.)

- "In personal property cases, plaintiffs are entitled to present evidence of the cost of repairs even in cases where recovery is limited to the lost market value of property. The cost of repairs constitutes a prima facie measure of damages, and it is the defendant's burden to respond with proof of a lesser diminution in value." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, internal citation omitted.)

- "In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that [insurer] '*may* pay the loss in money *or* repair … damaged … property.' The policy's use of the term 'may' suggests [insurer] had the discretion to choose between the two options." (*Baldwin, supra,* 1 Cal.App.5th at p. 550, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1718, 1719

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:220 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8–13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* §§ 177.41, 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 5:16 (Thomson Reuters)

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24333903P. Damages From Employer for Wrongful Discharge (Economic Damage)in Violation of Public Policy—Damages

[Insert number, e.g., "3."] **Past and future lost earnings.**

If you find that [*name of defendant*] [constructively] [discharged/constructively discharged] [*name of plaintiff*] in violation of [*specify, e.g., public policy and the Fair Employment and Housing Act*], then you must decide the amount of past and future lost earningsdamages that [*name of plaintiff*] has proven [he/she] is entitled to recover, if any. To make that decision, you must:

1. **Decide the amount that [*name of plaintiff*] would have earned up to today, including any benefits and pay increases; [and]**

2. **Add the present cash value of any future wages and benefits that [he/she] would have earned for the length of time the employment with [*name of defendant*] was reasonably certain to continue.; [and]**

3. **[Add damages for [*describe any other damages that were allegedly caused by defendant's conduct, e.g., "emotional distress"*] if you find that [*name of defendant*]'s conduct was a substantial factor in causing that harm.]**

In determining the period that [*name of plaintiff*]'s employment was reasonably certain to have continued, you should consider such things as:

(a) **[*Name of plaintiff*]'s age, work performance, and intent regarding continuing employment with [*name of defendant*];**

(b) **[*Name of defendant*]'s prospects for continuing the operations involving [*name of plaintiff*]; and**

(c) **Any other factor that bears on how long [*name of plaintiff*] would have continued to work.**

New September 2003; Renumbered from CACI No. 2433 and Revised November 2018

Directions for Use

Give this instruction for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500 et seq.) Include "constructively" in the opening paragraph if the plaintiff alleges constructive discharge instead of an actual discharge. (See CACI No. 2510, *"Constructive Discharge" Explained*.)

This instruction should be followed by CACI No. 3963, *Affirmative Defense—Employee's Duty to*

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Mitigate Damages, if ~~2407, *Employee's Duty to Mitigate Damages,* in cases where~~ the employee's duty to mitigate damages is at issue. Also give CACI Nos. 3904A, *Present Cash Value,* and 3904B, *Use of Present-Value Tables.*

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).* See punitive damages instructions in the ~~damages~~ Damages series~~section~~ (CACI No. 3940 et seq.).

Sources and Authority

- Standard for Punitive Damages. Civil Code section 3294(a).

- Employer Liability for Punitive Damages. Civil Code section 3294(b).

- A tortious termination subjects the employer to " 'liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)

- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)

- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers ... .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)

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- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64–5.67

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59 (Matthew Bender)

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~~2407~~3963. Affirmative Defense—Employee's Duty to Mitigate Damages

[*Name of defendant*] claims that if [*name of plaintiff*] is entitled to any damages, they should be reduced by the amount that [~~he/she~~*name of plaintiff*] could have earned from other employment. To succeed, [*name of defendant*] must prove all of the following:

1. **That employment substantially similar to [*name of plaintiff*]'s former job was available to [him/her];**

2. **That [*name of plaintiff*] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [*name of plaintiff*] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) **The nature of the work was different from [*name of plaintiff*]'s employment with [*name of defendant*];**

(b) **The new position was substantially inferior to [*name of plaintiff*]'s former position;**

(c) **The salary, benefits, and hours of the job were similar to [*name of plaintiff*]'s former job;**

(d) **The new position required similar skills, background, and experience;**

(e) **The job responsibilities were similar; [and]**

(f) **The job was in the same locality; [and]**

(g) **[*insert other relevant factor(s)*].**

[In deciding whether [*name of plaintiff*] failed to make reasonable efforts to retain comparable employment, you should consider whether [*name of plaintiff*] quit or was discharged from that employment for a reason within [his/her] control.]

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Directions for Use

This instruction may be given for any claim in which the plaintiff seeks to recover damages for

past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500 et seq.), when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

~~This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., California Practice Guide: Employment Litigation, ¶ 17:492 (Rutter Group).~~

~~This instruction should not be used for wrongful demotion cases.~~

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived … ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra,*

55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra,* 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn., supra,* 30 Cal.App.3d at pp. 253−254, internal citations omitted.)

- "The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao, supra,* 229 Cal.App.4th at p. 454.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17.492, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

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~~3963~~3965. No Deduction for Workers' Compensation Benefits Paid

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Do not consider whether or not [*name of plaintiff*] received workers' compensation benefits for [his/her] injuries. If you decide in favor of [*name of plaintiff*], you should determine the amount of your verdict according to my instructions concerning damages.

New September 2003; Revised December 2009; Renumbered to CACI No. 3965 November 2018

Directions for Use

This instruction is intended for use in conjunction with a special verdict form~~, in which case~~ if the judge ~~can~~ may need to make ~~any necessary~~ deductions from the verdict to avoid a~~if~~ double recovery ~~is an issue~~. It may also be read ~~in cases in which~~if there are no allegations regarding the employer's comparative fault.

Sources and Authority

- "Since the employer was not negligent, the death benefits paid did ~~If the employer has not been negligent, the workers' compensation benefits do "~~not constitute an impermissible double recovery but rather a payment from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 682 [180 Cal.Rptr. 843].)

- "Here the collateral source was workers' compensation benefits paid by the [defendant]'s policy. Under the general principles just described, this would not be an independent source; defendant is the policyholder, so the collateral source rule would not apply. Yet the California Supreme Court held that the rule did apply in a case in which an employee received benefits from the employer's workers' compensation policy and then sued a third party tortfeasor, the compensation insurer having waived its right of subrogation against the third party." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 637 [210 Cal.Rptr.3d 362] [action by employee against employer on claim alleged to not be within scope of employment].)

- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380], internal citations omitted.)

- "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919], footnote omitted.)

- "Alternatively, the jury may generally be instructed on the types of tort damages to which the

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employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra,* 233 Cal.App.3d at p. 1259, footnote omitted.)

- "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861].)

- "The *Espinoza* approach has provided an effective solution for pre-verdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455].)

Secondary Sources

2 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Workers' Compensation, §§ 23, 28–30, 35, 38, 43~~20, 24–26, 31, 34, 39–42~~

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation,* § 577.319 (Matthew Bender)

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Draft—Not Approved by Judicial Council

4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect (Code Civ. Proc., § 337.1)

[*Name of plaintiff*] claims that [his/her] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[*specify project, e.g., the roof replacement*]]. [*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove both of the following:

1. **That an average person during the course of a reasonable inspection would have discovered the defect; and**

2. **That the date on which the [construction project/survey of real property/[*specify project, e.g., roof replacement*]] was substantially complete was more than four years before [*insert date*], the date on which this action was filed.**

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.1 as a defense. This section provides a four-year limitation period from the date of substantial completion for harm caused by a patent construction defect. Do not give this instruction if the claim is for injuries to persons or property based on tort principles occurring in the fourth year after substantial completion. (See Code Civ. Proc., § 337.1(b).)

For discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance.*

Code of Civil Procedure section 337.1 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations for Patent Defects. Code of Civil Procedure section 337.1.

- "The statute of limitations in section 337.1 exists to 'provide a final point of termination, to protect some groups from extended liability.' " (*Delon Hampton & Associates, Chartered v.*

Superior Court (2014) 227 Cal.App.4th 250, 254 [173 Cal.Rptr.3d 407].)

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra,* 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 1303~~1159~~

3 Witkin, California Procedure (5th ed. 2008) Actions, § 484

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.54, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

Draft—Not Approved by Judicial Council

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant*] **contends that** [*name of plaintiff*]**'s lawsuit was not filed within the time set by law. To succeed on this defense,** [*name of defendant*] **must prove that the date on which the [construction project/survey of real property/[**_specify project, e.g., roof replacement_**]] was substantially complete was more than 10 years before** [*insert date*]**, the date on which this action was filed.**

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance.*

Code of Civil Procedure section 337.15 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations: Latent Defects. Code of Civil Procedure section 337.15.

- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' … [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)

- "A 'latent' construction defect is one that is 'not apparent by reasonable inspection.' As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. 'The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.' " (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc., supra,* 177 Cal.App.4th at p. 256, internal citations omitted.)

- "Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute." (*Martinez, supra,* 32 Cal.3d at p. 759.)

- "The 10-year period commences to run in respect to a person who has contributed towards 'an improvement' when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development." (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)

- "In 1981, the Legislature codified the holding in *Liptak* by adding subdivision (g) to section 337.15. 'The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: " 'In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.' " [Citation.]' " (*Nelson, supra,* 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- "Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one 'improvement' such as grading. It can also be a 'particular development,' i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the 'improver'—whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz, supra,* 220 Cal.App.3d at p. 308.)

- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement,* but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). … [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson, supra,* 61 Cal.App.4th at p. 97, original italics.)

- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson, supra,* 61 Cal.App.4th at p. 97.)

- "The purpose of section 337.15 and its definition of the 'substantial completion' that begins the running of the 10-year period make clear that the statute's protection applies to claims for damage due to defects in how an improvement was designed and constructed, not to claims based on how the improvement was used *after* its construction is complete and independent of the manner in which it was designed and constructed." (*Estuary Owners Assn. v. Shell Oil Co.* (2017) 13 Cal.App.5th 899, 915 [221 Cal.Rptr.3d 190], original italics.)

- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra,* 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 488

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08A (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.267 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.49 (Matthew Bender)

Item number: 03

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: October 19, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

Committee or other entity submitting the proposal:
Advisory Commitee on Civil Jury Instructionsf

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698
bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Maintaining and expanding CACI (the committee's ongoing project)
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised four times a year, and more often if necessary. Release 33 is the second full CACI release for 2018. Release 32 was approved in May. Releases 31A and 32A, online only releases, were approved in January and July 2018.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 34 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, the advisory committee also requests that RUPRO approve and submit to the Judicial Council for adoption 28 new and revised CACI instructions.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
September 24, 2018

To
Members of the Rules and Projects Committee

From
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Subject
Civil Jury Instructions: Instructions with Minor Revisions

Action Requested
Review and Approve Publication of Instructions with Minor Revisions

Deadline
October 19, 2018

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
415-865-4319 fax
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules and Projects Committee (RUPRO) approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 34 instructions in this release, prepared by the advisory committee, contain only the types of revisions that the Judicial Council has given RUPRO final authority to approve—primarily instructions with only changes to the Directions for Use or additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO approve for publication revisions to the 34 civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or Judicial Council approval. These instructions will be published in the 2019 edition of *CACI* and posted online on the California Courts website, and on Lexis and Westlaw.

The revised instructions are attached at pages 6–158.

Relevant Previous Council Action

The Task Force on Jury Instructions was appointed by the Judicial Council in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood by the average juror. In July 2003, the council approved its civil jury instructions for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[1]

At the October 20, 2006, Judicial Council meeting, the council approved authority for RUPRO to "review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to *Judicial Council of California Civil Jury Instructions* (CACI) and *Criminal Jury Instructions* (CALCRIM)."[2]

Under the implementing guidelines that RUPRO adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes,* RUPRO has final approval authority over the following:

(a) Additions of cases and statutes to the Sources and Authority;
(b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[3]
(c) Additions or changes to the Directions for Use;[4]
(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy. A nonsubstantive change is one that does not affect or alter any fundamental legal basis of the instruction;
(e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and
(f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Analysis/Rationale

Overview of revisions

Of the 34 revised instructions in this release that are presented for final RUPRO approval, all have revisions under category (a) above (additional cases added to Sources and Authority). Six

[1] See Cal. Rules of Court, rules 2.1050(d), 10.58(a).

[2] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sept. 12, 2006), p. 1.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] The committee only presents nonsubstantive changes to the Directions for Use for RUPRO's final approval. Substantive changes are posted for public comment and presented to the council for approval.

2

instructions also have additions to the Directions for Use (category (c) above: additions or changes to the Directions for Use). Of these, CACI No. 4120 has a citation added to the Directions for Use, and five hostile work environment harassment instructions (CACI Nos. 2521B and C, and CACI Nos. 2522A, B, and C) have a cross-reference added to the Directions for Use, as explained below.

Consolidation of Sources and Authority for hostile work environment harassment instructions

CACI has six instructions on hostile work environment harassment (2521A, B, and C; 2522A, B, and C). The 2521 group is for an employer defendant, and the 2522 group is for an individual defendant. Each group has an A instruction for harassment directed at the plaintiff, a B instruction for harassment directed at another person, and a C instruction for widespread sexual favoritism. Most of the cases on hostile work environment present general points that apply to all six instructions. The same case excerpts were being included six times.

The committee decided to consolidate and simplify the Sources and Authority excerpts for these instructions. The committee made 2521A the resting place for all case excerpts on hostile work environment claims generally; the Sources and Authority for the other five instructions are now limited to points relevant to the specific instruction. So for 2521B and C, the committee has retained the cases on employer liability for employee harassment. For the 2522 group, the committee has retained the cases on individual liability. Then for the two B instructions, the committee also kept the cases on harassment of others. And for the two C instructions, the committee kept the cases on sexual favoritism. For these five instructions, the committee has deleted all the case excerpts on points applicable to all six instructions and added a cross-reference back to 2521A in the Directions for Use.[5]

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.

[5] The committee previously implemented the same kind of consolidation with the defamation instructions. *CACI* has six instructions on various defamation claims (CACI Nos. 1700–1705), each with a different claim (e.g., per se, per quod, public figure, private figure). Adding all of the defamation case excerpts to every defamation instruction was repetitive. ~~So~~Therefore, the committee put case excerpts on general defamation points in CACI No. 1700 and then cross-referred back to 1700 in the Directions for Use for the other five instructions.

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6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

The advisory committee has deleted material from the Sources and Authority that duplicates other material that is already included or is to be added.

Nonfinal cases and incomplete citations

All cases included in this release are final. There is one incomplete citation to the California Supreme Court case of *Kim v. Toyota Motor Corp.* 6 Cal.5th 21, excerpted in the Sources and Authority to CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. Parallel citations to California Reporter Third and Pacific Third are not yet available. It is expected that the citations will be available before publication and will be added at that time.

Sources and Authority format cleanup

CACI format requires that case excerpts in the Sources and Authority be of directly quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the form of a legal statement with a citation rather than a direct quotation. Where found in instructions otherwise included, these out-of-format excerpts have been converted to direct quotations.

CACI format also orders statutes, rules, and regulations first; then case excerpts; and then any other authorities, such as a Restatement excerpt. Excerpts that were out of order have been moved to the proper location.

Policy implications

There are no policy implications.

Comments

Because the changes to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Alternatives considered

Rules 2.1050 and 10.58 of the California Rules of Court specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI*; and to submit its recommendations

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to the council for approval. The proposed revisions and additions meet this responsibility. There are no alternatives to be considered.

Fiscal and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, will pay royalties to the council. With respect to other commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of *CACI* instructions, at pages 6–162

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432. Affirmative Defense—Causation: Third-Party Conduct as Superseding Cause

[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because of the later misconduct of [*insert name of third party*]. To avoid legal responsibility for the harm, [*name of defendant*] must prove all of the following:

1. **That [*name of third party*]'s conduct occurred after the conduct of [*name of defendant*];**

2. **That a reasonable person would consider [*name of third party*]'s conduct a highly unusual or an extraordinary response to the situation;**

3. **That [*name of defendant*] did not know and had no reason to expect that [*name of third party*] would act in a [negligent/wrongful] manner; and**

4. **That the kind of harm resulting from [*name of third party*]'s conduct was different from the kind of harm that could have been reasonably expected from [*name of defendant*]'s conduct.**

New September 2003; Revised June 2011, December 2011

Directions for Use

A superseding cause instruction should be given if the issue is raised by the evidence. (See *Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863 [234 Cal.Rptr. 585]; disapproved in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d. 298] [there is no rule of automatic reversal or inherent prejudice applicable to any category of civil instructional error].) The issue of superseding cause should be addressed directly in a specific instruction. (See *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10 [116 Cal.Rptr. 575]; disapproved in *Soule, supra,* 8 Cal. 4th at p. 580.)

Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578 [237 Cal.Rptr. 521].) Therefore, the elements of this instruction are phrased in the affirmative and require the defendant to prove that they are all present in order to establish superseding cause. (See *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 702 [80 Cal.Rptr.2d 449].)

If, as a matter of law, a party is liable for subsequent negligence, as in subsequent medical negligence, this instruction should not be given.

Sources and Authority

" 'It is well established … that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct)

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of a third person.' In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148 [210 Cal.Rptr.3d 283, 384 P.3d 283], internal citation omitted.)

- "This issue is concerned with whether or not, assuming that a defendant was negligent and that his negligence was an actual cause of the plaintiff's injury, the defendant should be held responsible for the plaintiff's injury where the injury was brought about by a later cause of independent origin. This question, in turn, revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff; if, however, it is determined that the intervening cause was not foreseeable and that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries." (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199 [60 Cal.Rptr. 499, 430 P.2d 57].)

- " 'A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.' If the cause is superseding, it relieves the actor from liability whether or not that person's negligence was a substantial factor in bringing about the harm." (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1031 [47 Cal.Rptr.2d 348], internal citation omitted; see Restatement 2d of Torts, § 440.)

- "The rules set forth in sections 442–453 of the Restatement of Torts for determining whether an intervening act of a third person constitutes a superseding cause which prevents antecedent negligence of the defendant from being a proximate cause of the harm complained of have been accepted in California. Under these rules the fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the third person is done would not regard it as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent." (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864 [13 Cal.Rptr. 521, 362 P.2d 345], internal citations omitted.)

- "This test is but another way of saying that foreseeable intervening ordinary negligence will not supersede but such negligence, if 'highly extraordinary,' will supersede. [¶] '[T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if . . . the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent. … ' This test is but another way of saying a normal, but negligent, intervening response will not supersede but an extraordinarily negligent response will supersede." (*Martinez, supra,* 68 Cal.App.4th at p. 701 [holding that highly extraordinary negligence or extraordinarily negligent response obviates need to prove unforeseeable risk of harm].)

- "Intervening negligence cuts off liability, and becomes known as a superseding cause, if ' "it is determined that the intervening cause was not foreseeable *and* that the results which it caused were

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not foreseeable … .” ’ ” (*Martinez, supra,* 68 Cal.App.4th at pp. 700–701, original italics.)

- “ ‘[T]he defense of “superseding cause[]” … absolves [the original] tortfeasor, even though his conduct *was a* substantial contributing factor, when an independent event [subsequently] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.’ … [¶] To determine whether an independent intervening act was reasonably foreseeable, we look to the act and the nature of the harm suffered. To qualify as a superseding cause so as to relieve the defendant from liability for the plaintiff's injuries, both the intervening act and the results of that act must not be foreseeable. Significantly, ‘what is required to be foreseeable is the general character of the event or harm … not its precise nature or manner of occurrence.’ ” (*Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755−756 [155 Cal.Rptr.3d 693], original italics, internal citations omitted.)

- “ ‘Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. … “The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was ‘a substantial factor’ in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.” … It must appear that the intervening act has produced “harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.” … [¶] … [F]oreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. … Thus, the issue of superseding cause is generally one of fact. …’ ” (*Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417 [119 Cal.Rptr.3d 366].)

- “The intervening negligence (or even recklessness) of a third party will not be considered a superseding cause if it is a ‘normal response to a situation created by the defendant’s conduct’ and is therefore ‘ “… within the scope of the reasons [for] imposing the duty upon [the defendant] to refrain from negligent conduct” ’ in the first place.” (*Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 373 [163 Cal.Rptr.3d 55], internal citations omitted.)

- “Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act intervenes and supersedes the initial act.” (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [22 Cal.Rptr.2d 106].)

- “[T]he intervening and superseding act itself need not necessarily be a negligent or intentional tort. For example, the culpability of the third person committing the intervening or superseding act is just one factor in determining if an intervening force is a new and independent superseding cause.” (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1277 [168 Cal.Rptr.3d 499] [unforeseeable bankruptcy can be superseding cause].)

- “Whether an intervening force is superseding or not generally presents a question of fact, but becomes a matter of law where only one reasonable conclusion may be reached.” (*Ash, supra,* 223 Cal.App.4th at p. 1274.)

- “[O]ne does not reach the issue of superseding cause until one is satisfied that the record supports a

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finding of negligence on the part of the defendant and a further finding that but for such negligence the accident would not have occurred. This, at least, has been the approach of our Supreme Court. … [S]uch an approach may be analytically wrong, because a finding that plaintiff's harm was due to a superseding cause, is, in reality, a finding that the cause which injured the plaintiff was not a part of the risk created by the defendant.” (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169 [46 Cal.Rptr. 631].)

- “The potential for error in the [instruction] lies in the ambiguity of the words ‘extraordinary’ and ‘abnormal.’ These terms could be interpreted as meaning either: A. Unforeseeable (unpredictable, statistically extremely improbable, etc.); *or* B. Outside the scope of that which would be done by ordinary man. The instruction was correct if interpreted in sense A, since defendant’s conduct would not in fact give rise to liability if the criminal act were unforeseeable. However, the instruction was incorrect if interpreted in sense B. Such an interpretation would almost invariably preclude liability for failure to police against criminal conduct, since there are very few situations indeed to which ordinary men would respond by committing serious criminal offenses. Yet it is not the law that one has no duty to protect against foreseeable criminal acts.” (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807 [89 Cal.Rptr. 270], original italics.)

- “Proximate cause analysis is also concerned with intervening forces operating independent of defendant's conduct. Multiple elements are weighed in determining whether an intervening force is a superseding cause of harm to the plaintiff, thus absolving defendant from liability: ‘(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; [¶] (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; [¶] (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; [¶] (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; [¶] (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; [¶] (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.’ ” (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 197 [231 Cal.Rptr.3d 324], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1348~~197~~, 1349~~198~~

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, *Causation Issues*, ¶ 2:2444 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1326 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

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California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.74 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.321 (Matthew Bender)

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454. Affirmative Defense—Statute of Limitations

[*Name of defendant*] **contends that** [*name of plaintiff*]**'s lawsuit was not filed within the time set by law. To succeed on this defense,** [*name of defendant*] **must prove that** [*name of plaintiff*]**'s claimed harm occurred before** [*insert date from applicable statute of limitation*]**.**

New April 2007; Revised December 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations—Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit.*)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)
- " ' " ' "Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' " … In other words, "[a] cause of action accrues 'upon the occurrence of the

last element essential to the cause of action.' " ' " ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323 [226 Cal.Rptr.3d 267], original italics.)

- "It is undisputed that plaintiffs discovered shortly after the accident in 2010 that [defendant] had failed to secure the insurance coverage plaintiffs requested. Thus, this case does not involve the delayed discovery doctrine, which makes 'accrual of a cause of action contingent on when a party discovered or should have discovered that his or her injury had a wrongful cause.' In delayed discovery cases, 'plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.' Here, the question is when plaintiffs incurred 'actual injury'—not when they discovered [defendant]'s negligence. The trial court erred to the extent that it relied on the delayed discovery doctrine to determine when plaintiffs incurred actual injury." (*Lederer v. Gursey Schneider LLP* (2018) 22 Cal.App.5th 508, 521 [231 Cal.Rptr.3d 518], internal citations omitted.)

- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. … "Mere threat of future harm, not yet realized, is not enough." … "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." … Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)

- " '[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant." (*Czajkowski v. Haskell & White* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- "Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law." (*Lederer, supra,* 22 Cal.App.5th at p. 521.)

- "So long as the time allowed for filing an action is not inherently unreasonable, California courts afford 'contracting parties considerable freedom to modify the length of a statute of limitations.' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 74 [215 Cal.Rptr.3d 835].)

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Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01–71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, §§ 345.19, 345.20 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05, 4.14, 4.38, 4.39

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457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[*Name of plaintiff*] claims that even if [his/her/its] lawsuit was not filed by [*insert date from applicable statute of limitations*], [he/she/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [*specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits*]. In order to establish the right to proceed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] received timely notice that [*name of plaintiff*] was [*e.g., seeking workers' compensation*] instead of filing a lawsuit;**

2. **That the facts of the two claims were so similar that an investigation of the [*e.g., workers' compensation claim*] gave or would have given [*name of defendant*] the information needed to defend the lawsuit; and**

3. **That [*name of plaintiff*] was acting reasonably and in good faith by [*e.g., seeking workers' compensation*].**

For [*name of defendant*] to have received timely notice, [*name of plaintiff*] must have filed the [*e.g., workers' compensation claim*] by [*insert date from applicable statute of limitations*] and the [*e.g., claim*] notified [*name of defendant*] of the need to begin investigating the facts that form the basis for the lawsuit.

In considering whether [*name of plaintiff*] acted reasonably and in good faith, you may consider the amount of time after the [*e.g., workers' compensation claim*] was [resolved/abandoned] before [he/she/it] filed the lawsuit.

New December 2009; Revised December 2014

Directions for Use

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—*

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One-Year Limit, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(d)(1).

- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)

- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra,* 225 Cal.App.4th at p. 755.)

- "[E]quitable tolling, '[a]s the name suggests … is an equitable issue for court resolution.' " (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable … tolling." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.' ~~The doctrine has been applied 'where one action stands to lessen the harm that is the subject of the second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.'~~" (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one action

stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)

- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra,* 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra,* 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff delayed filing the second claim until the statute on that claim had nearly run …' or 'whether the plaintiff [took] affirmative actions which … misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)

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- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra,* 45 Cal.4th at p. 101, internal citation omitted.)

- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra,* 45 Cal.4th at p. 114.)

- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra,* 31 Cal.4th at pp. 383–384.)

- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra,* 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)

- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)

- " '[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy

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considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit ' "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, … the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482-483 [216 Cal.Rptr.3d 390], internal citations omitted.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird, supra,* 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra,* 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)

- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

- "Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory." (*Wassmann, supra,* 24 Cal.App.5th at pp. 853–854.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Actions, § 760 et seq.

Turner et al., California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 California Torts, Ch. 32, *Liability of Attorneys,* § 32.60[1][g.1] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.21 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.46 (Matthew Bender)

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610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant*] **contends that** [*name of plaintiff*]**'s lawsuit was not filed within the time set by law. To succeed on this defense,** [*name of defendant*] **must prove that before** [*insert date one year before date of filing*] [*name of plaintiff*] **knew, or with reasonable diligence should have discovered, the facts of** [*name of defendant*]**'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff*] **proves**

[*Choose one or more of the following three options:*]

[that [he/she/it] did not sustain actual injury until on or after [*insert date one year before date of filing*]**[,/; or]]**

[that on or after [*insert date one year before date of filing*] [*name of defendant*] **continued to represent** [*name of plaintiff*] **regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing*] **[he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff*] **had to file the lawsuit is extended for the amount of time that** [*insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]*]**.]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

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- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period,

and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

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- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra,* 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra,* 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. …* That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent*

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actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* … .” (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- “Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- “[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)

- “In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney's professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- “For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra,* 61 Cal.4th at p. 1238.)

- “*Lee* held that ‘section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to

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perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

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611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant*] **contends that** [*name of plaintiff*]**'s lawsuit was not filed within the time set by law. To succeed on this defense,** [*name of defendant*] **must prove that [his/her/its] alleged wrongful act or omission occurred before** [*insert date four years before date of filing*]**.**

[If, however, [*name of plaintiff*] **proves**

[*Choose one or more of the following four options:*]

[that [he/she/it] did not sustain actual injury until on or after [*insert date four years before date of filing*]**][,/; or]]**

[that on or after [*insert date four years before date of filing*] [*name of defendant*] **continued to represent** [*name of plaintiff*] **regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date four years before date of filing*] [*name of defendant*] **knowingly concealed the facts constituting the wrongful act or omission[,/; or]]**

[that on or after [*insert date four years before date of filing*] **[he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff*] **had to file the lawsuit is extended for the amount of time that** [*insert tolling provision, e.g., [name of defendant] knowingly concealed the facts*]**.]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

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Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

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- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated*." ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

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- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra,* 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* … ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

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- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- "[A] would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra,* 61 Cal.4th at p. 1238.)

- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

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1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements,* CACI No. 1001, *Basic Duty of Care,* and CACI No. 1003, *Unsafe Conditions,* if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is

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transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- "Public policy precludes landlord liability for a dangerous condition on the premises which came into existence after possession has passed to a tenant. This is based on the principle that the landlord has surrendered possession and control of the land to the tenant and has no right even to enter without permission. It would not be reasonable to hold a lessor liable if the lessor did not have the power, opportunity, and ability to eliminate the dangerous condition." (*Garcia v. Holt* (2015) 242 Cal.App.4th 600, 604 [195 Cal.Rptr.3d 47], internal citations omitted.)

- "The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- "With regard to landlords, 'reasonable care ordinarily involves making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later.' ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured

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on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” ’ ” (*Day v. Lupo Vine Street, L.P.* (2018) 22 Cal.App.5th 62, 69 [231 Cal.Rptr.3d 193].)

- “~~[W]here a landlord has relinquished control of property to a tenant, a ‘bright line’ rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ‘ “Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” [¶]~~ Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.~~’~~” (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)

- “[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger.” (*Mora, supra,* 210 Cal.App.3d at p. 781, internal citations omitted.)

- “[T]he landlord’s responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor ‘only with those matters which would have been disclosed by a reasonable inspection.’ The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord’s obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation.” (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- “It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]’s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter.” (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)

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- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

- "The existence of the landlord's duty to others to maintain the property in a reasonably safe condition is a question of law for the court." (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79 [168 Cal.Rptr.3d 196].)

- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1142~~1284, ~~1143~~1285

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.11 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 16:12–16:16 (Thomson Reuters)

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1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

[*Name of plaintiff*] claims that the [*product*]'s design caused harm to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**

2. **That [*name of plaintiff*] was harmed; and**

3. **That the [*product*]'s design was a substantial factor in causing harm to [*name of plaintiff*].**

If [*name of plaintiff*] has proved these three facts, then your decision on this claim must be for [*name of plaintiff*] unless [*name of defendant*] proves that the benefits of the [*product*]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

(a) The gravity of the potential harm resulting from the use of the [*product*];

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

[(f) [*Other relevant factor(s)*].]

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If the plaintiff asserts both tests, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or

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she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

"A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

- "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim v. Toyota Motor Corp.* 6 Cal.5th 21, 30 [-- Cal.Rptr.3d --, -- P.3d --], internal citation omitted.)

- " ~~'[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.'~~ Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on

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balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-

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benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. … First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* -- Cal.5th at p. --, internal citations omitted.)

- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* -- Cal.5th at p. --.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors*

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(1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

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1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

[*Name of defendant*] claims that [he/she] has not violated [*name of plaintiff*]'s right of privacy because the [*insert type of work, e.g., "picture"*] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [*name of defendant*] must prove either of the following:

1. **That the [*insert type of work, e.g., "picture"*] adds something new to [*name of plaintiff*]'s likeness, giving it a new expression, meaning, or message; or**

2. **That the value of the [*insert type of work, e.g., "picture"*] does not result primarily from [*name of plaintiff*]'s fame.**

New September 2003; Revised October 2008

Directions for Use

This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

Sources and Authority

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)

- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)

- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891-892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)

- "[T]he First Amendment … safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it

articles, books, movies, or plays." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 860 [230 Cal.Rptr.3d 625].)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist-it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see ... whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)

- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)

- "[Defendant] contends the plaintiffs' claims are barred by the transformative use defense formulated by the California Supreme Court in *Comedy III* … . 'The defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." ' " (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1177, internal citation omitted)

- "Simply stated, the transformative test looks at 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.' This transformative test is the court's primary inquiry when resolving a conflict between the right of publicity and the First Amendment." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 686 [166 Cal.Rptr.3d 359], internal citations omitted.)

- "*Comedy III's* 'transformative' test makes sense when applied to products and merchandise—

'tangible personal property,' in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs." (*De Havilland, supra,* 21 Cal.App.5th at p. 863, internal citation omitted.)

- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross, supra,* 222 Cal.App.4th at p. 687.)

- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

5 Witkin, Summary of California Law (110th ed. 20102017) Torts, § 680788

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 4(VII)-C, *Harm to Reputation and Privacy Interests,* ¶ 4:1385 (The Rutter Group)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

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1806. Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test─Public Interest

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[*Name of defendant*] **claims that [he/she] has not violated** [*name of plaintiff*]**'s right of privacy because the public interest served by** [*name of defendant*]**'s** [*specify privacy violation, e.g., use of [name of plaintiff]'s name, likeness, or identity*] **outweighs** [*name of plaintiff*]**'s privacy interests. In deciding whether the public interest outweighs** [*name of plaintiff*]**'s privacy interest, you should consider all of the following:**

a. Where the information was used;

b. The extent of the use;

c. The public interest served by the use;

d. The seriousness of the interference with [*name of plaintiff*]**'s privacy; and**

e. [*specify other factors*]**.**

New June 2015

Directions for Use

This instruction sets forth a balancing test for a claim for invasion of privacy. A defendant's First Amendment right to freedom of expression and freedom of the press can, in some cases, outweigh the plaintiff's right of privacy (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409-410 [114 Cal.Rptr.2d 307]; see also *Gill v. Hearst Publishing Co. Inc.* (1953) 40 Cal.2d 224, 228−231 [253 P.2d 441].) This balancing test is an affirmative defense. (See *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.)

A First-Amendment defense based on newsworthiness has been allowed for the defendant's use of the plaintiff's name or likeness. (See *Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-411; see CACI No. 1804A.) It has also been allowed for privacy claims based on intrusion into private affairs (see CACI No. 1800) and public disclosure of private facts (See CACI No. 1802; *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214−242 [74 Cal.Rptr.2d 843, 955 P.2d 469].) It has also been allowed for a claim that the plaintiff had been presented in a false light (See CACI No. 1802; *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278−279 [239 P.2d 630] [magazine's use of plaintiffs' picture in connection with article on divorce suggested that they were not happily married].)

Sources and Authority

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury*

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News, Inc. (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 208 [74 Cal. Rptr. 2d 843, 955 P.2d 469].)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "[T]he common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

"Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

~~"In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)~~

- ~~"We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)~~

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

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- “The First Amendment defense does not apply only to visual expressions, however. ‘The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.’ ” (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 687 [166 Cal.Rptr.3d 359].)

- “Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections or ‘story’ the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements.” (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 861 [230 Cal.Rptr.3d 625].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2010) Torts, § 681 et seq.

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy,* § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.35 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.27 (Matthew Bender)

1902. False Promise

[*Name of plaintiff*] claims [he/she] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made a promise to [*name of plaintiff*];**

2. **That [*name of defendant*] did not intend to perform this promise when [he/she] made it;**

3. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;**

4. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;**

5. **That [*name of defendant*] did not perform the promised act;**

6. **That [*name of plaintiff*] was harmed; and**

7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made a promise without any intention of performing it. (See Civ. Code, § 1710(4).) If element 4 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- Deceit. Civil Code section 1710.

- " ' "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. ~~[¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.~~ ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973−974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

- "Under Civil Code section 1709, one is liable for fraudulent deceit if he 'deceives another with intent to induce him to alter his position to his injury or risk … .' Section 1710 of the Civil Code defines deceit for the purposes of Civil Code section 1709 as, inter alia, '[a] promise, made without any intention of performing it.' ' "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity

(or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.]' Each element must be alleged with particularity." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059–1060 [141 Cal.Rptr.3d 142], internal citations omitted.)

- "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481 [55 Cal.Rptr.2d 225], internal citations omitted.)

- "[I]n a promissory fraud action, to sufficiently allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith, supra,* 205 Cal.App.4th at p. 1060.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith, supra,* 205 Cal.App.4th at p. 1061.)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a [written] contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 588 [230 Cal.Rptr.3d 528].)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~781~~899~~–786~~ 904

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][a] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.12 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.30 et seq. (Matthew Bender)

2 California Civil Practice: Torts § 22:20 (Thomson Reuters)

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff*] **claims that** [*name of defendant*] **wrongfully discriminated against [him/her]. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **was [an employer/[***other covered entity***]];**

2. **That** [*name of plaintiff*] **[was an employee of** [*name of defendant*]**/applied to** [*name of defendant*] **for a job/[***describe other covered relationship to defendant***]];**

3. **[That** [*name of defendant*] **[discharged/refused to hire/[***other adverse employment action***]]** [*name of plaintiff*]**;]**

   [or]

   [That [*name of defendant*] **subjected** [*name of plaintiff*] **to an adverse employment action;]**

   [or]

   [That [*name of plaintiff*] **was constructively discharged;]**

4. **That** [*name of plaintiff*]**'s** [*protected status-for example, race, gender, or age*] **was a substantial motivating reason for** [*name of defendant*]**'s [decision to [discharge/refuse to hire/[***other adverse employment action***]]** [*name of plaintiff*]**/conduct];**

5. **That** [*name of plaintiff*] **was harmed; and**

6. **That** [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment

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agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained.* Select "conduct" in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained.*) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- Perception and Association. Government Code section 12926(o).

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' "

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(*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist*. (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally … must provide evidence that (1) he [or she] was a

member of a protected class, (2) he [or she] was qualified for the position he [or she] sought … , (3) he [or she] suffered an adverse employment action, such as … denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)

- "Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim." (*Abed, supra,* 23 Cal.App.5th at p. 740, original italics.)

- "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." (*Abed, supra,* 23 Cal.App.5th at p. 741.)

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two." (*Swanson, supra,* 232 Cal.App.4th at p. 966.)

- "Evidence that an employer's proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ' " '[I]t is not enough … to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' " ' However, evidence of pretext is important: ' "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." ' " (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At

the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's

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punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1017–1021

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

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2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit may not proceed because [*name of plaintiff*] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [*name of defendant*]'s alleged unlawful practice occurred.

[*Name of plaintiff*] filed a complaint with the DFEH on [*date*]. [*Name of defendant*] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [*date more than one year before DFEH complaint was filed*]. [*Name of plaintiff*] claims that [*name of defendant*]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [*date less than one year before DFEH complaint was filed*].

[*Name of defendant*]'s alleged unlawful practice is considered as continuing to occur as long as [*name of plaintiff*] proves that all of the following three conditions continue to exist:

1. **Conduct occurring within a year of the date on which [*name of plaintiff*] filed [his/her] complaint with the DFEH was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff*] has resigned, or [*name of defendant*]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.

New June 2010; Revised December 2011, June 2015

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the

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jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850-851 [234 Cal.Rptr.3d 712] ~~[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that~~

~~falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720–721~~, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

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- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § ~~948~~1065

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies,* ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

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2509. "Adverse Employment Action" Explained

[*Name of plaintiff*] must prove that [he/she] was subjected to an adverse employment action.

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant*] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [*name of plaintiff*]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- “[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h).” (*Yanowitz, supra,* 36 Cal.4th at pp. 1054–1055.)

- “An ‘ “adverse employment action,” ’ … , requires a ‘substantial adverse change in the terms and conditions of the plaintiff's employment’. ” (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)

- “Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra,* 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- “Moreover, [defendant]’s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)

- “The employment action must be both detrimental and substantial ... [¶]. We must analyze [plaintiff’s] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff’s] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment.” (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- “The ‘materiality’ test of adverse employment action … looks to ‘the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,’ and the test ‘must be interpreted liberally … with a reasonable appreciation of the realities of the workplace … .’ ” (*Patten, supra,* 134 Cal.App.4th at p. 1389.)

- “Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367 [225 Cal.Rptr.3d 321].)

- “[A] mere oral or written criticism of an employee … does not meet the definition of an adverse employment action under [the] FEHA.” (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92 [221 Cal.Rptr.3d 668].)

- “Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ‘ “[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases.” [Citation].’ ” (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)

- “Not every change in the conditions of employment, however, constitutes an adverse employment action. ‘ “A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.” … ’ ‘[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.’ ” (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)

- “[R]efusing to allow a former employee to rescind a voluntary discharge—that is, a resignation free of employer coercion or misconduct—is not an adverse employment action.” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [217 Cal.Rptr.3d 258].)

- “[T]he reduction of [plaintiff]'s hours alone could constitute a material and adverse employment action by the [defendant].” (*Light, supra,* 14 Cal.App.5th at p. 93.)

- “[A] job reassignment may be an adverse employment action when it entails materially adverse consequences.” (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1279 [227 Cal.Rptr.3d 695].)

- “[T]he denial of previously promised training and the failure to promote may constitute adverse employment actions.” (*Light, supra,* 14 Cal.App.5th at p. 93.)

- “The trial court correctly found that the act of placing plaintiff on administrative leave [involuntarily] was an adverse employment action.” (*Whitehall, supra,* 17 Cal.App.5th at p. 367.)

- “[Plaintiff] has presented no authority, and we are aware of none, holding that a single threat of an adverse employment action, never carried out, could itself constitute an adverse employment action under the standard articulated in *Yanowitz* and its progeny.” (*Meeks v. AutoZone, Inc.* (2018) 24

Cal.App.5th 855, 879 [235 Cal.Rptr.3d 161].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 11

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1052–1055

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g., race, gender, or age*] at [*name of defendant*], causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*];**

2. **That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] was [*protected status, e.g., a woman*];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive;**

6. **[*Select applicable basis of defendant's liability:*]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524,

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"Severe or Pervasive" Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1042.)

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- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra,* 13 Cal.App.4th at p. 1000.)

- ~~"The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)~~

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- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- ~~"If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)~~

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239-1240 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct*

need not be motivated by sexual desire.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

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2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [*name of defendant*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*];**

2. **That [*name of plaintiff*], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive toward [*e.g., women*];**

6. **[*Select applicable basis of defendant's liability:*]**

    [That a supervisor engaged in the conduct;]

    [*or*]

    [That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

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Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C),

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

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- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- ~~"The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)~~

- ~~"The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)~~

- ~~"[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)~~

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- ~~"When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)~~

- ~~"[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)~~

- ~~"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)~~

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

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- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

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2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that widespread sexual favoritism at [*name of defendant*] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **[*Select applicable basis of defendant's liability:*]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

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sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

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- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- ~~"The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)~~

- ~~"The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)~~

- ~~" '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … [¶] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)~~

- ~~"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not~~

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~~perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)~~

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040-1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

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2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her] to harassment based on [*describe protected status, e.g., race, gender, or age*], causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] was [*protected status, e.g., a woman*];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive;**

6. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained.*

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

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If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- Personal Liability for Harassment. Government Code section 12940(j)(3).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- ~~"The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)~~

- ~~"When the workplace is permeated with discriminatory intimidation, ridicule and insult that is '~~

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~~"sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)~~

- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

- ~~"[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)~~

- ~~"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)~~

- ~~"[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)~~

- ~~"Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis, supra,* 224 Cal.App.4th at p. 1525, original italics.)~~

- ~~"[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)~~

- ~~"The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)~~

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- ~~“[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239-1240 [166 Cal.Rptr.3d 676].) .)~~

- ~~“A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire.*’ ” (*Lewis, supra,* 224 Cal.App.4th at p. 1527, fn. 8, original italics.)~~

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

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2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [*name of employer*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That [*name of plaintiff*] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive toward [*e.g., women*];**

6. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe*

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or Pervasive" Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- Personal Liability for Harassment. Government Code section 12940(j)(3).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

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- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- ~~"The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)~~

- ~~"The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)~~

- ~~"When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)~~

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

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- ~~"[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)~~

- ~~"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)~~

- ~~"[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)~~

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

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2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that widespread sexual favoritism by [*name of defendant*] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

5. **That [*name of plaintiff*] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- Personal Liability for Harassment. Government Code section 12940(j)(3).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

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- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- ~~"The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)~~

- ~~"The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)~~

- ~~"When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)~~

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- ~~"[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)~~

- ~~"To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not~~

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~~perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)~~

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

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2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. **That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

7. **That [***name of plaintiff***] was harmed; and**

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the

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FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "[*name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide him or her with other suitable job positions that he or she might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

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No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "There are three elements to a failure to accommodate action: '(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193-1194 [232 Cal.Rptr.3d 349]~~The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Cuiellette, supra,* 194 Cal.App.4th at p. 766~~.)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)

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- “A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA.” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- “Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)

- “The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of ‘reasonable accommodation’ by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff.” (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- “ ‘If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if “there is no vacant position for which the employee is qualified.” [Citations.] “The responsibility to reassign a disabled employee who cannot otherwise be accommodated does ‘not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .’ ” [Citations.] “What is required is the ‘duty to reassign a disabled employee if an already funded, vacant position at the same level exists.’ [Citations.]” [Citations.]’ ” (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- “[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee's original position.” (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

- “[A] disabled employee seeking reassignment to a vacant position ‘is entitled to preferential

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consideration.’ ” (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- “ ‘Generally, “ ‘[t]he employee bears the burden of giving the employer notice of the disability.’ ” ’ An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ‘ “ ‘[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.’ ” ’ ” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)

- “ ‘[A]n employer “knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.” ’ … [¶] ‘While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA].” ’ ” (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- “In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation.” (*Cornell, supra,* 18 Cal.App.5th at p. 938, internal citation omitted.)

- “ ‘ “ ‘This notice then triggers the employer's burden to take “positive steps” to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.’ ” ’ ” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’ ” (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- “ ‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’ ” (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- “[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations … .” (*Atkins, supra,* 8 Cal.App.5th at p. 721.)

- “On these issues, which are novel to California and on which the federal courts are divided, we

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conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra,* 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra,* 234 Cal.App.4th at pp. 377−378.)

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform … her duties', a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 833

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§

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115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

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2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her] unpaid wages. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of defendant*] owes [*name of plaintiff*] wages under the terms of the employment; and**

3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005, December 2013, June 2015

Directions for Use

This instruction is for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. All of the wage orders define hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (See, e.g., Wage Order 4, subd. 2(K).) The two parts of the definition are independent factors, each of which defines whether certain time spent is compensable as "hours worked." Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated. Courts have identified various factors bearing on an employer's control during on-call time. However, what qualifies as hours worked is a question of law. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838−840 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Therefore, the jury should not be instructed on the factors to consider in determining whether the employer has exercised sufficient control over the employee during the contested period to require compensation.

However, the jury should be instructed to find any disputed facts regarding the factors. For example, one factor is whether a fixed time limit for the employee to respond to a call was unduly restrictive. Whether there was a fixed time limit would be a disputed fact for the jury. Whether it was unduly restrictive would be a matter of law for the court.

The court may modify this instruction or write an appropriate instruction if the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if

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the employer proves that this was caused by a dishonest or willful act or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

Sources and Authority

- Right of Action for Wage Claim. Labor Code section 218.
- Wages Due on Discharge. Labor Code section 201.
- Wages Due on Quitting. Labor Code section 202.
- "Wages" Defined, Labor Code section 200.
- Wages Partially in Dispute. Labor Code section 206(a).
- Deductions From Pay. Labor Code section 221, California Code of Regulations, Title 8, section 11010, subdivision 8.
- Nonapplicability to Government Employers. Labor Code section 220.
- Employer Not Entitled to Release. Labor Code section 206.5.
- Private Agreements Prohibited. Labor Code section 219(a).
- "As an employee, appellant was entitled to the benefit of wage laws requiring an employer to promptly pay all wages due, and prohibiting the employer from deducting unauthorized expenses from the employee's wages, deducting for debts due the employer, or recouping advances absent the parties' express agreement." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1330 [200 Cal.Rptr.3d 315].)
- "The Labor Code's protections are 'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit,' and are applicable not only to hourly employees, but to highly compensated executives and salespeople." (*Davis, supra,* 245 Cal.App.4th at p. 1331, internal citation omitted.)
- "[W]ages include not just salaries earned hourly, but also bonuses, profit-sharing plans, and commissions." (*Davis, supra,* 245 Cal.App.4th at p. 1332, fn. 20.)
- "[A]n employee's on-call or standby time may require compensation." (*Mendiola, supra,* 60 Cal.4th at p. 840.)
- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

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- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

- "In light of the wage order's remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time, we conclude that the de minimis doctrine has no application under the circumstances presented here. An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine." (*Troester v. Starbucks Corp.* 5 Cal.5th 829, 847 [235 Cal.Rptr.3d 820, 421 P.3d 1114].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of Wages,* ¶¶ 11:456, 11:470, 11:470.1, 11:512−11.514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:75 (Thomson Reuters)

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2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for [unpaid wages/[*insert other claim*]], then [*name of plaintiff*] may be entitled to receive an award of a civil penalty based on the number of days [*name of defendant*] failed to pay [his/her] [wages/*other*] when due.

To recover the civil penalty, [*name of plaintiff*] must prove all of the following:

1. **The date on which [*name of plaintiff*]'s employment ended;**

2. **[That [*name of defendant*] failed to pay all wages due by [*insert date*];]**

   [or]

   [The date on which [*name of defendant*] paid [*name of plaintiff*] all wages due;]

3. **[*Name of plaintiff*]'s daily wage rate at the time [his/her] employment with [*name of defendant*] ended; and**

4. **That [*name of defendant*] willfully failed to pay these wages.**

The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

The term "willfully" means that the employer intentionally failed or refused to pay the wages.

New September 2003; Revised June 2005

Directions for Use

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time penalties under Labor Code section 203. The court must determine when final wages are due based on the circumstances of the case and applicable law—see Labor Code sections 201 and 202. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

The definition of "wages" may be deleted as redundant if it is redundant with other instructions.

Sources and Authority

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- Wages of Discharged Employee Due Immediately. Labor Code section 201.

- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.

- Right of Action for Unpaid Wages. Labor Code section 218.

- Wages of Contract Employee on Quitting. Labor Code section 202.

- "Wages" Defined. Labor Code section 200.

- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.

- Wages Partially in Dispute. Labor Code section 206(a).

- Exemption for Certain Governmental Employers. Labor Code section 220(b).

- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee *his* full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)

- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be

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‘undercut’ by company payroll practices or ‘any industry habit or custom to the contrary.’ ” (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- “ ‘ “[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” …’ ” (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- “[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness.” (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.” (*Kao, supra,* 12 Cal.App.5th at p. 963.)

- “A ‘good faith dispute’ excludes defenses that ‘are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.’ Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it.” (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- “A proper reading of section 203 mandates a penalty equivalent to the employee’s daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days.” (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- “ ‘A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.’ ” (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- “In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant’s interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee’s claim for penalties is accompanied by a claim for unpaid final wages.” (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (**11th ed. 2017**) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:~~513~~512–11:~~515~~ 514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

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3002. "Official Policy or Custom" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:***]**

> **[A rule or regulation approved by the [city/county]'s legislative body;] [or]**
>
> **[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]**
>
> **[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]**
>
> **[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]**

New September 2003; Revised June 2012; Renumbered from CACI No. 3008 December 2012

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

In some cases, it may be necessary to include additional provisions addressing factors that may indicate an official custom in the absence of a formal policy. The Ninth Circuit has held that in some cases the plaintiff is entitled to have the jury instructed that evidence of governmental inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can support an inference that an unconstitutional custom or practice has been unofficially adopted. (*Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1234, fn. 8.)

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443-1444, internal citation omitted.)

- "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." (*Bd. of the County Comm'rs v. Brown* (1997) 520 U.S. 397, 404 [117 S.Ct. 1382, 137 L.Ed.2d 626].)

- "The custom or policy must be a 'deliberate choice to follow a course of action . . . made from among

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various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " (*Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1075.)

- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

- "[A] plaintiff can show a custom or practice of violating a written policy; otherwise an entity, no matter how flagrant its actual routine practices, always could avoid liability by pointing to a pristine set of policies." (*Castro, supra,* 833 F.3d at p. 1075 fn. 10.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

- "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920], internal citations omitted.)

- "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." (*Jett, supra,* 491 U.S. at p. 737, internal citations omitted.)

- "~~A "policy" is ' "a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." '~~ *Gibson v. County of Washoe* [(9th Cir. 2002) 290 F.3d 1175, 1186] discussed two types of policies: those that result in the municipality itself violating someone's constitutional rights or instructing its employees to do so, and those that result, through omission, in municipal responsibility 'for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation.' We have referred to these two types of policies as policies of action and inaction." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1143, internal citations omitted.)

- "A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve

constitutional rights, a plaintiff must show, in addition to a constitutional violation, 'that this policy "amounts to deliberate indifference" to the plaintiff's constitutional right[,]' and that the policy caused the violation, 'in the sense that the [municipality] could have prevented the violation with an appropriate policy.' " (*Tsao, supra,* 698 F.3d at p. 1143, internal citations omitted.)

- "To show deliberate indifference, [plaintiff] must demonstrate 'that [defendant] was on actual or constructive notice that its omission would likely result in a constitutional violation.' " (*Tsao, supra,* 698 F.3d at p. 1145.)

- "[P]laintiff may prove … deliberate indifference, through evidence of a 'failure to investigate and discipline employees in the face of widespread constitutional violations.' Thus, it is sufficient under our case law to prove a 'custom' of encouraging excessive force to provide evidence that personnel have been permitted to use force with impunity." (*Rodriguez v. Cty. of L.A.* (9th Cir. 2018) 891 F.3d 776, 803, internal citations omitted.)

- "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." ' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268], internal citations omitted.)

- "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra,* 147 Cal.App.3d at p. 570, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, §§ ~~816, 819~~890 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12,* 8.40

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3005. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of supervisor defendant*] is personally liable for [his/her] harm. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of supervisor defendant*] knew, or in the exercise of reasonable diligence should have known, of [*name of subordinate employee defendant*]'s wrongful conduct;**

2. **That [*name of supervisor defendant*] knew that the wrongful conduct created a substantial risk of harm to [*name of plaintiff*];**

3. **That [*name of supervisor defendant*] disregarded that risk by [expressly approving/impliedly approving/ [or] failing to take adequate action to prevent] the wrongful conduct; and**

4. **That [*name of supervisor defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New April 2007; Renumbered from CACI No. 3013 December 2010; Revised December 2011; Renumbered from CACI No. 3017 December 2012; Revised June 2013

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

For certain constitutional violations, deliberate indifference based on knowledge and acquiescence is insufficient to establish the supervisor's liability. The supervisor must act with the purpose necessary to establish the underlying violation. (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 676–677 [129 S.Ct. 1937, 173 L.Ed.2d 868] [for claim of invidious discrimination in violation of the First and Fifth Amendments, plaintiff must plead and prove that defendant acted with discriminatory purpose].) In such a case, element 3 requires not only express approval, but also discriminatory purpose. The United States Supreme Court has found constitutional torts to require specific intent in three situations: (1) due process claims for injuries caused by a high-speed chase (See *Cnty. of Sacramento v. Lewis* (1998) 523 U.S. 833, 836 [118 S.Ct. 1708, 140 L.Ed.2d 1043].); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance (See *Whitley v. Albers* (1986) 475 U.S. 312, 320−321 [106 S.Ct. 1078, 89 L.Ed.2d 251].); and (3) invidious discrimination under the equal protection clause and the First Amendment free exercise clause. (See *Ashcroft v. Iqbal, supra,* 556 U.S. at pp. 676−677.)

The Ninth Circuit has held that deliberate indifference based on knowledge and acquiescence is still sufficient to support supervisor liability if the underlying constitutional violation does not require purposeful discrimination. (*OSU Student Alliance v. Ray* (9th Cir. 2012) 699 F.3d 1053, 1070−1075 [knowing acquiescence is sufficient to establish supervisor liability for free-speech violations because intent to discriminate is not required]; see also *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1207 [same for 8th Amendment violation for cruel and unusual punishment].)

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Sources and Authority

- "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. … [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)

- "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." (*Starr, supra,* 652 F.3d at p. 1207.)

- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response ' " was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices' " '; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)

- "A supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.' [Defendants] testified that they were mere observers who stayed at the end of the [plaintiffs'] driveway. But based on the [plaintiffs'] version of the facts, which we must accept as true in this appeal, we draw the inference that [defendants] tacitly endorsed the other Sheriff's officers' actions by failing to intervene. … On this appeal we do not weigh the evidence to determine whether [defendants'] stated reasons for not intervening are plausible." (*Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1086, internal citation omitted.)

- "A supervisory official is liable under § 1983 so long as 'there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.' 'The requisite causal connection can be established . . . by setting in motion a series of acts by others or by knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.' Thus, a supervisor may 'be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.' " (*Rodriguez v. Cty. of L.A.* (9th Cir. 2018) 891 F.3d 776, 798~~We have found supervisorial liability under § 1983 where the supervisor 'was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.' Thus, supervisors 'can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.' " (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 961~~,

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internal citations omitted.)

- "[T]he claim that a supervisory official knew of unconstitutional conditions and 'culpable actions of his subordinates' but failed to act amounts to 'acquiescence in the unconstitutional conduct of his subordinates' and is 'sufficient to state a claim of supervisory liability.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1243.)

- " '[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.' " (*Starr, supra,* 652 F.3d at p. 1207, internal citation omitted.)

- "Respondent … argues that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.' That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." (*Ashcroft v. Iqbal, supra,* 556 U.S. at p. 677, internal citations omitted.)

- "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action ''because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.' " (*Ashcroft v. Iqbal, supra,* 556 U.S. at pp. 676–677, internal citations omitted.)

- "*Iqbal* … holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability. 'The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.' Allegations that the [defendants] knowingly acquiesced in their subordinates' discrimination did not suffice to state invidious racial discrimination claims against

them, because such claims require specific intent—something that knowing acquiescence does not establish. On the other hand, because Eighth Amendment claims for cruel and unusual punishment generally require only deliberate indifference (not specific intent), a Sheriff is liable for prisoner abuse perpetrated by his subordinates if he knowingly turns a blind eye to the abuse. The Sheriff need not act with the purpose that the prisoner be abused. Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged." (*OSU Student Alliance, supra,* 699 F.3d at p. 1071, internal citations omitted.)

- " '[S]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is the "moving force of a constitutional violation." ' " (*Crowley v. Bannister* (9th Cir. 2013) 734 F.3d 967, 977.)

- "When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. *Iqbal* itself supports this holding. There, the Court rejected the invidious discrimination claims against [supervisory defendants] because the complaint failed to show that those defendants advanced a policy of purposeful discrimination (as opposed to a policy geared simply toward detaining individuals with a 'suspected link to the [terrorist] attacks'), not because it found that the complaint had to allege that the supervisors intended to discriminate against [plaintiff] in particular. Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." (*OSU Student Alliance, supra,* 699 F.3d at p. 1076.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~347~~413

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § 8

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles*, ¶ 7.10 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.20[4] (Matthew Bender)

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3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**

2. **That the force used by [*name of defendant*] was excessive;**

3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**

4. **That [*name of plaintiff*] was harmed; and**

5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) **Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;**

(b) **The seriousness of the crime at issue; [and]**

(c) **Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]**

(d) **[*specify other factors particular to the case*].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016

Directions for Use

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v.*

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Connor (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)

For an instruction for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Police Officer.*

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- " 'The intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)

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- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider,' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark Cnty.* (9th Cir. 2016) 828 F.3d 910, 920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics,

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internal citations omitted.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry, supra,* 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra,* 57 Cal.4th at p. 639.)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is

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probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. Cty. of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- " In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of

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force constitutional.” (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- “Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the ‘solution’ could be worse than the problem.” (*Glenn, supra,* 661 F.3d at p. 468.)

- “This Court has ‘refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.’ The Court has, however, ‘found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.’ A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force.” (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- “By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force.” (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- “[P]reshooting conduct is included in the totality of circumstances surrounding an officer’s use of deadly force, and therefore the officer’s duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable.” (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- “A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied.” (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.” ’ By contrast, an officer who is ‘ “pursuing his own goals and is not in any way subject to control by [his public employer],” ’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

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- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. Cty. of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally

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lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Employment Discrimination—In General—Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

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3042. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force against [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force against [*name of plaintiff*];**

2. **That the force used was excessive;**

3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**

4. **That [*name of plaintiff*] was harmed; and**

5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) **The need for the use of force;**

(b) **The relationship between the need and the amount of force that was used;**

(c) **The extent of injury inflicted;**

(d) **The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]**

(e) **Any efforts made to temper the severity of a forceful response; [and]**

(f) **[*Insert other relevant factor.*]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010; Renumbered from CACI No. 3013 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for

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the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term “good faith.”

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- “Section 1983 claims may be brought in either state or federal court.” (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- “The Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones, and it is now settled that ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.’ In its prohibition of ‘cruel and unusual punishments,’ the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’ ” (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- “[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, ‘the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” ’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- “[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- “Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need ‘to maintain or restore discipline’ through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that ‘prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.’ ” (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- “We recognize that prison officials have a ‘better grasp’ of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force … cases, we

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instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security.” (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- “[T]his Court rejected the notion that ‘significant injury’ is a threshold requirement for stating an excessive force claim. … ‘When prison officials maliciously and sadistically use force to cause harm,’ … ‘contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.’ ” (*Wilkins v. Gaddy* (2010) 559 U.S. 34, 37 [130 S.Ct. 1175, 175 L.Ed.2d 995].)

- “This is not to say that the ‘absence of serious injury’ is irrelevant to the Eighth Amendment inquiry. ‘[T]he extent of injury suffered by an inmate is one factor that may suggest “whether the use of force could plausibly have been thought necessary” in a particular situation.’ The extent of injury may also provide some indication of the amount of force applied. … [N]ot ‘every malevolent touch by a prison guard gives rise to a federal cause of action.’ ‘The Eighth Amendment's prohibition of “cruel and unusual” punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.’ An inmate who complains of a ‘push or shove’ that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts.” (*Wilkins, supra,* 559 U.S. at pp. 37–38, original italics, internal citations omitted.)

- “ ‘[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,’ are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response.” (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- “ ‘[T]he appropriate standard for a pretrial detainee's excessive force claim [under the Fourteenth Amendment] is solely an objective one.’ In contrast, a convicted prisoner's excessive force claim under the Eighth Amendment requires a subjective inquiry into ‘whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’ ” (*Rodriguez v. Cty. of L.A.* (9th Cir. 2018) 891 F.3d 776, 788, internal citation omitted.)

- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.” ’ By contrast, an officer who is ‘ “pursuing his own goals and is not in any way subject to control by [his public employer],” ’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations

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omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Constitutional Law, § ~~826~~901

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

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3052. Use of Fabricated Evidence—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] deliberately fabricated evidence against [him/her], and that as a result of this evidence being used against [him/her], [he/she] was deprived of [his/her] [*specify right, privilege, or immunity secured by the Constitution, e.g., liberty*] without due process of law. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [*specify fabricated evidence, e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime*];**

2. **That this [*e.g., statement*] was not true;**

3. **That [*name of defendant*] knew that the [*e.g., statement*] was not true; and**

4. **That because of [*name of defendant*]'s conduct, [*name of plaintiff*] was deprived of [his/her] [*e.g., liberty*].**

To decide whether there was a deprivation of rights because of the fabrication, you must determine what would have happened if the [*e.g., statement*] had not been used against [*name of plaintiff*].

[Deprivation of liberty does not require that [*name of plaintiff*] have been put in jail. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]

New May 2017

Directions for Use

This instruction is for use if the plaintiff claims to have been deprived of a constitutional or legal right based on false evidence. Give also CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*.

What would have happened had the fabricated evidence not been presented (i.e., causation) is a question of fact. (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1013 [132 Cal.Rptr.3d 143].)

Give the last optional paragraph if the alleged fabrication occurred in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra,* 199 Cal.App.4th at pp. 1010–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2010) 627 F.3d 1101, 1110.)

- "[T]here is a clearly established constitutional due process right not to be subjected to criminal

charges on the basis of false evidence that was deliberately fabricated by the government." (*Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074–1075.)

- "In order to prevail on a judicial deception claim, a plaintiff must prove that '(1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1240.)

- "To establish causation, [plaintiff] must raise a triable issue that the fabricated evidence was the cause in fact and proximate cause of his injury. Like in any proximate cause analysis, an intervening event may break the chain of causation between the allegedly wrongful act and the plaintiff's injury." (*Caldwell v. City & Cty. of San Francisco* (9th Cir. 2018) 889 F.3d 1105, 1115, internal citation omitted.)

- "A plaintiff can prove deliberate fabrication in several ways. Most basically, a plaintiff can produce direct evidence of deliberate fabrication. Alternatively, a plaintiff can produce circumstantial evidence related to a defendant's motive." (*Caldwell, supra,* 889 F.3d at p. 1112, internal citations omitted.)

- " 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [Citations.]' " (*Ricciuti, supra,* 124 F.3d at p. 130.)

- "Even if there was probable cause to arrest plaintiff, we cannot say as a matter of law on the record before us that he would have been subjected to continued prosecution and an unfavorable preliminary hearing without the use of the false lab report and testimony derived from it. These are questions of fact which defendants appear to concede are material to the issue of causation, and which cannot be determined without weighing the evidence presented and conclusions reached at the preliminary hearing. Defendants' statement of undisputed facts does not establish lack of causation as a matter of law." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1013.)

- "There is no authority for defendants' argument that a due process claim cannot be established unless the false evidence is used to *convict* the plaintiff. … [T]he right to be free from criminal *charges,* not necessarily the right to be free from conviction, is a clearly established constitutional right supporting a section 1983 claim." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1010.)

- "There is no sound reason to impose a narrow restriction on a plaintiff's case by requiring incarceration as a sine qua non of a deprivation of a liberty interest." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1011.)

- "[T]here is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence

are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts. Furthermore, the social workers' alleged transgressions were not made under pressing circumstances requiring prompt action, or those providing ambiguous or conflicting guidance. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." (*Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1119.)

- "[T]o the extent that [plaintiff] has raised a deliberate-fabrication-of-evidence claim, he has not adduced or pointed to any evidence in the record that supports it. For purposes of our analysis, we assume that, in order to support such a claim, [plaintiff] must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." (*Devereaux, supra,* 263 F.3d at p. 1076.)

- "[T]he Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. The district court erred by granting judgment as a matter of law to Defendants because, in this case involving direct evidence of fabrication, Plaintiff was not required to show that [defendant] actually or constructively knew that he was innocent." (*Spencer v. Peters* (9th Cir. 2017) 857 F.3d 789, 800, internal citations omitted.)

- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux,* an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra,* 627 F.3d at p. 1111.)

- "[N]ot all inaccuracies in an investigative report give rise to a constitutional claim. Mere 'careless[ness]' is insufficient, as are mistakes of 'tone.' Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot 'show the fabrication actually injured her in some way.' " (*Spencer, supra,* 857 F.3d at p. 798, internal citations omitted.)

- "In light of long-standing criminal prohibitions on making deliberately false statements under oath, no social worker could reasonably believe that she was acting lawfully in making deliberately false statements to the juvenile court in connection with the removal of a dependent child from a caregiver." (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1113 [190 Cal.Rptr.3d 97], footnotes omitted.)

- "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when

it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification." (*Manuel v. City of Joliet* (2017) __ U.S. __ [137 S.Ct. 911, 918, 197 L.Ed.2d 312], internal citation omitted.)

- "Deliberately fabricated evidence in a prosecutor's file can rebut any presumption of prosecutorial independence [i.e., that filing of a criminal complaint immunizes investigating officers because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time]. … In sum, if a plaintiff establishes that officers either presented false evidence to or withheld crucial information from the prosecutor, the plaintiff overcomes the presumption of prosecutorial independence and the analysis reverts back to a normal causation question." (*Caldwell, supra,* 889 F.3d at p. 1116, internal citation omitted.)
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Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff*] claims that [he/she/[*name of decedent*]] was neglected by [[*name of individual defendant*]/ [and] [*name of employer defendant*]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [[*name of individual defendant*]/[*name of employer defendant*]'s employee] had a substantial caretaking or custodial relationship with [*name of plaintiff/decedent*], involving ongoing responsibility for [his/her] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**

2. **That [*name of plaintiff/decedent*] was [65 years of age or older/a dependent adult] while [he/she] was in [[*name of individual defendant*]'s/[*name of employer defendant*]'s employee's] care or custody;**

3. **That [[*name of individual defendant*]/[*name of employer defendant*]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [*name of plaintiff/decedent*]'s basic needs, including [*insert one or more of the following:*]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent*] from health and safety hazards;]

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;*]

4. **That [*name of plaintiff/decedent*] was harmed; and**

5. **That [[*name of individual defendant*]'s/[*name of employer defendant*]'s employee's] conduct was a substantial factor in causing [*name of plaintiff/decedent*]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008, January 2017

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful

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death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2; Civ. Code, § 3333.2(c)(2).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.

- "Elder" Defined. Welfare and Institutions Code section 15610.27.

- "Neglect" Defined. Welfare and Institutions Code section 15610.57.

- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

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- "The Elder Abuse Act does not 'apply *whenever* a doctor treats any elderly patient. Reading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme.' " (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 223 [232 Cal.Rptr.3d 733], original italics.)

- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn, supra,* 63 Cal.4th at p. 155.)

- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra,* 63 Cal.4th at p. 152.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at p. 159, internal citation omitted.)

- " '[I]t is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect.' For these reasons, *Winn* better supports the conclusion that the majority of [defendant]'s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court's focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach." (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103-104 [224 Cal.Rptr.3d 219].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 [230 Cal.Rptr.3d 42].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of*

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Gregory v. Beverly Enterprises, Inc. (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "It seems to us, then, that respecting the patient's right to consent or object to surgery is a necessary component of 'provid[ing] medical care for physical and mental health needs.' Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component of what we think of as 'medical care.' " (*Stewart, supra,* 16 Cal.App.5th at p. 107, internal citation omitted.)

- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 345].)

- "Disagreements between physicians and the patient or surrogate about the type of care being provided does not give rise to an elder abuse cause of action." (*Alexander, supra,* 23 Cal.App.5th at p. 223.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1865, ~~1686~~1869–~~1688~~1871

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* § 5.33[3] (Matthew Bender)

3600. Conspiracy—Essential Factual Elements

[*Name of plaintiff*] **claims that [he/she] was harmed by** [*name of coconspirator*]**'s** [*insert tort theory*] **and that** [*name of defendant*] **is responsible for the harm because [he/she] was part of a conspiracy to commit** [*insert tort theory*]**. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.**

If you find that [*name of coconspirator*] **committed [a/an]** [*insert tort theory*] **that harmed** [*name of plaintiff*]**, then you must determine whether** [*name of defendant*] **is also responsible for the harm.** [*Name of defendant*] **is responsible if** [*name of plaintiff*] **proves both of the following:**

1. **That** [*name of defendant*] **was aware that** [*name of coconspirator*] **[and others] planned to** [*insert wrongful act*]**; and**

2. **That** [*name of defendant*] **agreed with** [*name of coconspirator*] **[and others] and intended that the** [*insert wrongful act*] **be committed.**

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant*] **responsible for the harm.**

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged coconspirators. [*Name of plaintiff*] **is not required to prove that** [*name of defendant*] **personally committed a wrongful act or that [he/she] knew all the details of the agreement or the identities of all the other participants.**

New September 2003

Sources and Authority

- "Conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. … A conspiracy requires evidence 'that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.' Thus, conspiracy provides a remedial measure for affixing liability to all who have 'agreed to a common design to commit a wrong' when damage to the plaintiff results. The defendant in a conspiracy claim must be capable of committing the target tort." (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652 [231 Cal.Rptr.3d 771], internal citations omitted.)

- "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied*

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Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510−511 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)

- "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339], internal citation omitted.)

- "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damages on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging ... conspiratorial conduct is to implicate all ... who agree to the plan to commit the wrong as well as those who actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392, 598 P.2d 45], internal citations omitted.)

- "To support a conspiracy claim, a plaintiff must allege the following elements: '(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.' " (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [157 Cal.Rptr.3d 368].)

- " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 511, internal citations omitted.)

- "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157, 629 P.2d 1369].)

- "Defendants seem to argue that an action for conspiracy must be based exclusively on tort principles, not on a statutory violation that provides civil penalties. No authority is cited for that proposition, and we cannot conceive of a basis for limiting conspiracy claims in that manner. It is sufficient that a conspiracy is based on an agreement to engage in unlawful conduct regardless of whether the conspiracy violates a duty imposed by tort law or a statute." (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1158 [151 Cal.Rptr.3d 683].)

- "[Defendant] finally argues, relying on federal or out-of-state authorities, that because [plaintiff] only alleged [driver] was negligent and the evidence does not permit a finding that either she or [driver] intended to harm anyone, there is no basis for liability; that there cannot be a civil conspiracy to commit a negligent act. We acknowledge there is a split within out-of-state authorities, most of which hold that parties cannot conspire to commit a negligent or unintentional act and such a conspiracy is a legal impossibility. [¶] But the law in California remains that a civil conspiracy requires an express or tacit agreement only to commit a civil wrong or tort, which then renders all participants 'responsible … for all damages ensuing from the wrong … .' " (*Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1293 [188 Cal.Rptr.3d 623], footnote omitted.)

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- "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree-expressly or tacitly-to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra,* 86 Cal.App.4th at p. 333, internal citations omitted.)

- "Conspiracies are typically proved by circumstantial evidence. '[S]ince such participation, cooperation or unity of action is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' " (*Rickley, supra,* 212 Cal.App.4th at p. 1166, internal citation omitted.)

- "A cause of action for civil conspiracy may not arise ... if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing ... ." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183, 775 P.2d 508], internal citation omitted.)

- "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 514, internal citations omitted.)

- "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437], internal citations omitted.)

- "We agree ... that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550], internal citations omitted.)

- " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752], internal citations omitted.)

- "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate is not enough ... .' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543], internal citations omitted, disapproved on another ground in

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Applied Equipment Corp., supra, 7 Cal.4th at p. 521, fn. 10.)

- "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt, supra,* 24 Cal.3d at p. 785, internal citations omitted.)

- "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "[A] nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1474 [171 Cal.Rptr.3d 548].)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2010~~2017) Torts, § ~~45~~ 151 et seq.

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-I, *Conspiracy,* ¶ 11:167 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, § 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.20 et seq. (Matthew Bender)

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3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of actor*]'s [*insert tort theory, e.g., assault and battery*] and that [*name of defendant*] is responsible for the harm because [he/she] aided and abetted [*name of actor*] in committing the [*e.g., assault and battery*].

If you find that [*name of actor*] committed [a/an] [*e.g., assault and battery*] that harmed [*name of plaintiff*], then you must determine whether [*name of defendant*] is also responsible for the harm. [*Name of defendant*] is responsible as an aider and abetter if [*name of plaintiff*] proves all of the following:

> **1. That [*name of defendant*] knew that [a/an] [*e.g., assault and battery*] was [being/going to be] committed by [*name of actor*] against [*name of plaintiff*];**
>
> **2. That [*name of defendant*] gave substantial assistance or encouragement to [*name of actor*]; and**
>
> **3. That [*name of defendant*]'s conduct was a substantial factor in causing harm to [*name of plaintiff*].**

Mere knowledge that [a/an] [*e.g., assault and battery*] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

It appears that one may be liable as an aider and abetter of a negligent act. (See *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1290 [188 Cal.Rptr.3d 623]; *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the

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commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141 [69 Cal.Rptr.3d 445].)

- "The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014) No. 3610 …)." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 [179 Cal.Rptr.3d 813].)

- "[C]ausation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476 [171 Cal.Rptr.3d 548].)

- "The fact the instruction [CACI No. 3610] does not use the word 'intent' is not determinative. 'California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." (*Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 [173 Cal.Rptr.3d 784], original italics, internal citations omitted.)

- "As noted, some cases suggest that a plaintiff also must plead specific intent to facilitate the underlying tort. We need not decide whether specific intent is a required element because, read liberally, the fifth amended complaint alleges that [defendant] intended to assist the Association in breaching its fiduciary duties. In particular, plaintiffs allege that, with knowledge of the Association's breaches, [defendant] 'gave substantial encouragement and assistance to [the Association] *to breach its fiduciary duties.'* Fairly read, that allegation indicates intent to participate in tortious activity." (*Nasrawi, supra,* 231 Cal.App.4th at p. 345, original italics, internal citations omitted.)

- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this

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doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654 [231 Cal.Rptr.3d 771]~~Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*American Master Lease LLC, supra,* 225 Cal.App.4th at p. 1475~~.)

- "Restatement Second of Torts … recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] … [¶] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself … .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. … It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra,* 152 Cal.App.4th at pp. 93–94, internal citations omitted.)

- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. … A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a

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defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. … [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra,* 127 Cal.App.4th at p. 1146, original italics, internal citations omitted.)

- "The concert of action theory of group liability 'may be used to impose liability on a person who did not personally cause the harm to plaintiff, but whose " '[a]dvice or encouragement to act operates as a moral support to a tortfeasor[,] and if the act encouraged is known to be tortious[,] it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.' " ' The doctrine is likened to aiding and abetting." (*Navarrete, supra,* 237 Cal.App.4th at p. 1286.)

- " 'Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " ' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324 [166 Cal.Rptr.3d 116].)

- " '[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. …' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at pp. 1475–1476.)

- "Nor do we agree with [defendant]'s contention that there is no evidence she aided and abetted [tortfeasor]. Her claim is premised on the assertion that the law in California does not permit liability for aiding and abetting 'unintentional conduct'; that [plaintiff] alleged no intentional tort, only that [tortfeasor] acted negligently, and there is no evidence he intended to harm anyone. She argues, 'Even if [tortfeasor] inadvertently violated the law against an "exhibition of speed," which he did not, [defendant] could not be liable for aiding and abetting such unintentional conduct.' However, for purposes of joint liability under a concert of action theory, it suffices that [defendant] assist or encourage [tortfeasor]'s breach of a duty, which Vehicle Code section 23109 imposed upon him (and also upon her not to aid and abet [tortfeasor])." (*Navarrete, supra,* 237 Cal.App.4th at p. 1290.)

- "James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement …), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser.", (*Orser, supra,* 252 Cal.App.2d at p. 668, original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

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Secondary Sources

5 Witkin, Summary of California Law (10th 11th ed. 20052017) Torts, §§ 149, 15044

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability,* §§ 9.01, 9.02 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.04 (Matthew Bender)

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3711. Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of his or her authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003

Directions for Use

This instruction is not intended for cases involving limited liability partnerships.

Sources and Authority

- Formation of Partnership. Corporations Code section 16202.

- Liability of Partnership. Corporations Code section 16305(a).

- "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership act as agents for all of the partners." (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211, 371 P.2d 987].)

- "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119], internal citations omitted.)

- " '[A] partnership need not be evidenced by writing [citation]. It is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts [citations].' 'In that sense, any partnership without a written agreement is a "de facto" partnership.' '[T]he question of partnership is one of fact … .' " (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694 [230 Cal.Rptr.3d 771~~In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts." (*Singleton v. Fuller* (1953) 118 Cal.App.2d 733, 740-741 [259 P.2d 687~~], internal citation omitted.)

- "Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business." (*Eng, supra,* 21 Cal.App.5th at p. 694~~It is essential, however, to the existence of a partnership that there be a~~

community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise." (*Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663, 668 [61 Cal.Rptr. 436], internal citation omitted.)

- "The CACI instructions cited by the court [CACI Nos. 3711, 3712] are correct and were pertinent to the jury's question regarding partnership formation." (*Eng, supra,* 21 Cal.App.5th at p. 706.)

Secondary Sources

9 Witkin, Summary of California Law (10th 11th ed. 20052017) Partnership, § 3943

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.06 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 402, *Partnerships: Actions Between General Partners and Partnership*, § 402.12 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:36–3:37 (Thomson Reuters)

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3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)

- "An injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future." (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 341 [181 Cal.Rptr.3d 286].)

- "The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 [208 Cal.Rptr.3d 363]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183 [217 Cal.Rptr.3d 519] [CACI 3903A is an accurate statement of the law].)

- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical care in a variety of factual scenarios." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats &*

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Provisions, Inc. (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics, internal citations omitted.)

- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra,* 52 Cal.4th at p. 566.)

- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567, internal citation omitted.)

- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra,* 237 Cal.App.4th at p. 1330.)

- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra,* 237 Cal.App.4th at pp. 1330−1331.)

- "Here, we are confronted with an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan. We hold that such a plaintiff shall be considered uninsured, as opposed to insured, for the purpose of determining economic damages." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1269 [232 Cal.Rptr.3d 404].)

- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser

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payment has been made to the provider by a factor … . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)

- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)

"[T]he collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits." (*Cuevas, supra,* 11 Cal.App.5th at p. 180.)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value … .' " (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra,* 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309]; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 436 [209 Cal.Rptr.3d 101] ["Nothing in *Howell* suggests a need to revisit the issues we addressed in *Katiuzhinsky"*].)

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- “The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place.” (*Uspenskaya, supra,* 241 Cal.App.4th at p. 1003.)

- “Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor.” (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)

- “ ‘To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.’ ” (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- “It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is ‘not required’ for a doctor to ‘testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]’ [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery.” (*J.P., supra,* 232 Cal.App.4th at pp. 341−342.)

- “[W]hile an injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future, evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. It does not appear, however, that [expert] used the full amount billed for past medical services in making the calculations for her life care plan. We observe ‘the “requirement of certainty … cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award.” ’ At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result.” (*Cuevas, supra,* 11 Cal.App.5th at p. 182, internal citations omitted.)

- “[I]t seems particularly appropriate for the trial court to perform its traditional gatekeeper role as to the admissibility of evidence and, pursuant to Evidence Code section 352, to determine whether evidence that is minimally probative should be admitted or whether it will require an undue consumption of time to try the collateral issues that evidence of what a third party paid for an account receivable and lien will necessarily raise.” (*Moore, supra,* 4 Cal.App.5th at p. 443.)

- “[E]vidence which might be admissible in one case might not be admissible in another. ‘[T]he facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue … .’ ” (*Moore, supra,* 4 Cal.App.5th at p. 442.)

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Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1846 et seq.

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:33–3:233 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

1 California Civil Practice: Torts § 5:12 (Thomson Reuters)

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3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for the death of [*name of decedent*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of decedent*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The financial support, if any, that [*name of decedent*] would have contributed to the family during either the life expectancy that [*name of decedent*] had before [his/her] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**

2. **The loss of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [*name of decedent*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. **The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]**

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[3. The loss of [*name of decedent*]'s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

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[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]

In determining [*name of plaintiff*]'s loss, do not consider:

1. **[*Name of plaintiff*]'s grief, sorrow, or mental anguish;**
2. **[*Name of decedent*]'s pain and suffering; or**
3. **The poverty or wealth of [*name of plaintiff*].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information*], the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years, and the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011, December 2013

Directions for Use

If the decedent recovered damages for lost earning capacity in his or her lifetime, an heir's recovery for lost financial support (economic damages item 1) is to be measured by the decedent's physical condition at the time of death. There is no similar limitation on recovery for loss of consortium (noneconomic damages item 1). (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997−1000 [159 Cal.Rptr.3d 195]; see *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 694 [209 P. 999].)

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval

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between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.

- Damages for Wrongful Death. Code of Civil Procedure section 377.61.

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766],

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original italics.)

- "'[W]rongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 195 [231 Cal.Rptr.3d 324]~~In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted~~.)

- "Under Code of Civil Procedure section 377.61, damages for wrongful death "are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection." (*Boeken, supra,* 217 Cal.App.4th at p. 997.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- " 'The pecuniary value of the society, comfort, and protection that is lost through the wrongful death of a spouse, parent, or child may be considerable in cases where, for instance, the decedent had demonstrated a "kindly demeanor" toward the statutory beneficiary and rendered assistance or "kindly offices" to that person. [Citation.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198−199 [191 Cal.Rptr.3d 263].)

- "Factors such as the closeness of a family unit, the depth of their love and affection, and the character of the decedent as kind, attentive, and loving are proper considerations for a jury assessing noneconomic damages … ." (*Soto, supra,* 239 Cal.App.4th at p. 201.)

- "California permits recovery in a child's wrongful death action for loss of a parent's consortium." (*Boeken, supra,* 217 Cal.App.4th at pp. 997−998.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield

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the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

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- “We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with ‘the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...’ This was a correct statement of the law.” (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- “It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents.” (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- “The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased’s health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive.” (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

- “Accordingly, the trial court in this case did not err in refusing [defendant]’s two proposed jury instructions, and in denying its request to modify CACI No. 3921, its motion for a directed verdict, its motion for a judgment notwithstanding the verdict, and its motion for a new trial, all of which were based on the erroneous ground that [plaintiff]’s loss of consortium damages were to be measured from [decedent]’s physical condition at the time of his death.” (*Boeken, supra,* 217 Cal.App.4th at p. 1000.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1690~~1873–~~1697~~1880

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64*, Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters)

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4120. Affirmative Defense—Statute of Limitations

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*]'s claimed harm occurred before [*insert date four years before complaint was filed*] unless [*name of plaintiff*] proves that before [*insert date four years before complaint was filed*], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [*name of defendant*]'s wrongful act or omission.

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *Austin v. Medicis* (2018) 21 Cal.App.5th 577, 587–588 [230 Cal.Rptr.3d 528]; *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra,* 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty or constructive fraud. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67−68 [72 Cal.Rptr.2d 359]; see also *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 322 [166 Cal.Rptr.3d 116] [constructive fraud].)

Sources and Authority

- Four-Year Statute of Limitations. Code of Civil Procedure section 343.

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- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- " '[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,' governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "Defendants argue on appeal that the gravamen of plaintiff's complaint is that defendants' acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff's claim is not founded upon the concealment of facts but upon defendants' alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "To be sure, section 340.6, subdivision (a), exempts claims of 'actual fraud' from its limitations period—but the exemption does not extend to claims of constructive fraud." (*Austin, supra,* 21 Cal.App.5th at p. 587.)

- "Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343 … . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. … [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at pp. 1312, 1313.)

- "The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 [171 Cal.Rptr.3d 548].)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "We also are not persuaded by [defendant]'s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: 'A misrepresentation that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.' " (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- " 'Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. "Thus, when a

potential plaintiff is in a fiduciary relationship with another individual, that plantiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary." ' " (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 157 [192 Cal.Rptr.3d 423].)

- "Delayed accrual due to the fiduciary relationship does not extend beyond the bounds of the discovery rule, which operates to protect the plaintiff who ' "despite diligent investigation … is blamelessly ignorant of the cause of his injuries" ' and should not be barred from asserting a cause of action for wrongful conduct ' "before he could reasonably be expected to discover its existence." ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 334 [226 Cal.Rptr.3d 267].)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], original italics, internal citations omitted.)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- "[T]he statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at p. 1479].)

- " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. …' " (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 588 [169 Cal.Rptr.3d 39].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 677–679

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

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7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

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Advisory Committee on Criminal Jury Instructions
Annual Agenda—2019
Approved by RUPRO:

I. COMMITTEE INFORMATION

Chair:	Hon. Peter J. Siggins, Presiding Justice, Court of Appeal, First Appellate District, Division Three
Lead Staff:	Kara Portnow, Attorney, Criminal Justice Services

Committee's Charge/Membership:
Make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council criminal jury instructions (CALCRIM) [Rule 10.59]

The Advisory Committee on Criminal Jury Instructions currently has 13 members. The attached term of services chart provides the composition of the committee.
2 appellate court justices;
6 trial court judges;
2 attorneys whose primary area of practice is criminal defense;
2 attorneys whose primary area of practice is representing the People of the State of California in criminal matters;
1 law school professor whose primary area of expertise is criminal law.

Subcommittees/Working Groups: The committee has one subcommittee, the CALCRIM Workgroup, consisting of six members who meet to pre-vet all materials before they go to the full committee for review.

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II. COMMITTEE PROJECTS

#	New or One-Time Projects	
1.	***Project Title*** Not applicable.	***Priority***
	Project Summary: ***Status/Timeline:***. ***Fiscal Impact/Resources:***. ***Internal/External Stakeholders:*** ***AC Collaboration:***	

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#	Ongoing Projects and Activities	
1.	***Project Title:*** **Maintenance—Case Law and Legislation**	***Priority 1***
	Project Summary: Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required. Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. ***Status/Timeline:*** Ongoing, with delivery to Judicial Council at March and September meetings. ***Fiscal Impact/Resources:*** No implementation costs are associated with this project. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue. ***Internal/External Stakeholders:*** Not applicable. ***AC Collaboration:*** Not applicable.	
2.	***Project Title:*** **Maintenance—Comments From Users**	***Priority 1***
	Project Summary: Review comments received from jury instruction users and propose any necessary changes and improvements. Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. ***Status/Timeline:*** Ongoing, with delivery to Judicial Council at March and September meetings. ***Fiscal Impact/Resources:*** No implementation costs are associated with this project. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue. ***Internal/External Stakeholders:*** Not applicable. ***AC Collaboration:*** Not applicable.	

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#	Ongoing Projects and Activities	
3.	***Project Title:*** **New Instructions and Expansion into New Areas.**	***Priority 1***
	Project Summary: Review suggestions received from jury instruction users, new legislation, and case law and propose new criminal jury instructions as appropriate. Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. ***Status/Timeline:*** Ongoing, with delivery to Judicial Council at March and September meetings. ***Fiscal Impact/Resources:*** No implementation costs are associated with this project. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue. ***Internal/External Stakeholders:*** Not applicable. ***AC Collaboration:*** Not applicable.	
4.	***Project Title:*** **Technical Corrections**	***Priority 1***
	Project Summary: Make any necessary corrections or editing changes to the jury instructions. Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. ***Status/Timeline:*** Ongoing, with delivery to Judicial Council at March and September meetings. ***Fiscal Impact/Resources:*** No implementation costs are associated with this project. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue. ***Internal/External Stakeholders:*** Not applicable. ***AC Collaboration:*** Not applicable.	

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III. LIST OF 2018 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	**Maintenance—Case Law and Legislation:** Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required. Ongoing. Releases presented to Judicial Council for approval in March 2018 and September 2018.
2.	**Maintenance—Comments From Users:** Review comments received from jury instruction users and propose any necessary changes and improvements. Ongoing. Releases presented to Judicial Council for approval in March 2018 and September 2018.
3.	**New Instructions and Expansion into New Areas:** Review new legislation and case law and suggestions received from jury instruction users and propose new criminal jury instructions as appropriate. Ongoing. Releases presented to Judicial Council for approval in March 2018 and September 2018.
4.	**Technical Corrections:** Make any necessary corrections or editing changes to the jury instructions. Ongoing. Releases presented to Judicial Council for approval in March 2018 and September 2018.

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Appellate Advisory Committee
Annual Agenda[1]—2018-2019
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	Hon. Louis R. Mauro, Associate Justice of the Court of Appeal, Third Appellate District
Lead Staff:	Christy Simons, Attorney, Legal Services

Committee's Charge/Membership: *Insert charge from Cal. Rules of Court, or the specific charge to the Task Force. Hyperlink rule number to courts public site. Insert total number of members and number of members by category.*

Rule 10.40 of the California Rules of Court states the charge of the Appellate Advisory Committee (AAC), which is to make recommendations to the Judicial Council for improving the administration of justice in appellate proceedings and to make proposals on training for justices and appellate support staff to the Governing Committee of the Center for Judicial Education and Research.

The AAC currently has 21 members. The attached terms of service chart provides the composition of the committee.

Subcommittees/Working Groups[2]: *List the names of each subcommittee or working group, including groups made up exclusively of committee/task force members and joint groups with other advisory committees/task forces. To request approval for the creation of a new subgroup, include "new" after the name of the proposed subgroup and describe its purpose.*

1. Rules Subcommittee
2. Appellate Division Subcommittee
3. Legislative Subcommittee
4. Joint Appellate Technology Subcommittee
5. Privacy Subcommittee *(New) – For the last three years, this has been an ad hoc subcommittee charged with addressing issues of personal privacy in appellate opinions. The issues have proven to be evolving and ongoing rather than discrete and of limited duration.*

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

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II. COMMITTEE PROJECTS

#	New or One-Time Projects[3]	
1.	***Project Title:* Privacy protection in appellate opinions**	***Priority 1(e)***[4] *See footnote 4*
	Project Summary[5]***:*** Address privacy concerns about information included in appellate opinions in light of the ease with which these opinions are searchable online. This includes raising the awareness of justices, court staff, and litigants regarding protecting personal privacy during the appeal and before opinions are filed. It also includes addressing concerns regarding private information contained in opinions that have already been filed. The objective is to better protect individual privacy while ensuring the public's access to appellate court opinions and developments in case law. The project originated with issues identified by the Family and Juvenile Law Advisory Committee and the Access and Fairness Advisory Committee. Subcommittee: Privacy. ***Specific Projects:*** • ***Pilot program to reduce indexing of unpublished opinions***. The pilot program concludes at the end of 2018. Review data, evaluate results, draft a report, and develop recommendations to the Administrative Presiding Justices Advisory Committee and/or the Judicial Council. This program was approved by RUPRO in the 2017 and 2018 annual agendas as part of the privacy subcommittee's charge to consider whether to recommend amendments to the rules of court or other actions to better protect the privacy of victims, witnesses, and others who are described in or otherwise affected by appellate opinions. Completion date of January 1, 2020. • ***Notice on privacy for court clerks to provide to parties.*** Consider developing a rule regarding a notice appellate court clerks can send to the parties to bring privacy issues to their attention and provide guidance on safeguarding individual personal privacy. Completion date of January 1, 2020	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.
[5] A key objective is a strategic aim, purpose, or "end of action" to be achieved for the coming year.

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#	New or One-Time Projects[3]	
	• ***Review rule 8.90.*** Consider whether any amendments to rule 8.90 (which took effect January 1, 2017) should be proposed in order to further its purpose of protecting individual privacy in appellate opinions. Any rule amendment would be a project for a future rules cycle. Completion date of January 1, 2020 ***Status/Timeline:*** Efforts to protect personal privacy in appellate opinions are ongoing. The completion date for each specific project is stated above. ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
2.	***Project Title:* Advisement of appellate rights in juvenile cases**	***Priority 1(e)*** *See footnote 4*
	Project Summary: To clarify the appellate rights available to parties in juvenile law cases, consider revising rule 5.590 to (1) remove the requirement that parents be present at the hearing to receive advisement of their appellate rights and (2) include reference to additional hearing types and the applicable statute. In addition, one of the advisory committee comments is no longer accurate and requires revision. This project is on the current annual agenda as a priority 2 project. The committee determined that the due process implications for parents warrant a priority 1 rating. Subcommittee: Rules. ***Status/Timeline:*** Work deferred last year to work more closely with the Family and Juvenile Law Advisory Committee/effective date of January 1, 2020 for rules and forms ***Fiscal Impact/Resources***: Committee staff and Family and Juvenile Law Advisory Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Family and Juvenile Law Advisory Committee	

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#	New or One-Time Projects[3]	
3.	***Project Title:* Appointment of counsel in misdemeanor appeals**	***Priority 1(b), 1(e)*** *See footnote 4*
	Project Summary: Consider whether to amend rule 8.851 to provide for the appointment of counsel for misdemeanor defendants who are involved in appeals as respondents or pre-conviction appellants. Currently the rule provides for the appointment of counsel for post-conviction appellants only. Also, consider whether to revise form CR-133, Request for Lawyer in Misdemeanor Appeal, to clarify that a defendant need not be the appellant to use the form to request appointment of counsel. This project is on the 2017-2018 annual agenda but has been deferred while *Gardner v. Superior Court* (formerly *Morris v. Superior Court*) 17 Cal.App.5th 636 is pending in the California Supreme Court. The issue in that case is whether an appellate division of the superior court is required to appoint counsel for an indigent defendant charged with a misdemeanor offense on an appeal by the prosecution. The case is fully briefed; oral argument has not been set. This project is rated priority 2 on the current annual agenda, but a decision in *Gardner* is expected this year and the committee determined that action is urgently needed. Subcommittee: Appellate Division. ***Status/Timeline:*** Deferred pending California Supreme Court action/anticipated effective date of January 1, 2020 for rules and forms ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
4.	***Project Title:* Oral argument in misdemeanor appeals**	***Priority 1(e)*** *See footnote 4*
	Project Summary: To save resources, consider whether to amend rule 8.885(a) to clarify that oral argument will not be set in cases presenting no issues. Also, consider amending rule 8.885(d) to set forth a procedure for waiving oral argument. These are suggestions from a presiding judge of an appellate division and a member of the committee. This project is on the current annual agenda as priority 1(e); work was started this year but deferred in order to conduct more research into appellate division practices. Subcommittee: Appellate Division. ***Status/Timeline:*** Some preliminary research has been done/anticipated effective date of January 1, 2020.	

#	New or One-Time Projects[3]	
	Fiscal Impact/Resources: Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
5.	***Project Title:* CEQA rules**	***Priority 1(a) and 1(c)*** *See footnote 4*
	Project Summary: Assembly Bills 1826, 734, and 987 add new projects to those for which expedited procedures are set forth under the rules of court (rules 3.2200 et seq. in the trial court and rules 8.700-8.705 in the appellate court) for challenges made under CEQA. The pertinent rules must be amended as appropriate to include the new projects. Subcommittee: Rules. ***Status/Timeline:*** Two statutes have a July 1, 2019 deadline for amending the rules; the other has a September 1, 2019 deadline. Rules to circulate during the Winter Cycle with a July 1, 2019 effective date. ***Fiscal Impact/Resources:*** Committee staff, staff to Civil and Small Claims Advisory Committee, Governmental Affairs ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Civil and Small Claims Advisory Committee	
6.	***Project Title:* Rules modernization: Uniform formatting rules for electronic documents**	***Priority 1(e)*** *See footnote 4*
	Project Summary: All appellate courts have implemented e-filing, but local rules for the format of electronic documents are often incomplete or inconsistent among the districts, resulting in burdens for litigants, attorneys, and appellate courts. The goal of this project is to develop uniform formatting rules for electronic documents filed or otherwise submitted to the appellate courts. This project originated with suggestions for rules regarding exhibits and bookmarking, and was expanded in scope to include uniform formatting for all electronic documents at the suggestion of Justice Mauro, chair of the committee. Subcommittee: JATS. ***Status/Timeline:*** New project/Completion date of January 1, 2020	

#	New or One-Time Projects[3]	
	Fiscal Impact/Resources: Committee staff and Information Technology Advisory Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Joint project with the Information Technology Advisory Committee	
7.	***Project Title:* Standards for record retention and preservation**	***Priority 2(b)*** *See footnote 4*
	Project Summary: Consider amending rule 10.1028 to extend the time for keeping reporters' transcripts in criminal appeals. The rule currently requires that the original reporter's transcript be kept for 20 years, but this is not long enough to account for longer sentences. Also consider whether to amend the rule to remove the requirement that appellate courts must follow the Trial Court Records Manual (TCRM) in storing their records. A Court of Appeal that is planning to scan and store records electronically, and that needs to put procedures in place to comply with the rules, has found the requirement of complying with the TCRM to be burdensome and not helpful. These suggestions are from a Court of Appeal justice, a clerk/executive officer, and an assistant clerk/executive officer at three different districts. Subcommittee: Rules. ***Status/Timeline:*** Current priority 2 project combined with new project/Completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
8.	***Project Title:* Time for trial court clerk to provide notice of appeal to court reporter**	***Priority 2(b)*** *See footnote 4*

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#	New or One-Time Projects[3]	
	Project Summary: To avoid delay in the preparation of the reporter's transcript, consider whether to amend rules to provide a time frame within which the trial court clerk must provide notice of appeal and record designation to the court reporter. There are time frames within which the court reporter must prepare the transcript after receiving notice, but no time frame within which that notice must be given. The suggestion specifies rule 8.714 (appeal from an order dismissing or denying a petition to compel arbitration), but this project also includes consideration of rule 8.702 (appeals in CEQA cases) and the general rules regarding the court clerk's duty to provide notice to the court reporter. This project is expanded in scope from the project listed on the committee's current annual agenda. Subcommittee: Rules. ***Status/Timeline:*** Newly expanded project/Completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee) ***AC Collaboration:*** None	
9.	***Project Title:* Civil commitment cases—rule for the normal record on appeal and form notice of appeal**	***Priority 2(b)*** *See footnote 4*
	Project Summary: To provide guidance and ensure that the record is complete, consider developing a rule setting forth the contents of the normal record on appeal and a form notice of appeal for civil commitment cases. Civil commitment cases include extensions for those found not guilty by reason of insanity (Pen. Code, § 1026 et seq.) and those found incompetent to stand trial (Pen. Code, § 1367 et seq.). They also include commitments under the Mentally Disordered Offenders Act (Pen. Code, § 2962 et seq.), Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.), Developmentally Disabled Persons Act (Welf. & Inst. Code, § 6500 et seq.), and Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.). Subcommittee: Rules. ***Status/Timeline:*** Second year of a current priority 2 project/Completion date of January 1, 2020 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Joint Rules Subcommittee	

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#	New or One-Time Projects[3]	
	AC Collaboration: Consulting with staff to the Probate and Mental Health Advisory Committee and the mental health subcommittee of the Collaborative Courts Advisory Committee	
10.	***Project Title:* Expand the record on appeal to include PowerPoint presentations, visual aids, digital media, emails, and other materials in their native format**	***Priority 2(b)*** *See footnote*
	Project Summary: Increasingly, prosecutors and defense attorneys are relying on, and making objections to, PowerPoint presentations and other forms of digital or electronic media at jury trials. Consider amending the rules to include as part of the normal record on appeal the PowerPoint presentations, electronic communications, and other digital or electronic media used at trial. Subcommittee: Rules. ***Status/Timeline:*** New project/Tentative completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Joint Rules Subcommittee ***AC Collaboration:*** This will involve collaboration with ITAC, and specifically the Digital Evidence Workstream, which may take the lead in developing technical requirements.	
11.	***Project Title:* Word limit for briefs in civil cases**	***Priority 2(b)*** *See footnote 4*
	Project Summary: In light of daunting caseloads and limited resources, consider whether to amend the rules to decrease the permitted length of appellate briefs in civil cases. This project was suggested by Kevin Green, committee member, Justice Ikola, former committee chair, and Justice Rylaarsdam. Subcommittee: Rules. ***Status/Timeline:*** Second year of a current priority 2 project/Completion date of January 1, 2020 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None	

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#	New or One-Time Projects[3]	
	AC Collaboration: None	
12.	***Project Title:* Format of motions and applications filed in the appellate division**	***Priority 2(b)*** *See footnote 4*
	Project Summary: To resolve uncertainty and provide clarity, amend rule 8.817 to provide that either superior court rules (rules 2.100-2.118) or appellate rules (rules 8.40, 8.44, and 8.204) regarding formatting apply to motions and applications filed in the appellate division. Generally, the appellate rules do not apply because they apply only in cases pending in a reviewing court, and the appellate division is not defined as a reviewing court under rule 8.10(6). Subcommittee: Appellate Division. ***Status/Timeline:*** Second year of a current priority 2 project/Completion date of January 1, 2020 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
13.	***Project Title:* Rule for timely filed amicus briefs in the appellate division**	***Priority 2(b)*** *See footnote 4*
	Project Summary: The rule regarding service and filing in the appellate division does not address applications for filing amicus briefs. This has caused confusion when counsel instead relied on the rule regarding timeliness for such applications filed in the Court of Appeal or the Supreme Court. Subcommittee: Appellate Division. ***Status/Timeline:*** Second year of a current priority 2 project; no work to be done in 2019 due to resource constraints/Completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff	

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#	New or One-Time Projects[3]	
	Internal/External Stakeholders: None ***AC Collaboration:*** None	
14.	***Project Title:* Revise statement on appeal forms**	***Priority 2(b)*** *See footnote 4*
	Project Summary: Revise several statement on appeal and order forms used in limited civil, misdemeanor, and infraction appeals to make clarifications and corrections, and to make them consistent as appropriate with recently revised settled statement forms used in unlimited civil cases. Historically, the settled statement process and the statement on appeal process in the appellate division were intended to be consistent with each other except where inconsistencies could not be avoided. This project originated with suggestions from a superior court which were deferred to allow work on the settled statement forms to be completed. Subcommittee: Appellate Division. ***Status/Timeline:*** New project/Completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
15.	***Project Title:* Rules modernization: See project descriptions below**	***Priority 2(b)*** *See footnote 4*
	Project Summary: Modernizing appellate court rules for e-filing and e-business is one of the main charges for JATS. Rules modernization includes projects such as (1) reviewing appellate rules to ensure they are consistent with e-filing practice and considering potential rule modifications where outdated provisions challenge or prevent e-business; (2) considering rule amendments to remove requirements for paper versions of documents; and (3) developing new rules to facilitate e-filing and e-business. Subcommittee: JATS. ***Specific projects:***	

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#	New or One-Time Projects[3]
	• ***Numbering of materials in requests for judicial notice***. Consider amending rule 8.252, which requires that materials to be judicially noticed be numbered consecutively, starting with page number one. The problem is that such materials are attached to a motion and declaration(s) and are electronically filed as one document, making pagination and reference to those materials in the briefs confusing for litigants and the courts. This project may be addressed by the uniform format rules project. Source of the project: Dan Kolkey, committee member. Second year of a current priority 2 project/completion date of January 1, 2020 • ***Method of notice to the court reporter***. Consider whether to amend rule 8.405, which governs the filing of an appeal in juvenile cases, to remove or modify the requirement in subdivision (b)(1)(B) that the clerk notify the court reporter "by telephone and in writing" to prepare a transcript. This language may be outdated or inconsistent with other rules requiring notification by the clerk. Source of the project: Tricia Penrose, Director of Juvenile Operations, Los Angeles Superior Court. New suggestion/completion date of January 1, 2021 • ***Clarify the filing date of an e-filed document***. Amend rule 8.77 to clarify that an e-filed document received by the court before midnight that meets the filing requirements is deemed to have been filed that day. This project addresses an ambiguity in the rule that has resulted in inconsistent treatment of e-filed documents that are received after business hours. Source of the project: California Lawyers Association. New suggestion/completion date of January 1, 2021 • ***Court of Appeal service copy of a petition for review***. Amend rule 8.500(f)(1) to remove the requirement of a separate service copy of a petition for review. Once the Supreme Court accepts a petition for review for filing, the Court of Appeal automatically receives a filed/endorsed copy of the petition. The filing of the petition satisfies the service requirements for the Court of Appeal. This project is intended to eliminate an inefficiency. Source of the project: Colette Bruggman, Assistant Clerk/Administrator, Third District Court of Appeal. Second year of a current priority 2 project/completion date of January 1, 2020 • ***Amend rule 8.70 to clarify content***. Consider amending rule 8.70 to clarify the subdivision (c)(2)(B) definition of a document and make subdivision (c)(2)(D) parallel with the rest of (c)(2). Source of the project: Justice Mauro, committee chair. New suggestion/completion date of January 1, 2021 ***Status/Timeline:*** The rules modernization effort is ongoing. The completion date for each specific project is stated above. ***Fiscal Impact/Resources:*** Committee staff and Information Technology Advisory Committee staff ***Internal/External Stakeholders:*** None

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#	New or One-Time Projects[3]	
	AC Collaboration: Joint project with the Information Technology Advisory Committee.	
16.	***Project Title:* E-filing and e-readers for incarcerated individuals**	***Priority 2(b)*** *See footnote 4*
	Project Summary: The recent amendment of Code of Civil Procedure section 271 provides that a reporter's transcript will be produced in electronic format unless requested in paper. Defense counsel have reported enthusiasm for the prospect of electronic transcripts, but they must often request paper because in many instances their clients cannot use electronic versions. Other jurisdictions have made e-filing and electronic tablets available to incarcerated individuals in ways that are safe, permit access to electronic documents, but do not provide incarcerated individuals with internet access. This project involves exploring options with the California Department of Corrections and Rehabilitation (CDCR) and potentially recommending to the Judicial Council the development of a pilot program with one prison and one court to test promising options. Justice Mauro, committee chair, suggested this project. Subcommittee: JATS. ***Status/Timeline:*** New project/completion date of January 1, 2021 ***Fiscal Impact/Resources:*** Committee staff and Information Technology Advisory Committee staff. Also, there may be costs involved in a pilot program and any subsequent implementation, to be determined. However, the expectation is that such costs would be more than offset by the elimination of paper in appeals involving incarcerated individuals. ***Internal/External Stakeholders:*** Stakeholders include CDCR and the court(s) that participate(s) in any pilot program. ***AC Collaboration:*** Joint project with the Information Technology Advisory Committee; also will involve working with the Court Executives Advisory Committee	
17.	***Project Title:* Rules regarding certification of electronic records, electronic signatures, and paper copies of electronically filed documents**	***Priority 2(b)*** *See footnote 4*
	Project Summary: The Information Technology Advisory Committee is considering rules for trial courts governing certification of electronic records, standards for electronic signatures, and whether parties should have to submit paper copies of documents when filing electronically. (In the trial courts, some of these changes will require legislation where there are statutory requirements for the trial courts	

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#	New or One-Time Projects[3]	
	regarding electronic filing, service, and signatures. See Code Civ. Proc., § 1010.6.) JATS will offer input on changes proposed for trial courts that affect appellate courts. In addition, after ITAC has resolved these issues for trial courts, JATS may wish to consider proposing changes to the appellate rules on these issues. This project originated with ITAC. Subcommittee: JATS. ***Status/Timeline:*** This project is ongoing in that the work by JATS must wait until the project is moved forward by ITAC. An estimated completion date is January 1, 2021. ***Fiscal Impact/Resources:*** Committee staff and Information Technology Advisory Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Joint project with the Information Technology Advisory Committee	
18.	***Project Title:* Appellate document management system**	***Priority 2(b)***
	Project Summary: The committee will receive status updates and provide feedback to Judicial Council Information Technology (JCIT) staff on implementation of a new document management system in the appellate courts. Phase 1 is in progress. The Third Appellate District and the Fifth Appellate District are piloting the initial implementation. This is JCIT's implementation project; the project originated with ITAC. RUPRO previously approved AAC's involvement on October 24, 2017. Subcommittee: JATS. ***Status/Timeline:*** This project is ongoing in that implementation across the appellate courts will take years. The timing of JATS's work will depend on the phases of implementation. Tentative completion date is 2021. ***Fiscal Impact/Resources:*** Committee staff and Information Technology Advisory Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Joint project with the Information Technology Advisory Committee	

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#	Ongoing Projects and Activities	
1.	***Improve Rules and Forms***	***Priority 1*** *See footnote 4*
	Project Summary Working through the Rules Subcommittee, review case law changes that impact appellate courts and appellate procedure and suggestions from committee members, judicial officers, court staff, the bar, and the public concerning appellate rules and forms and appellate administration. Make recommendations to the Judicial Council for necessary changes to appellate rules, standards, and forms (rule 10.21). ***Status/Timeline*** Ongoing ***Fiscal Impact/Resources:*** Committee staff; potentially others depending on the project ***Internal/External Stakeholders:*** Depends on the project ***AC Collaboration:*** As appropriate, depending on the project	
2.	***Review Pending Legislation***	***Priority 1*** *See footnote 4*
	Project Summary Working through the Legislative Subcommittee, review pending legislation affecting appellate procedure and court administration and make recommendations to the Policy Coordination and Liaison Committee as to whether the Judicial Council should support or oppose the legislation (rule 10.34). ***Status/Timeline*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, Governmental Affairs ***Internal/External Stakeholders:*** None ***AC Collaboration:*** As appropriate, depending on the project	
3.	***Legislative Implementation***	***Priority 1*** *See footnote 4*

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#	Project	Priority
	Project Summary Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office that may have an impact on appellate procedure and court administration, and, where appropriate, propose to the Judicial Council rules and forms to implement the legislation or to bring rules and forms into conformity with it. ***Status/Timeline*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, Governmental Affairs ***Internal/External Stakeholders:*** Usually none, but depends on the legislation ***AC Collaboration:*** As appropriate, depending on the legislation	
4.	***Rules and Forms: Miscellaneous Technical Changes Project***	***Priority 2(a)*** *See footnote 4*
	Project Summary Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2): "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy…." ***Status/Timeline*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, RUPRO staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	

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III. LIST OF 2017-2018 PROJECT ACCOMPLISHMENTS

[Provide highlights and achievements of completed projects that were included in the 2017-2018 Annual Agenda.]

#	Project Highlights and Achievements
1.	**Privacy Protection**. A pilot program is underway that adds an instruction to the unpublished opinions page of the California courts website directing search engines not to index the opinions on that page is underway. The pilot is authorized to run through the end of 2018.
2.	**Settled Statements**. Form changes to address the difficulties in preparation and certification of these statements. Approved by the Judicial Council on September 21, 2018; changes take effect January 1, 2019.
3.	**Finality in Appellate Division Decisions**. Rule changes to ensure that parties have sufficient time to seek review of appellate division decisions. Approved by the Judicial Council on September 21, 2018; changes take effect January 1, 2019.
4.	**Sealed and Confidential Records**. Rule changes to address records submitted electronically in the Court of Appeal. Approved by the Judicial Council on September 21, 2018; changes take effect January 1, 2019.
5.	**Notice on Appeal and Record on Appeal Forms**. Revise forms to provide more complete and accurate information, make corrections, and clarify various items. Approved by the Judicial Council on September 21, 2018; changes take effect January 1, 2019.
6.	**Rules Modernization.** Rule changes to address formatting of electronic reporters' transcripts following enactment of AB 1450, amending Code of Civil Procedure section 271, in October 2017. The amended rule took effect January 1, 2018.
7.	**Review Pending Legislation**. The committee recommended sponsoring legislation to amend Welfare and Institutions Code section 827 regarding access to juvenile case records. The Legislative Subcommittee considered several rounds of amendments to AB 1617, which was signed by the Governor on September 4, 2018.
8.	**Legislative Implementation**. The committee recommended rules to implement a bill relating to the formatting of electronic reporter's transcripts. The amendments to rule 8.144 were adopted January 1, 2018 (see item 6).

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Civil and Small Claims Advisory Committee
Annual Agenda[1]—2018-2019
Approved by RUPRO: _________

I. COMMITTEE INFORMATION

Chair:	Hon. Ann I. Jones, Judge, Superior Court of Los Angeles County
Lead Staff:	Anne M. Ronan, Attorney, Legal Services

Committee's Charge/Membership:

Under rule 10.41 of the California Rules of Court, the Civil and Small Claims Advisory Committee (C&SCAC) is charged with making recommendations to the Judicial Council for improving the administration of justice in civil and small claims proceedings.

C&SCAC currently has 27 voting members and 2 advisory members. The committee hopes to fill 2 recently vacated positions shortly. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups:[2]

- Alternative Dispute Resolution Subcommittee
- Legislative Subcommittee
- Protective Orders Subcommittee (working with the Joint Protective Order Working Group, led by Family & Juvenile Advisory Committee)
- Rules and Forms Subcommittee (formerly Small Claims and Limited Case Subcommittee)[3]
- Futures Recommendations Subcommittee (formerly Unlimited Case and Complex Litigation Subcommittee)
- Ad Hoc Joint Working Group to Implement AB 2185 (new; see project item 5)

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.
[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.
[3] For this year, C&SCAC is continuing with its temporary reorganization of two of its five standing subcommittees, to allow one to continue to focus on the implementation of the Future Commission recommendations, and the other to continue the ongoing work of moving forward with rules, forms, and best practices for small claims, limited, and unlimited civil courts.

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II. COMMITTEE PROJECTS

#	New or One-Time Projects[4]
1.	**Unlawful Detainer Pleadings** ***Priority 1(a) and 1(c)*** *[see footnote 5]* [5] ***Project Summary*** Two bills require changes to unlawful detainer forms. • Assembly Bill 2413 expands certain affirmative defense in unlawful detainer cases, and mandates that the Judicial Council adopt or revise the UD answer form to reflect this change. • Assembly Bill 2343 defines the five-day period in which a party must answer an unlawful detainer complaint as *excluding* Saturday, Sunday and any other judicial holiday. The UD summons must be amended to reflect this change. ***Status/Timeline*** Both statutes have September 2019 operative date. Forms to circulate in Winter comment cycle with September 1 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs AC Collaboration: External Partners:
2.	**CEQA rules** ***Priority 1(a) and 1(c)*** *[see footnote 5]* ***Project Summary*** Assembly Bills 1826, 734, and 987 add new projects to those for which expedited procedures under Rules of Court, rule 3.2200 et seq. apply in the trial court and in the appellate court for challenges made under CEQA. The pertinent trial court and appellate court rules must be amended as appropriate to include the new projects.

[4] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[5] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

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#	New or One-Time Projects[4]
	Status/Timeline Two statutes have a July 1, 2019 deadline for amending the rules; the other has a September 1 deadline. Rules to circulate the Winter Cycle with July 1 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs AC Collaboration: Appellate Advisory Committee External Partners:
3.	**Discovery Motions** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 2230 authorizes courts to allow parties to use certain procedures in making motions to compel discovery that are different than those currently required by rule of court. The pertinent rules must be amended to reflect this change. ***Status/Timeline*** Statute has January 1, 2020 operative date. Rules will be circulated in the Spring comment cycle, with a January 2020 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
4.	***Gun Violence Restraining Orders** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 1200 amends the statutes relating to gun violence restraining orders (GVRO) to, among other things, mandate the title of the forms to be used in relation to the orders; add ammunition and magazines to the items to be seized; provide that service by sheriffs shall be reimbursed; and eliminate any filing fees. Senate Bill 2888* amends the statutes to add two new categories of parties who may seek GVROs, coworkers and employees of a school that the person with the guns recently attended. The GVRO forms must be amended to reflect the changes in the statutes.

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#	New or One-Time Projects[4]
	Status/Timeline The statutes have January 2019 operative dates. The goal is to present revised forms at November 2018 council meeting with January 1, 2019 effective date and to circulate the forms post-adoption in winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, CFCC, Governmental Affairs AC Collaboration: Joint Protective Order Working Group External Partners:
5.	**Pseudonymous Guardian Ad Litem** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 2185 establishes a procedure for a person applying to be appointed guardian ad litem to do so using a pseudonym if the court makes certain required findings as to the need for preserving anonymity. Because applications for appointment as guardian ad litem must be made on mandatory Judicial Council forms (either a civil, family law, or probate guardian ad litem application form), development of a form for the ex parte application to proceed pseudonymously in any of those types of cases should be considered. ***Status/Timeline*** Statute has January 1, 2019 operative date. Form will be circulated in the Winter cycle with September 1 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Center for Family Children and the Courts (CFCC), Governmental Affairs AC Collaboration: Family and Juvenile Advisory Committee; Probate and Mental Health Advisory Committee (an ad hoc group working with members from each will be formed) External Partners:
6.	**Court Orders re Identity Theft in Business Entity Filings** ***Priority 1(a) and 1(c)*** *[see footnote 5]* ***Project Summary*** Senate Bill 1196 provides that a party may petition the court to stop the wrongful use of the party's identity in a business entity filing with the Secretary of State, and mandates that the council adopt an order form that may be filed with the Secretary of State, to be issued if the court determines that a petition is meritorious.

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#	New or One-Time Projects[4]
	Status/Timeline Statute has January 1, 2019 operative date. Form will be circulated in the Winter cycle with September 1 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
7.	**Court Reporters for Indigent Parties** ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** Amend fee waiver rules and revise forms to reflect recent decision by California Supreme Court in *Jameson v. Desta* that an indigent party has the right to a court reporter if requested. ***Status/Timeline*** Rules and forms to circulate in Winter Cycle with September 1, 2019 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, CFCC AC Collaboration: Family and Juvenile Advisory Committee; Probate and Mental Health Advisory Committee; Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee External Partners:
8.	***Protective Order Working Group Projects (****under lead of Family and Juvenile Law Advisory Committee****)*** ***Priority 1*** *[see footnote 5]* ***Project Summary:*** Work with Protective Orders Working Group (POWG) to examine the need for statewide guidance and policies on access to the California Courts Protective Order Registry (CCPOR) and to begin consideration of revising forms to request restraining order (forms to be consistent across DV and civil restraining order form groups). ***Status/Timeline:*** Ongoing JCC Staff Resources: Committee staff, CFCC, IT staff

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#	New or One-Time Projects[4]
	AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee, Criminal Law Advisory Committee, Information Technology Committee External Partners:
9.	***Proposal re Civil Harassment Forms*** ***Priority 2****[see footnote 5]* ***Project Summary:*** Consider proposal made to Judicial Council regarding Civil Harassment (CH) forms, for adding an item regarding temporary judges, describing the correct standard of review for ordering removal of firearms, and other issues relating to firearms on CH forms. JCC Staff Resources: Committee staff AC Collaboration: External Partners:

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#	**Ongoing Projects and Activities** *[Group projects by priority number.]*
10.	**New Civil Tiers and Streamlined Litigation** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Assess and develop recommendations to further the "civil tiers" proposal in Report of the Commission on Future of California's Court System (Futures Commission) for: • Advancing a legislative proposal for increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000 and developing an intermediate civil case tier • Developing streamlined methods for litigating and managing all types of civil cases, including o Legislative proposal for including unlawful detainer proceedings within the procedures for limited civil cases, including mandatory expedited jury trials o Legislative proposal revising discovery statutes to make discovery proportional to amount at issue (based on civil case tiers), require mandatory early disclosures, and limit number of expert witnesses o Amended case management rules and statutes, and amended forms to implement same o Legislative proposal to allow partial summary judgments in unlimited cases o Legislative proposal, rules, and best practices relating to remote access in certain civil proceedings o Increased ADR in all case levels, including, potentially, online ADR for small claims cases • After initial statutory changes to tiers enacted, developing: o new rules and forms as appropriate to facilitate new discovery scheme o amendments and revisions to rules and forms if needed to reflect changes in limited case tier Per direction from Chief Justice: Work with various bar groups and legal aid providers to ensure the fairness and equity of any proposals and work with trial court leadership to ensure the courts' ability to implement such changes. ***Status/Timeline*** Project underway. • During the 2017-2018 cycle, the committee developed proposals concerning limited civil case jurisdiction and unlawful detainers (which has already been circulated for public comment) and concerning changes to civil discovery based on new civil tiers (which is being circulated in fall 2018). The committee intends to review and address the comments received this fall and to present recommendations on these proposals at the January 2019 council meeting, with the potential for moving them forward in the 2019 legislative cycle. • In this committee year, the committee intends to develop a proposal for amending the current rules on case management conferences and possibly a further legislative proposal concerning motions for partial summary judgment, to be circulated for public comment in spring 2019 and go to the council in September 2019; • Also in this committee year, the committee will begin consideration of proposals addressing online ADR in small claims court. • Additional rules, forms, and legislation to follow in 2020 if new laws are enacted.

	Resources/Partners JCC Staff Resources: Committee staff; Office of Court Research (for assistance court statistics issues); Information Technology Advisory Committee staff; Governmental Affairs staff AC Collaboration: Trial Court Presiding Judges Advisory Committee; Court Executives Advisory Committee, Information Technology Advisory Committee, Committee on Providing Access and Fairness External Partners: Stakeholders, including plaintiff and defense bar, insurance industry representatives, in-house counsel and business groups, and legal aid organizations; organizations using online ADR; National Center for State Courts staff.
11.	***Civil Subject Matter Resource for Futures Commission Recommendations*** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Provide consultation and review of civil and small claims procedural matters as requested, to other advisory committees working on implementation of recommendations of the Futures Committee, per direction of Chief Justice in May 2017 letter. The committee will undertake tasks as requested. ***Status/Timeline*** as needed ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Traffic Futures Working Group; Information Technology Advisory Committee, Advisory Committee on Providing Access and Fairness
12.	**Interpreters in Small Claims Court** ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** Address implementation issues that may result from legislation (Senate Bill 1155*) that effectively requires that small claims court cases are to be treated the same as all other civil cases for purposes of ensuring qualifications of interpreters assisting in such cases. [Whether or not the legislation is enacted, rules of court regarding temporary interpreters may need to be amended to ensure temporary interpreters may be used in small claims court hearings.] Additionally, consider whether various Small Claims forms need to be revised or developed to inform parties on the change in law and to facilitate their requesting interpreters as early as possible in the proceedings.

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	Status/Timeline If new statute enacted, amended rules of court and revised forms may be circulated for comment in winter 2019 with operative date of September 2019. If not enacted, circulate in spring cycle with January 1, 2020 operative date. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Language Access Plan Implementation Task Force; Court Interpreters Advisory Panel; Court Executives Advisory Committee External Partners: Small Claims Advisors and court staff
13.	**Informing Mediation Participants About Confidentiality** ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** Senate Bill 954, which the committee previously provided technical assistance on, requires attorneys representing a client participating in a mediation or a mediation consultation to provide that client with a printed disclosure containing information about the confidentiality of mediations. Rules and forms will be reviewed to determine whether they need to be amended in light of the new law. ***Status/Timeline*** January 2020 planned effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
14.	**Gender Identity and Name Change Forms—Cleanup Legislation** ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** In 2017, Senate Bill 179 added a third gender alternative for California residents, nonbinary in addition to male or female, and also amended the procedures for seeking name changes to conform to gender (Code Civ. Proc. § 1277.5) and the procedures and legal requirements for seeking changes of gender on birth certificates (Health and Safety Code § 103430),which resulted in the council adopting and approving new and revised forms. Clean-up legislation to amend and clarify some of the new procedures regarding minors have now been enacted Senate Bill 3250, effective January 1, 2019, and further revisions to the amended forms plus some new forms will be necessary to reflect those changes. In addition, Assembly Bill 2201, also effective January 1, 2019, amends the name

	change rules for those in the Same at Home address confidentiality program, which will also require revisions to certain Name Change forms. ***Status/Timeline*** The new statutes both have a January 2019 operative date. The goal is to present revised forms at November 2018 council meeting with January 1, 2019 effective date and to circulate the forms post-adoption in winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office; staff to Family and Juvenile Advisory Committee AC Collaboration: Family and Juvenile Advisory Committee External Partners: Transgender Law Center
15.	**Privacy of Minor's Information in Protective Orders** (with Joint Protective Order Working Group) ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** In 2018, the committee, working with Family and Juvenile Advisory Committee, recommended that the council adopt new rules and forms to implement Assembly Bill 953, which authorized a minor or a minor's guardian to petition the court to keep information regarding the minor that was submitted to the court for issuance of a civil harassment or domestic violence protective order in a confidential case file. There is still need for an information sheet to be developed to go along with the new rules and forms, and work to be done to clarify how best to address the issue of confidentiality in CLETS system. ***Status/Timeline*** New rules and forms will go into effect January 1, 2019; goal is to have the information sheet and any revised forms circulate for comment in Spring 2019, with January 1, 2020 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, CFCC staff. AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee External Partners:

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16.	**Review Suggestions** *__Priority 1__ [see footnote 5]* ***Project Summary*** As mandated by rule 10.21(c), review suggestions from members of the judicial branch and the public for improving civil practice and procedure, court-connected ADR, and case management and recommend actions by the council or one of its committees. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate based on proposal received. External Partners:
17.	**Review of Pending Legislation** *__Priority 1__ [see footnote 5]* ***Project Summary*** Review pending legislation on civil procedure and court administration and make recommendations to the council's Policy Coordination and Liaison Committee, as required by Rule 10.34(a)(3) ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs AC Collaboration: External Partners:
18.	**Review of Enacted Legislation** *__Priority 1__ [see footnote 5]* ***Project Summary*** Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office that may have an impact on issues within the advisory committee's purview and, where appropriate, propose to the council rules and forms to implement the legislation or to bring rules and forms into conformity with it. ***Status/Timeline*** Ongoing

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	Resources/Partners JCC Staff Resources: Committee staff; Governmental Affairs AC Collaboration: External Partners:
19.	**Provide Subject Matter Expertise** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Serve as subject matter resource for other advisory groups to avoid duplication of efforts and contribute to the development of recommendations for council action. Such efforts may include providing civil and small claims procedural expertise and review to working groups, advisory committees, and subcommittees as needed ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate for project on which advice or consultation requested. External Partners:
20.	**Rules Modernization Project** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Assist Information Technology Advisory Committee (ITAC) it its Rules Modernization Project, a collaborative multi-year effort to comprehensively review and modernize statutes and rules so that they will be consistent with and foster modern e-business practices. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Information Technology Advisory Committee

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	External Partners:
21.	**Rules and Forms: Miscellaneous Technical Changes Project** ***Priority 2(a)*** *[see footnote 5]* ***Project Summary:*** Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2); "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy….". ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:

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III. LIST OF 2017 PROJECT ACCOMPLISHMENTS:

highlights and achievements of projects that were included in the 2017 Annual Agenda

#	Project Highlights and Achievements *[Provide brief, broad outcome(s) and completed date.]*
	New Civil Tiers and Streamlined Litigation Developed two proposals to circulate for comment, in efforts to further recommendations from the Futures Commission report: one proposal to increase the jurisdictional amount of limited civil cases and include unlawful detainers within all limited civil case procedures, and the other proposal to make discovery in general civil cases proportional to the value and complexity of the case (with each case assigned to one of three civil case tiers) and mandating the early exchange of information and documents between the parties. The committee will continue to work on these proposals in the coming committee year, reviewing and responding to the comments received.
	Civil Forms: Name Change and Gender Change Forms Developed forms and form revisions to implement new laws that changed the process for seeking name changes to conform to gender; changed the process for adults seeking recognition of a gender change, including by adding "nonbinary" as one of the genders that can be recognized; added a new process for minor's seeking recognition of gender changes; and eliminated the prohibition on name changes for persons or under the jurisdiction of the Department of Corrections and Rehabilitation (those in state prison or on parole) and those in county jail, while at the same time adding a service requirement for such petitions (Revised forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; new forms NC-100 INFO, NC-125/NC-225, NC-150, NC-500, NC-500 INFO and NC-520; and revoked forms NC-210/NC-310, NC-220, and NC-320.)
	Protective Orders: Protecting Information of People Under 18 Years Old Developed new rules and forms to implement statutory provisions allowing courts to keep certain information relating to minors confidential; jointly with Family and Juvenile Law Advisory Committee, through joint Protective Order Working Group (Cal. Rules of Court, new rules 3.1161 and 5.382; new forms CH-160, CH-165, CH-170, CH-175, DV-160, DV-165, DV-170, and DV-175; revised forms CH-109 and DV-109)
	Protective Orders: Entry of Gun Violence Restraining Orders into CLETS Amended rules to add Gun Violence Restraining Order case types to the list to be send to CLETS and for which remote access is limited (rules 1.51 and 2.503)
	Civil Forms: Declarations of Moving Party Regarding Meet and Confer Amended forms to reflect expansion of meet and confer rule to motions to strike and motions for judgment on the pleadings (revise forms CIV-140 and CIV-141).
	Civil Forms: Confidential Information Form Under Civil Code § 1708.85 Amended instructions and definitions on statutorily required form in cases re the distribution of sexually explicit materials (form MC-125))
	Civil Forms: Enforcement of Judgment Exemption Revised form to add new type of exemption for ABLE accounts (form EJ-155)
	Civil Practice and Procedure: Denial of Request to Remove Name from Shared Gang Database Amended rules and forms to implement clean-up legislation
	Technology: Rules Modernization Project Developed new form for withdrawal of consent to electronic service. Joint proposal with Information Technology Advisory Committee (form EFS-006).

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	Remote Access to Court Records for Parties, Attorneys and Justice Partners Participated in joint working group that developed rules for online access to court records for parties, their attorneys, local justice partners, and other government agencies.
	Legislative Proposal Regarding Small Claims Court Interpreters. The committee worked with the Language Access Plan Implementation Task Force to develop proposed legislation that would provide improved quality of interpretation for small claims parties with limited English proficiency, while continuing to allow temporary interpreters as appropriate, without making the process so burdensome that the parties loose realistic access to the courts. Council approved the proposal in January 2018 and since then the committee worked with PCLC and Government Affairs in efforts to maintain the bill as originally proposed.
	Deskbook on Complex Litigation Management Completed **s**ubstantial revisions to deskbook, concluding a 2-year project. (implementation project; charge for work was made to CSCAC by the council at October 22, 1999 meeting)

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Item number: 07

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: November 30, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Name Change and Gender Change Forms

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan 415-865-8933 anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 09.28.18
Project description from annual agenda:
AB 2201 09/27/2018 The council has adopted mandatory forms for name change proceedings. For the forms to be in compliance with the law, they must be revised to reflect new categories of participants who can take part in the confidential name change program. Statute is operative January 1, 2019
AB 3250 09/26/2018 The council has adopted mandatory forms for name change and gender change proceedings. For the forms to be in compliance with the law they must be revised to reflect new categories of authorized petitioners, additional service requirements, and new OSC requirement., Statute is operative January 1, 2019.

If requesting July 1 or out of cycle, explain:
The proposed revised or new mandatory forms need to be adopted effective January 1, 2019 or the forms will not be incompliance with the new laws (cited above) that go into effect that day.

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 30, 2018:

Title
Civil Practice and Procedure: Name Change and Gender Change Forms

Rules, Forms, Standards, or Statutes Affected
Revise forms NC-100 INFO, NC-121, NC-125, NC-225, NC-400, NC-400 INFO, NC-420, NC-500, NC-500 INFO, and NC-520; and adopt forms NC-510G and NC-530G.

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2019

Date of Report
October 17, 2018

Contact
Anne M Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends adopting and revising various Judicial Council name change forms to reflect recently enacted legislative amendments that go into effect January 1, 2019. Senate Bill 3250 adds new requirements for issuance and service of orders to show cause in certain name change and gender change proceedings initiated by parents or guardians, as well as requiring new judicial findings in gender change proceedings brought by guardians. Assembly Bill 2201 adds a new category of petitioners (those seeking to avoid human trafficking) to those who may seek confidential name changes. The advisory committee recommends that the mandatory forms be revised and two additional forms adopted by January 1, 2019 so that the mandatory forms will be correct under the new laws when they become effective.

Recommendation

In order to implement statutory changes enacted in Senate Bill 3250 and Assembly Bill 2201, the Civil and Small Claims Advisory Committee recommends the Judicial Council take the following actions, effective January 1, 2019:

1. The advisory committee recommends that the council revise the following forms:

    - *Instructions for Filing a Petition for Change of Name* (form NC-100-INFO), to reflect the changes in law as to who can apply for confidential name changes (those seeking to avoid human trafficking) and as to who must be served with notice of the order to show cause;

    - *Proof of Service of Order to Show Cause* (form NC-121), to reflect that under the new law there will be multiple orders to show cause for which the form may be used;

    - *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225), to reflect the change in law regarding what objections do not constitute good cause for objections;

    - *Confidential Cover Sheet—Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-400); *Information Sheet for Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-400 INFO); and *Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-420), to add the new factual basis that supports seeking a confidential name change proceeding (to avoid human trafficking), and to reflect the elimination of filing fees by the new law for minors in the address confidentiality program;

    - *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500); *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500 INFO) and *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520), to implement the changes in procedures for petitions for recognition of a minor's change of gender.

2. The advisory committee recommends that council adopt the following forms:

    - *Declaration of Guardian or Dependency Attorney (Supplemental Attachment to Form NC-500)* (form NC-510G), to provide the information guardians and guardians ad litem are required under the new law to include in such petitions;
    - *Order Recognizing Minor's Change of Gender and for Issuance of New Birth Certificate and Decree Changing Name* (form NC-530G), to reflect the findings required under the new law in orders on petitions brought by guardians.

The advisory committee recommends that the revised and new forms be made effective January 1, 2019, because the current, mandatory, forms will contain incorrect statements of the law as of that date. The committee intends to have the forms circulated for comment post-adoption, in the winter comment cycle. The new and revised forms are attached at pages 8-24.

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Relevant Previous Council Action

The council first adopted name change forms effective January 2001 to standardize procedures used for name change proceedings throughout the state. These forms have received minor modifications through the years since then. Along with revisions to the set, new forms were adopted effective January 2010 to implement the confidential name change program run by the Secretary of State for those in their address confidentiality program, "Safe at Home." Changes were made in 2014 to reflect statutory amendments eliminating the publication requirement for petitioners seeking to change their names to conform to their gender identity. Recently, in September 2018, the forms were revised to reflect new statutory procedures for name changes to confirm to gender identity.

In 2003, the Judicial Council adopted a set of forms for persons to petition for recognition of a gender change and issuance of a new birth certificate reflecting that change. In 2006, the council adopted an additional set of forms to petition for a change of gender and issuance of a new birth certificate, without a name change. Changes were made to those forms (1) in 2011 to reflect the change in venue requirements for petitioners who are California-born, transgender individuals residing outside the state; (2) in 2012 to reflect the statutory change in the evidence required to support such requests; (3) in 2014 to add information about the administrative process that may be used as an alternative to the court proceedings, and (4) in September 2018 to reflect new statutory procedures for recognition of gender change, including petitions for minors.

Analysis/Rationale

Assembly Bill 3250

As noted, many of the Name Change forms were revised this past year, effective September 2018, to implement the changes in procedures enacted in 2017 in Senate Bill 179. This year, the Legislature passed Senate Bill 3250[1] to clean up some problems with implementing Senate Bill 179, particularly relating to procedures for petitions for minors, thus requiring further revisions to the forms. The Legislature chose to make those change effective January 1, 2019, which means that the forms needs to be revised immediately to ensure that parties and the courts act in compliance with the law when seeking name changes and gender changes.

Change of Names to Conform to Gender Identity. Senate Bill 179 altered the process for changing names to conform to gender identity so that it no longer paralleled the process for other name changes, eliminating the automatic setting of a hearing and instead setting a hearing only if objections are filed showing good cause to oppose the name change, within six weeks of issuance of an order to show cause (OSC). The law included no requirement to publish this OSC or to serve it on anyone, even in the situation where the petition was on behalf of a minor. Senate Bill 3250 has amended the statute to provide that when such petition is made on behalf of a minor, the petition and OSC must be served on any non-signing parent within 30 days of the date

[1] Assembly Bill 3250 may be viewed at
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3250

of receiving the order. [2] *The Instructions for Filing a Petition for Change of Name* (form NC-100 INFO at item 4) and *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/225) have both been revised to reflect this change in the law. Item 3 on the OSC containing a statement from the statute that certain objections do not constitute good cause has also been revised to reflect the amended statutory language in Assembly Bill 3250.[3]

Recognition of Minor's Change of Gender Identity. Senate Bill 179 added a process for requesting an order recognizing a minor's change of gender and for issuance of a new birth certificate.[4] The text of the 2017 statute assumes that a minor can bring the petition, and the forms adopted by the council this past year reflected that, [5] even though minors generally cannot file an action on their own in civil proceedings. [6] The law also required the petition to be signed either by one or both parents or the minor's guardian, or, if there is no living parent and no guardian, then by a near relative or friend. If not signed by all living parents, the petition must be served on any living parent who did not sign it. (There were no other service provisions in the statute.) The OSC on these petitions is to include a hearing date.

Assembly Bill 3250 cleaned up several aspects of these provisions of the Health and Safety Code, in the following ways:

- Does not treat the minor as the petitioner, thus clarifying that such petitions follow the general rule and are to be brought on behalf of a minor, not by the minor.[7]
- Corrects the deadline for service of the petition and OSC on non-signing parents, to at least 30 days before the hearing date set in the OSC.[8]
- Adds new service provisions, parallel to those in the name change statutes,[9] for petitions brought by guardians or court-appointed dependency attorneys appointed as guardians ad litem (dependency attorneys), requiring that, if the minor's parents are deceased, all living grandparents known to the petitioner must be served with the petition and an OSC, not less than 30 days before the hearing date set in the OSC.[10]

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[2] See new Code Civ. Proc., § 1277.5(a)(2).

[3] See new Code Civ. Proc., § 1277.5(c).

[4] See new Health & Saf. Code, §§ 103430(e).

[5] The current petition (form NC-500) lists both the minor and an adult as the petitioners, and the current instruction sheet (form NC-500 INFO) is directed to the petitioning minor.

[6] Currently, minors generally cannot file an action on their own in civil proceedings. See Code Civ. Proc., § 372(a), requiring guardian ad litem, and (b) providing for certain exceptions.

[7] See new Health & Saf. Code, §§ 103430(e)(1).

[8] See new Health & Saf. Code, §§ 103430(e)(1)(A).

[9] See Code Civ. Proc., § 1277(e).

[10] See new Health & Saf. Code, §§ 103430(f)(2). (Note, this service requirement for dependency attorneys was also included in the name change provisions in AB 3250 (cf. new section 1277(e)), but those amendments were made ineffective by passage of the later-enacted statute SB 2201, which amended a different portion of section 1277.

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- Requires that petitions brought by a guardian must include certain information about the guardianship and the likelihood that the child will remain with the guardian until adulthood, just as in name change proceedings,[11] and requires that the court make a finding to that effect before granting the petition.[12]

Revisions have been made to the *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500); *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500 INFO); and *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520) to reflect these changes in the law. The minor is no longer listed as the petitioner in either the petition or the instructions sheet. The request in the petition (form NC-500 at item 4) for an OSC directed to living parents has been expanded to include a request for an OSC directed to grandparents in appropriate cases. The instructions (form NC-500 INFO) on requesting a hearing and serving the OSC have been revised to address the new service requirements for guardians and dependency attorneys. The OSC itself (form NC-520) has also been revised, to allow a court to issue it directed at grandparents if there are no living parents (the current form is directed solely to parents because under current law no other objectors had standing).[13]

The advisory committee is also recommending two new forms, to implement the new requirements placed on gender change recognition petitions brought by guardians or dependency attorneys.

- *Declaration of Guardian or Dependency Attorney (Supplemental Attachment to Form NC-500)* (form NC-510G) would supplement the petition, providing the additional information required of petitioners who are guardians or are dependency attorneys appointed to be guardians ad litem. This form parallels the existing supplement form for guardians bringing name change petitions (form NC-110G), just as the statutory provisions parallel each other. It will be required with all gender change petitions brought for a minor by a guardian or dependency attorney, and so will be used in place of the NC-110G when a name change petition is made at the same time.

- *Order Recognizing Minor's Change of Gender and for Issuance of New Birth Certificate and Decree Changing Name* (form NC-530G) is a new order form for petitions brought by guardians, needed so the court can make the additional findings required on such petitions under Assembly Bill 3250. This form is based on the current combined gender change/name change order (form NC-230), but also includes the findings regarding

[11] See Code Civ. Proc., §§ 1276(f) and 1278(d).

[12] See new Health & Saf. Code, §§ 103430(g).

[13] The new statutory description relating to objections has also been included in the revised OSC.

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guardianships found on the name change order for petitions brought by guardians, form NC-130(G).

Senate Bill 2201[14]

This bill, enacted after Senate Bill section 3250,[15] amends the provisions that allow certain categories of individuals who are members of the Safe at Home program, the address confidentiality program run by the Secretary of State's office, to obtain confidential name changes. The new law adds a new category of individuals—those seeking to avoid human trafficking—to those who can use the confidential procedures.[16] The following three forms used for those proceedings list the categories of those authorized to keep the name changes confidential, and therefore each has been revised to reflect this additional category:

- *Confidential Cover Sheet—Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-400);
- *Information Sheet for Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-400 INFO); and
- *Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-420).

In addition, the general name change information sheet, *Instructions for Filing a Petition for Change of Name* (form NC-100-INFO) has been revised to reflect the new category of those who can use these confidential proceedings. Both that form and form NC-400 INFO, directed at the confidential name changes, have also been revised to reflect the new provisions that eliminate the filing fee for name change petitions for minors who meet the requirements of the confidential name change procedures.[17]

Policy implications

These form revisions and new forms are required because the council has mandated the use of forms for proceedings seeking name changes or to recognize changes of gender, and the current forms will be incorrect under the law as of January 1, 2109.

Comments

The forms have not yet been circulated for comments but must be approved expeditiously because the new law will be in effect in January 2019 and at that time the current forms will not be correct. Without the revised forms, those bringing petitions for minors' name changes to

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[14] Senate Bill 2201 may be viewed at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2201*.

[15] The date of enactment is pertinent only because it means that the provisions in this bill, Code Civil Procedure section 1277, override the provisions of that section in SB 3250.

[16] See new Code Civ. Proc. § 1277(b)(2)

[17] See new Government Code section 70635.

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conform to gender will not be aware of the new service requirements on non-signing parents and grandparents in situations where parents are deceased. Those petitioning for recognition of minors' gender change will not be aware of the correct deadline for service of the OSC, and guardians will not be able to have an OSC issued directed to the proper parties, or orders issued with the necessary findings.

The forms can be circulated in the winter cycle, and the committee will return to the council with recommendations for further modifications if appropriate.

Alternatives considered

Because the forms will be incorrect under the new law if not revised, the only alternative considered was when to recommend approval of the proposed revisions. As discussed above, the committee concluded it was better to amend now than to circulate for comment first and have incorrect forms in use for the next nine months.

Fiscal and Operational Impacts

There will need to be training for clerks, judicial officers, and court legal services and self-help offices on the new statutory requirements, and how these new and revised forms reflect those changes. New training materials and internal procedures will need to be developed.

Attachments and Links

1. Forms NC-100 INFO, NC-121, NC-125, NC-225, NC-400, NC-400 INFO, NC-420, NC-500, NC-500 INFO, and NC-520; and adopt forms NC-510G and NC-530G, at pages 8-24.
2. Link to Assembly Bill 3250--
   http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3250.
3. Link to Senate Bill 2201--
   http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2201.

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1. **Where to File**

   The petition for change of name must be filed in the superior court of the county where the person whose name is to be changed is a resident.

2. **Whose Name May Be Changed**

   The petition may be used to change your own name and, under certain circumstances, the names of others (e.g., children under 18 years of age).

3. **Confidentiality of Certain Names**

   If you are a participant in the Secretary of State's address confidentiality program (Safe at Home), your current and proposed names may be kept confidential. (Code Civ. Proc., § 1277(b).) See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)* (form NC-400-INFO) for additional instructions.

4. **What Forms Are Required**

   Prepare an original and two copies of each of the following documents:

   a. *Petition for Change of Name* (form NC-100)

   b. *Name and Information About the Person Whose Name Is to Be Changed (Attachment to Petition For Change of Name)* (form NC-110) (attach as many copies as necessary)

   c. *Order to Show Cause for Change of Name* (form NC-120) or, if applicable, *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125)

   d. *Decree Changing Name* (form NC-130 or, for guardians, form NC-130G)

   e. *Civil Case Cover Sheet* (form CM-010)

   In addition, a guardian must prepare and attach a *Declaration of Guardian (Supplemental Attachment to Petition)* (form NC-110G) for each child whose name is to be changed.

5. **Filing and Filing Fee**

   Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition and *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition. A filing fee will be charged unless you qualify for a fee waiver. (If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Court Fees and Costs* (form FW-001-INFO). There is no filing fee for minors in the State's address confidentiality program (Safe at Home).

6. **Requesting a Court Hearing Date and Obtaining the Order to Show Cause**

   You should request a date for the hearing on the *Order to Show Cause for Change of Name* (form NC-120) at least six weeks in the future. Take the completed form to the clerk's office. The clerk will provide the hearing date and location, obtain the judicial officer's signature, file the original, and give you a copy.

   If you are changing your name to conform to gender identity, you need not request a hearing date. Instead, complete the *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125) and take the completed form to the clerk's office. The clerk will obtain the judicial officer's signature, file the original, and give you a copy.

7. **Publishing the Order to Show Cause**

   In most cases, a copy of the *Order to Show Cause* must be published in a local newspaper of general circulation once a week for **at least four consecutive weeks** before the date of the hearing. You must select the newspaper from among those newspapers legally qualified to publish orders and notices. The newspaper used must file a Proof of Publication with the superior court before the hearing. If no newspaper of general circulation is published in the county, the court may order the *Order to Show Cause* to be posted by the clerk. But you **do not have to publish** the order if you are seeking to change a name to conform to your gender identity or are a participant in (1) the State Witness Program, or (2) the address confidentiality program, and the petition alleges that you are petitioning (a) to avoid domestic violence, (b) to avoid stalking, (c) to avoid sexual assault, or (d) to avoid human trafficking.

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8. **Name Change for Children**

a. If you are a petitioning parent requesting the name change for a child under 18 years of age, and one of the parents, if living, does not join in consenting to the name change, the petitioning parent must have a copy of the *Order to Show* Cause or notice of the time and place of the hearing served on the nonconsenting parent. Service must be made **at least 30 days prior to the hearing,** under Code of Civil Procedure sections 413.10, 414.10, 415.10, or 415.40.

b. If you are a petitioning parent or any other adult requesting the name change for a child **to conform to that child's gender identity** and a living parent does not join in consenting to the name change, you must have a copy of the petition and the *Order to Show Cause* served on the nonconsenting parent. Service must be made **within 30 days of the date the order is made by the court,** under Code of Civil Procedure sections 413.10, 414.10, 415.10, or 415.40.

c. If the nonconsenting parent resides in California, the order or notice must be personally served on the nonconsenting parent. You cannot personally serve this document.

d. If the nonconsenting parent resides outside California, that parent may be served by sending a copy of the order or notice by first-class mail, postage prepaid, return receipt requested.

e. If you are the guardian of a minor and filing a petition to change the name of that minor, you must (1) provide notice of the hearing to any living parent of the child by personal service at least 30 days before the hearing (or as in b above), or (2) if either or both parents are deceased or cannot be located, serve notice of the hearing on the child's grandparents, if living, not less than 30 days before the hearing, under Code of Civil Procedure sections 413.10, 414.10, 415.10, or 415.40. *(If the minor's name is being changed to conform to gender identity, these notices and orders for grandparents need not be completed or served.)*

If you have served a parent or grandparent, file a copy of the completed *Proof of Service of Order to Show Cause* (form NC-121) with the court before the hearing.

9. **Name Change for Person in Jail or Prison or on Parole**

If you are a person in county jail, or under the jurisdiction of the Department of Corrections and Rehabilitation (in state prison, or on parole) you may file a petition to change your name, but must serve the petition on a government agency.

- If in county jail, you must provide a copy of the petition to the county sheriff's department. Check with the department as to how that should be done.
- If in state prison, you must provide a copy of the petition to the warden. Check with the warden's office as to how that should be done.
- If on parole, you must provide a copy of the petition to the regional parole administrator. Check with the administrator's office as to how that should be done.

After you have provided a copy to the sheriff, warden, or regional parole administrator, file a copy of the completed *Proof of Service By Mail* (form POS-030) with the court.

Note that the declaration on form NC-110 as to whether the petitioner is in jail or under jurisdiction of the California Department of Corrections and Rehabilitation is only for purposes of determining if service of the petition is required.

10. **Court Hearing**

If no written objection is filed at least two court days before the scheduled hearing, the court may grant the petition and sign the decree without a hearing. Check with the court to find out if a hearing will be held. If there is a hearing, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original decree.

If you filed a petition for name change to conform to gender identity, and timely objections were filed, the court may set a hearing date after receiving the objections. If it does, you will be sent a notice of the hearing date. Check with the court after the deadline for filing objections to see if a hearing date has been set. If there are no objections, the court will grant the petition and sign the decree without a hearing.

11. If you were born in California and want to amend a birth certificate to show the name change, you should contact the following office:

California Department of Public Health
Vital Records - MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
website: ***www.cdph.ca.gov***

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name change petitions, the times when petitions are heard, and the newspapers that may be used to publish the *Order to Show Cause.*

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ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO. :
E-MAIL ADDRESS:
ATTORNEY FOR (*Name*):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PETITION OF *(Name of each petitioner):*

FOR CHANGE OF NAME

DRAFT

10-09-18

Not approved by the Judicial Council

PROOF OF SERVICE OF ORDER TO SHOW CAUSE
BY ☐ PERSONAL DELIVERY ☐ MAILING (OUTSIDE CALIFORNIA ONLY)

CASE NUMBER:

1. At the time of mailing or personal delivery, I was at least 18 years of age and **not a party** to this proceeding.
2. My residence or business address is *(specify)*:

3. I personally delivered or mailed a copy of the following (*title of document)*:

(Complete either a or b):

a. ☐ **Personal delivery.** I personally delivered a copy to the person served as follows:
   (1) Name of person served:
   (2) Address where delivered:
   (3) Date delivered:
   (4) Time delivered:

b. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
   (1) I enclosed a copy in an envelope and mailed the sealed envelope to the person served by first-class mail, postage prepaid, return receipt requested, to the address outside of California listed below.
   (2) The envelope was addressed and mailed as follows:
      (a) Name of person served:
      (b) Address on envelope:
      (c) Date of mailing:
      (d) Place of mailing *(city and state)*:

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

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

DRAFT

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:	DRAFT
NAME:	09-27-18
FIRM NAME:	Not approved by the Judicial Council
STREET ADDRESS:	
CITY: STATE: ZIP CODE:	
TELEPHONE NO.: FAX NO.:	
E-MAIL ADDRESS:	
ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PETITION OF *(Name of each petitioner):* FOR CHANGE OF NAME	
ORDER TO SHOW CAUSE FOR CHANGE OF NAME TO CONFORM TO GENDER IDENTITY	CASE NUMBER:

DRAFT

TO ALL INTERESTED PERSONS:

1. Petitioner *(name):* filed a petition with this court for a decree changing name as follows:

	Present name		Proposed name
a.		to	
b.		to	
c.		to	
d.		to	

2. THE COURT ORDERS that any person objecting to the name changes described above must file a written objection that includes the reasons for the objection within six weeks of the date this order is issued. If no written objection is timely filed, the court will grant the petition without a hearing.

3. A hearing date may be set only if an objection is timely filed and shows good cause for opposing the name change. Objections based solely on concerns that the proposed change is not the person's actual gender identity or gender assigned at birth shall not constitute good cause. (See Code Civ. Proc., § 1277.5(c).)

NOTE: If a petition is filed to change the name of a minor to conform to gender identity that does not include the signatures of both living parents, the petition and this order to show cause shall be served on the parent who did not sign the petition, pursuant to section 413.10, 414.10, or 415.40, within 30 days from the date on which the order is made by the court.

Date:

JUDGE OF THE SUPERIOR COURT

CONFIDENTIAL

ATTORNEY *(Name, State Bar number, and address;* ***leave blank if no attorney****):* STATE BAR NUMBER:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO.:
E-MAIL ADDRESS:
ATTORNEY FOR (*name*): **[CONFIDENTIAL]**

FOR COURT USE ONLY

DRAFT

09/27/18

Not approved by the Judicial Council

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PETITION OF *(Name of each petitioner)*:
[**CONFIDENTIAL**]

CONFIDENTIAL COVER SHEET NAME CHANGE PROCEEDING UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)

CASE NUMBER:

DRAFT

INSTRUCTIONS: This petition for change of name is being brought by a petitioner who is a participant in the Secretary of State's address confidentiality program under Government Code section 6205 et seq. and who is petitioning (1) to avoid domestic violence, (2) to avoid stalking, (3) to avoid sexual assault, or (4) to avoid human trafficking. **As provided by Code of Civil Procedure section 1277(b), the current legal name of the petitioner must be kept confidential by the court and must not be published or posted in the court's calendars, indexes, or register of actions, or by any means or in any public forum.**

This *Confidential Cover Sheet* must be affixed to the first page of the petition and to any other documents filed in this name change action. (See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program) (Safe at Home)* (form NC-400 INFO).)

This cover sheet is affixed to the following documents *(check all that apply):*

1. ☐ *Petition for Change of Name* (form NC-100)
2. ☐ *Attachment to Petition for the Name Change* (form NC-110)
3. ☐ *Order to Show Cause for Change of Name* (form NC-120)
4. ☐ *Decree Changing Name* (form NC-130)
5. ☐ *Civil Case Cover Sheet* (form CM-010)
6. ☐ *Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-410)
7. ☐ *Declaration in Support of Application to File Documents Under Seal in Name Change Proceedings Under Confidentiality Program (Safe at Home)* (form NC-420)
8. ☐ *Order on Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-425)
9. ☐ *Other (describe):*

Date:

The name of the petitioner is to remain confidential UNLESS:

1. The petitioner's participation in the address confidentiality program is ended (Gov. Code, § 6206.7); or
2. The court finds by clear and convincing evidence that the allegations of domestic violence or stalking in the petition are false. (Code Civ. Proc., § 1278(b).)

Form Adopted for Mandatory Use
Judicial Council of California
NC-400 [Rev. January 1, 2019]

Code of Civil Procedure §§ 1277, 1278; Cal. Rules of Court, rule 2.575
www.courtinfo.ca.gov

NC-400-INFO Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)

1 Confidentiality in Name Change Proceedings

It is important that you understand that changing your name, especially confidentially, is a life-changing decision**.** It may make it more difficult for you to enforce a restraining order and significantly impair your ability to obtain a passport, apply for school programs, purchase or rent property, gain employment, get credit, start a business, and other matters.

The law provides confidentiality for a petitioner seeking a name change who is a participant in the Secretary of State's confidential address program, Safe at Home, under Government Code section 6205 et seq., ***and*** who asserts reasons for a name change that include seeking (1) to avoid domestic violence, (2) to avoid stalking, (3) to avoid sexual assault, or (4) to avoid human trafficking. (One of these reasons must be stated in the papers filed with the *Petition for Change of Name*.)

By law, the court must keep the current legal name of such a petitioner confidential. The court must not publish or post the name in the court's calendars, indexes, or registers of actions, or in any other place in which it might be accessible to the public. In addition, the proposed new name is not put into the court records at all and does not have to be published. (Code Civ. Proc., § 1277(b).)

To ensure this confidentiality for the name change proceeding, petitioners must follow the instructions below.

2 Is a Lawyer Necessary?

You are not required to have a lawyer, but it is highly advisable that you contact a lawyer or legal service agency to discuss the effects of a confidential name change**.**

3 How to Get Started

Before beginning the court process for a confidential name change, you must be an active participant in the Safe at Home program. You must complete and file a Notice of Intent of Name Change with the Safe at Home program at the Secretary of State's Office. You will receive a letter from that program to show to the court, confirming that the you are an active participant in the confidential address program and that a Notice of Intent of Name Change is on file. You can reach the Safe at Home program by calling toll free 1-877-322-5227 or by going to the Web site at *www.sos.ca.gov/safeathome.*

4 Where to File

As with all name change petitions, the petition filed under the confidential address program must be filed in the superior court of the county where the person whose name is to be changed presently lives.

5 Whose Name May be Changed

The petition may be used to change one's own name and, under certain circumstances, the names of others (e.g., children under 18 years of age). There are no filing fees for minors in the Safe at Home program.

6 Name Changes for Children

A petitioner in the confidential address program must comply with all the rules stated in item 8 in the *Instructions* on the back of the *Petition for Change of Name*, concerning serving notice of a name change petition for a child on the child's parents or grandparents. The confidentiality provisions do not change those requirements. You will generally not be able to change a child's name without notifying the other parent.

7 What Forms Are Required

Prepare an original and two copies of the forms described in item 4 of the *Instructions* on the back of the *Petition for Change of Name* (form NC-100). In addition:

a. In the *Petition for Change of Name* (form NC-100), *Order to Show Cause for Change of Name* (form NC-120), and *Decree Changing Name* (form NC-130), include your present name where indicated. Instead of including the proposed new name, indicate that the new name is confidential and on file with the Secretary of State's Safe at Home program.

b. In the *Attachment to the Petition for Change of Name* (form NC-110), include the reasons for seeking the name change.

c. Prepare and attach to the front of each document a *Confidential Cover Sheet—Name Change Proceeding Under Address Confidentiality Program* (*Safe at Home*) (form NC-400). Do not include the petitioner's current name on these forms. These forms will flag the documents as containing confidential information.

You will also need a copy of the letter from the Safe at Home program to take to the court when filing the petition, to confirm that you are in the confidential address program and have a Notice of Intent of Name Change on file. Keep a copy of that letter for your records.

8 Filing

Follow the instructions in item 5 of the *Instructions* on the back of the *Petition for Change of Name* (form NC-100).

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Prepare and attach a *Confidential Cover Sheet* (form NC-400*)* to the *Civil Case Cover Sheet* (form CM-010), your petition, and any other document you file under that item.

9 Requesting a Court Hearing Date and Obtaining the Order to Show Cause

You should request a date for the hearing on the *Order to Show Cause For Change of Name* at least six weeks after the date you file the petition. Take the completed form to the clerk's office. The clerk will provide the hearing date and location, obtain the judicial officer's signature, file the original, and give you a copy.

10 No Requirement to Publish the Order To Show Cause

In most cases, the *Order to Show Cause* must be published in a local newspaper of general circulation. But a petitioner does not have to publish the order if he or she is a participant in the address confidentiality program and the petition alleges that he or she (1) is petitioning to avoid domestic violence, (2) is petitioning to avoid stalking, or (3) is, or is filing on behalf of, a victim of sexual assault.

11 Court Hearing

If no written objection is filed at least two court days before the hearing, the court may grant the petition without a hearing. Check with the court to find out if a hearing will be held. If there is a hearing, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original decree.

12 Application to File Documents Under Seal

If a petitioner in the confidential address program believes that the protections described above and required by law that keeping the current and future name confidential are not sufficient in a particular case, the petitioner may ask the court to file the petition and related documents under seal. Documents filed under seal are secured and kept separate from the public files.

For the court to order that the petition may be filed under seal, you must show facts to support the following findings by the court:

a. There is an overriding interest that overcomes the right of public access to the record.
b. That overriding interest supports sealing the name change documents.
c. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.
d. The proposed order to seal the records is narrowly tailored to protect that overriding interest.
e. No less restrictive means than sealing the whole record exist to achieve the overriding interest.

A petitioner in the confidential address program may file an application to file records under seal following the procedures in rule 2.577 of the California Rules of Court. The application must be made on *the Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program* (*Safe at Home*) (form NC-410) and be accompanied by a *Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program (Safe at Home)* (form NC-420), containing facts sufficient to justify the sealing.

Attach a *Confidential Cover Sheet* (form NC-400) to the application. All the documents that you want filed under seal must be put in a sealed envelope, with a completed *Confidential Cover Sheet* (form NC-400) on top marked "Conditionally Under Seal." and lodged with the court. If the application is denied, the documents will be returned by the clerk unless you file written notice within 10 days that they should be filed unsealed.

13 Making the Records Public

Even if the documents are not sealed, as long as the other requirements are met, your name will remain confidential **UNLESS**:

a. Your participation in the address confidentiality program is ended under Government Code section 6206.7; or

b. The court finds by clear and convincing evidence that the allegations of domestic violence or stalking in the petition are false (see Code of Civil Procedure section 1278(b).)

If another person or a court wants to make the records public based on the above, the court must hold a hearing, with notice sent to the petitioner in care of the Safe at Home program, as permitted under Government Code section 6206(a)(5)(A).

Local courts may supplement these instructions. For instance, the court may provide you with additional written information identifying the department that handles name change petitions and the times when petitions are heard. Check with the court to determine whether supplemental information is available.

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CONFIDENTIAL

NC-420

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	**DRAFT**
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		**09/27/18**
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		**Not approved by the Judicial Council**
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PETITION OF *(Name of each petitioner):*		
DECLARATION IN SUPPORT OF APPLICATION TO FILE DOCUMENTS UNDER SEAL IN NAME CHANGE PROCEEDING UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)		CASE NUMBER:

I *(name):* declare as follows:

1. I have personal knowledge of the facts stated in this declaration and could and would testify competently to those facts.
2. I am a participant in the Secretary of State's confidential address program, Safe at Home.
3. I am seeking a name change *(check all that apply):*
   a. ☐ To avoid domestic violence.
   b. ☐ To avoid stalking.
   c. ☐ To avoid sexual assault.
   d. ☐ To avoid human trafficking.
4. Facts showing that there is an overriding interest that overcomes the right of public access to the records in this name change proceeding are *(specify):*

   ☐ Continued on Attachment 4 *(If you need more space, attach form MC-025.)*
5. Facts showing that the overriding interest described in item 4 supports filing the documents in this name change proceeding under seal are *(specify):*

   ☐ Continued on Attachment 5. *(If you need more space, attach form MC-025.)*

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PETITIONER:	CASE NUMBER:

6. Facts showing that there is a substantial probability that the overriding interest described in item 4 will be prejudiced if the records in this name change proceeding are not sealed are *(specify):*

☐ Continued on Attachment 6. *(If you need more space, attach form MC-025.)*

7. Facts showing that an order sealing the records in this action is narrowly tailored to protect that overriding interest are *(specify):*

☐ Continued on Attachment 7. *(If you need more space, attach form MC-025.)*

8. Facts showing that there is no less restrictive means to protect that overriding interest than filing the entire record under seal are *(specify, including facts that show why the law requiring the court to keep the current name and the proposed name confidential, is not sufficient protection of that interest):*

☐ Continued on Attachment 8. *(If you need more space, attach form MC-025.)*

☐ The number of pages attached is:

I declare under penalty of perjury under the laws of the State of California that the foregoing, including statements on all attachments, is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

DRAFT

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO.:
E-MAIL ADDRESS:
ATTORNEY FOR (*name*):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PETITION OF *(name of each petitioner):*

DRAFT

10-09-18

Not approved by the Judicial Council

PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE
☐ **and CHANGE OF NAME**

CASE NUMBER:

Use this form only for a petition relating to a minor. (Petitioners 18 years or older must use form NC-200 or NC-300.) Before you complete this petition, read the *Instructions for Filing* (form NC-500-INFO). Everyone must complete items 1 through 5 and the affidavit on the back. If you are seeking a name change in addition to recognition of gender change, you must also complete items 6, 7, and 8, and form NC-110. If the petition is being brought by a guardian or a dependency attorney appointed as guardian ad litem also complete the NC-510G form.

1. This request is being made by *(minor's present name):* and *(check one of the following)*
   a. ☐ two parents *(names):*
   b. ☐ one parent *(name):*
   c. ☐ near relative *(name and relationship):*
   d. ☐ guardian or dependency attorney appointed as guardian ad litem *(name):*
   e. ☐ other *(specify):*

2. Petitioners request a decree recognizing that minor's gender is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

3. Petitioners request the court to order that a new birth certificate be issued reflecting the gender change sought by this petition.

4. a. Petitioners request that the court issue an order directing any living parent who did not sign this petition to file written objections and appear to show cause why the petition for recognition of gender change should not be granted.

   b. ☐ (*Check if parents are deceased or cannot be located.*) Petitioners request that the court issue an order directing any living grandparent to file written objections and appear to show cause why the petition for recognition of gender change should not be granted.

5. Living parents of petitioning minor who did not sign this petition are (*specify names and addresses, or check a box below*):

   ☐ The minor has no living parent. ☐ The minor has no living parent other than the parent or parents who signed this petition.

6. ☐ Petitioners request that the court decree that the minor's name is changed to conform to minor's gender identity to *(proposed name):*

   (If petitioner has already obtained a decree of change of name, attach a certified copy of the decree to this petition. If no name change is requested, skip items 6, 7, and 8, and go to Affidavit.)

(Continued on next page)

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PETITION OF *(name of each petitioner):*	CASE NUMBER:

7. Petitioners provide the following information in support of this petition:
   a. The affidavit on page 2 of this form.
   ☐ b–f. The information contained in the attachment. *(If seeking a name change, you must attach a completed copy of the attachment* Name and Information About the Person Whose Name Is to Be Changed *(form NC-110).*

8. ☐ The minor named in item 1 is a resident of this county. *(This must be checked if a name change is requested.)*

DECLARATION

I *(minor's present name):* declare under penalty of perjury under the laws of the state of California that the request for a change in gender to *(check one):* ☐ **female** ☐ **male** ☐ **nonbinary** is to conform my legal gender to my gender identity and is not for any fraudulent purpose.

Date:

(TYPE OR PRINT NAME OF MINOR) ▶ (SIGNATURE OF MINOR)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN) ▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN) ▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN) ▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN) ▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

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INSTRUCTIONS FOR FILING PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE (AND CHANGE OF NAME)

1. **Where to File**
   You may file a petition for a court order for recognition of a change of gender for a minor and issuance of a new birth certificate reflecting that change in the superior court of any county in California. (If the minor was born in California, you may file the order with the State Registrar and obtain a new birth certificate.) If your petition **includes a request to change the minor's name**, you must file in the superior court of the county where the minor whose name is to be changed presently resides.

2. **What Forms Are Required**
   You need an original and two copies of each of the following forms:
   a. *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-500)
   b. *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-520) (see item 5 below).
   c. *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330)
   d. *Civil Case Cover Sheet* (form CM-010)
   e. *Declaration of Guardian or Dependency Attorney* (form NC-510G) (if being filed by one of those individuals)

   If you are also seeking a name change for the minor, you also need an original and two copies of the forms listed at f, g, and possibly h below.
   f. *Name and Information About the Person Whose Name Is to Be Changed (Attachment to Petition for Change of Name)* (form NC-110 and, if a guardian is signing the petition, form NC-110G).
   g. *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225) (see item 5 below).
   h. *Decree Changing Name and Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-230)

3. **Completing the Petition**
   Use form NC-500 only for a person under 18. (Adults seeking an order recognizing change of gender must use form NC-200 or NC-300.)
   - Fill out the top left side of the form with your name, address, phone, and e-mail address (or your attorney's, if you have one) and the name and address of the court in which you are filing the form.
   - In item 1, put the name of the minor and the name and relationship of the adult who is signing the petition. One or both parents or a guardian should sign. If neither parent is alive, and there is no guardian, a near relative or friend can sign. Check one of the boxes to show whether the person signing is a parent, guardian, near relative, or other (and describe what the "other" relationship is).
   - Item 2 asks the court for a decree reflecting the minor's new gender. Check the box to indicate what gender the minor has changed to.
   - Item 3 asks the court for an order that a new birth certificate be issued to reflect the change of gender.
   - Item 4 asks the court to issue an order that will give notice to any living parent who did not sign the petition that any objections must be filed with the court. (This order is required by Health & Saf. Code, § 103435(e).) If parents are deceased or cannot be located and he petition is brought by a guardian or dependency attorney appointed as a guardian ad litem, check the box next to 4b to ask the court to issue an order that will give notice to any living grandparent **(A guardian or dependency attorney must also complete form NC-510G)**.
   - In item 5, put the name and address of any living parent of the minor who is not signing the petition. If there are no parents living, or none other than the person or persons signing the petition, check the appropriate box in item 5.
   - If **not asking to change the name of the minor**, you can skip items 6, 7, and 8 on the form and go to the Declaration and signatures required at the end of the form. (See Declaration and Signatures instructions below.)
   - If asking the court to **change the name of the minor** in this petition, complete the following items also:
     - Check the box in the title of the form, in front of "and CHANGE OF NAME."
     - Check item 6, and put the proposed new name in that item. (If you have already obtained a name change decree from a court that you want to have reflected in the new birth certificate, you do not need to get another decree or to check this box, but must attach a certified copy of that name change decree to this form.)
     - Check the box in item 7 and complete an additional form, form NC-110. If guardian or dependency attorney appointed as a guardian ad litem is the adult signing the petition, complete form NC-110G also. That form must be signed by the same adult signing this petition.
     - Check item 8, stating that the minor whose name is to be changed is a resident of the county in which you are filing.
   - *Declaration and Signatures.* The minor may complete (check the box identifying the new gender) and sign the Declaration on the second page of the petition. Be sure the minor reads it carefully, because it is signed under penalty of perjury. The adult named in item 1 must also sign the form, and any living parent may also sign.

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4. **Filing and Filing Fee**
Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition with any attachments required on page one of this information sheet and any order to show cause required below along with the *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition and any order to show cause. A filing fee will be charged unless you qualify for a fee waiver. If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Court Fees and Costs* (form FW-001–INFO).

5. **Requesting a Court Hearing Date and Serving the Order to Show Cause**
A. Petition Requiring a Hearing.
You must request a hearing in the following situations:
   (1) One or more living parents of the minor has not signed the petition. That parent must be given notice and the right to object to the petition.
   (2) Petition is brought by a guardian or a dependency attorney appointed as a guardian ad litem and parents are deceased or cannot be located. In this case, any living grandparents known to petitioners must be given notice and the right to object to the petition.

If a hearing is required, you should request a date for a hearing on the *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520) at least six weeks in the future. Take the completed form to the clerk's office. The clerk will provide the hearing date and location, obtain the judicial officer's signature, file the original, and give you a copy. You must have a copy of the completed *Order to Show Cause* showing the time and place of the hearing served on the nonsigning parent or grandparent at least 30 days before the hearing date, and you must file a Proof of Service with the court (see form NC-121). **If a nonsigning parent or grandparent lives in California, the form must be served on the parent in person. If a nonsigning parent or grandparent lives outside California, the form may be served either in person or by first-class mail requiring return receipt. If such service is not possible or if a nonsigning person lives outside the United States, then you may ask the court that service be done in another way.**

B. Petitions Not Requiring a Hearing.
If all parents of the minor now living have signed the petition, or if there are no living parents and the petition is brought by another adult who is not a guardian or a dependency attorney appointed as a guardian ad litem, then you need not request a hearing date and one of the following will apply:

- **If you are not requesting a name change**, you need not do anything further unless the court asks you to. The court will make the decision based on the petition you filed.

- **If you are requesting a name change in this petition**, you must complete the *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225), take it to the clerk's office to obtain the judicial officer's signature, and file the original. You do not need to serve this form on anyone. If objections are filed within six weeks of the issuance of that form, the court will set a hearing date and send you and the objectors notice of the date, time, and place. If no objections are filed, the court will make the decision based on the petition you filed.

6. **Court Hearing**
If a hearing date was set, but no written objection is filed at least two court days before the hearing, the court may grant the petition without a hearing. Check with the court to find out if a hearing will be held. If a hearing is held, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original order: form NC-230 if your petition included a request for a name change and form NC-330 if it did not ask for a name change.

7. **Domestic Violence Confidentiality Program**
In cases where the petitioner is a participant in the state address confidentiality program (Safe at Home), the petition, the order to show cause, and the name change portion of the petition should, instead of giving the proposed name, indicate that the new name is confidential and on file with the Secretary of State. See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)* (form NC-400-INFO).

8. **Birth Certificate**
If you were born in California, to obtain a new birth certificate reflecting the change of gender or name, file a certified copy of the order within 30 days with the Secretary of State and the State Registrar and pay the applicable fees. You may write or contact the State Registrar at:

California Department of Public Health
Vital Records – MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
Website: *www.cdph.ca.gov*

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name and gender change petitions, and the times when petitions are heard.

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ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:	DRAFT
NAME:	
FIRM NAME:	
STREET ADDRESS:	
CITY: STATE: ZIP CODE:	
TELEPHONE NO.: FAX NO.:	10-09-18
E-MAIL ADDRESS:	
ATTORNEY FOR (*name*):	Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name of each petitioner):* FOR CHANGE OF GENDER (Minor)	
ORDER TO SHOW CAUSE FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE ☐ and CHANGE OF NAME	CASE NUMBER:

☐ TO ALL LIVING PARENTS OF MINOR:

☐ *(If petition brought by guardian or dependency attorney appointed as guardian ad litem)* TO ALL LIVING GRANDPARENTS OF THE MINOR:

1. Petitioner *(name of petitioning adult):* filed a petition for an order recognizing change of gender and issuance of a new birth certificate for *(name of minor):*

2. THE COURT ORDERS that any living parent or, if parents are deceased, grandparent interested in this matter appear before this court at the hearing indicated below to show cause, if any, why the petition should not be granted. Any person objecting to the recognition of gender change described above must file a written objection that includes the reasons for the objection **at least two court days before the matter is scheduled** to be heard, and must appear at the hearing to show cause why the petition should not be granted. If no written objection is timely filed or, even if filed timely, the objector does not appear on the hearing date, the court may grant the petition without a hearing.

NOTICE OF HEARING

a. Date:	Time:	☐ Dept.:	☐ Room:

b. The address of the court is ☐ same as noted above ☐ other *(specify):*

TO ALL LIVING PARENTS OF MINOR:

TO ALL INTERESTED PERSONS:

3. ☐ A petition has been filed seeking change of name from *(minor's current name):*
   to *(proposed name):*

4. ☐ THE COURT ORDERS that any person objecting to the name change described above must file a written objection that includes the reasons for the objection **within six weeks of the date this order is issued.** If no written objection is timely filed, the court will grant the petition without a hearing.

   A hearing date may be set only if an objection is timely filed and shows good cause for opposing the name change. Objections based solely on concerns over the petitioner's actual gender identity or gender assigned at birth shall not constitute good cause. (See Code Civ. Proc., § 1277.5 (c).)

Date:

JUDGE OF THE SUPERIOR COURT

DRAFT

PETITION OF *(Name of petitioner or petitioners):* FOR CHANGE OF NAME	CASE NUMBER:

Attachment of

DECLARATION OF GUARDIAN OR DEPENDENCY ATTORNEY

Supplemental Attachment to Form NC-500

(Guardians appointed by the Juvenile or Probate courts must fill out all items on this page. Dependency attorneys appointed as guardians ad litem pursuant to rules adopted under section 326.5 of Welfare and Institutions Code must only fill out 7a-e.)

7. a. Petitioner *(name)*:
   b. Petitioner's address *(street, city, county, and zip code)*:
   c. Petitioner is the guardian or dependency attorney appointed as guardian ad litem of the following minor whose name is to be changed:
      (1) Name *(present name of child)*:
      (2) Address *(street, city, county, and zip code)*:
   d. Petitioner was appointed guardian or dependency a of the minor identified in item 7c by *(specify)*:
      (1) Superior Court of California, County of *(name)*:
      (2) Department *(check one)*: ☐ Juvenile ☐ Probate
      (3) Case number *(specify)*:
      (4) Date of appointment *(specify)*:
   e. The grandparents of the minor whose name is to be changed are *(provide names and addresses, if known)*:
      (1) Grandfather *(name)*: (address):
      (2) Grandmother *(name)*: (address):
      (3) Grandfather *(name)*: (address):
      (4) Grandmother *(name)*: (address):
   f. The minor identified in item 7c is likely to remain under the guardian's care until the minor reaches the age of majority because *(explain)* :

      ☐ Continued *(if you need additional space, check the box, prepare an Attachment 7f, and attach it to this declaration).*
   g. The minor identified in item 7c is not likely to be returned to the custody of his or her parents because *(explain)*:

      ☐ Continued *(if you need additional space, check the box, prepare an Attachment 7g, and attach it to this declaration).*
   h. Other relevant information about the guardianship and why the proposed name change is in the best interest of the minor *(specify):*

      ☐ Continued *(if you need additional space, check the box, prepare an Attachment 7h, and attach it to this declaration).*

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

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER)

Guardian of *(name of minor):*

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ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER:
NAME:
FIRM NAME:
STREET ADDRESS:
CITY: STATE: ZIP CODE:
TELEPHONE NO.: FAX NO.:
E-MAIL ADDRESS:
ATTORNEY FOR (*name*):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PETITION OF *(name of each petitioner):*

DRAFT

09-27-18

Not approved by the Judicial Council

ORDER RECOGNIZING CHANGE OF MINOR'S GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE

☐ **and DECREE CHANGING NAME** (BY GUARDIAN or DEPENDENCY ATTORNEY)

CASE NUMBER:

1. The petition was duly considered:
   a. ☐ at the hearing on *(date):* in Courtroom: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. All notices required by law have been given.
   b. The person seeking recognition of a change of gender *(specify present name)*: is a minor.
   c. ☐ The petition was filed on behalf of the minor by a dependency attorney appointed as guardian ad litem pursuant to rules adopted under Section 326.5 of Welfare and Institutions Code *(name):*
   d. ☐ The petition was filed on behalf of the minor by the minor's guardian *(name):*
      (1) The minor is likely to remain in the guardian's care until the age of majority.
      (2) The minor whose name is to be changed is not likely to be returned to the custody of his or her parents.
   e. The minor ☐ is not ☐ is required to register as a sex offender under section 290 of the Penal Code.
      This determination was made *(check one):* ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.
   f. ☐ No objections to the proposed recognition of gender change were made.
   g. ☐ Objections to the proposed recognition of gender change of name were made by *(name):*
   h. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient, that the proposed recognition of gender change is in the best interest of the minor, and that the petition should be granted.
   i. ☐ Other findings *(if any):*

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PLAINTIFF:	CASE NUMBER:
DEFENDANT:	

THE COURT ORDERS

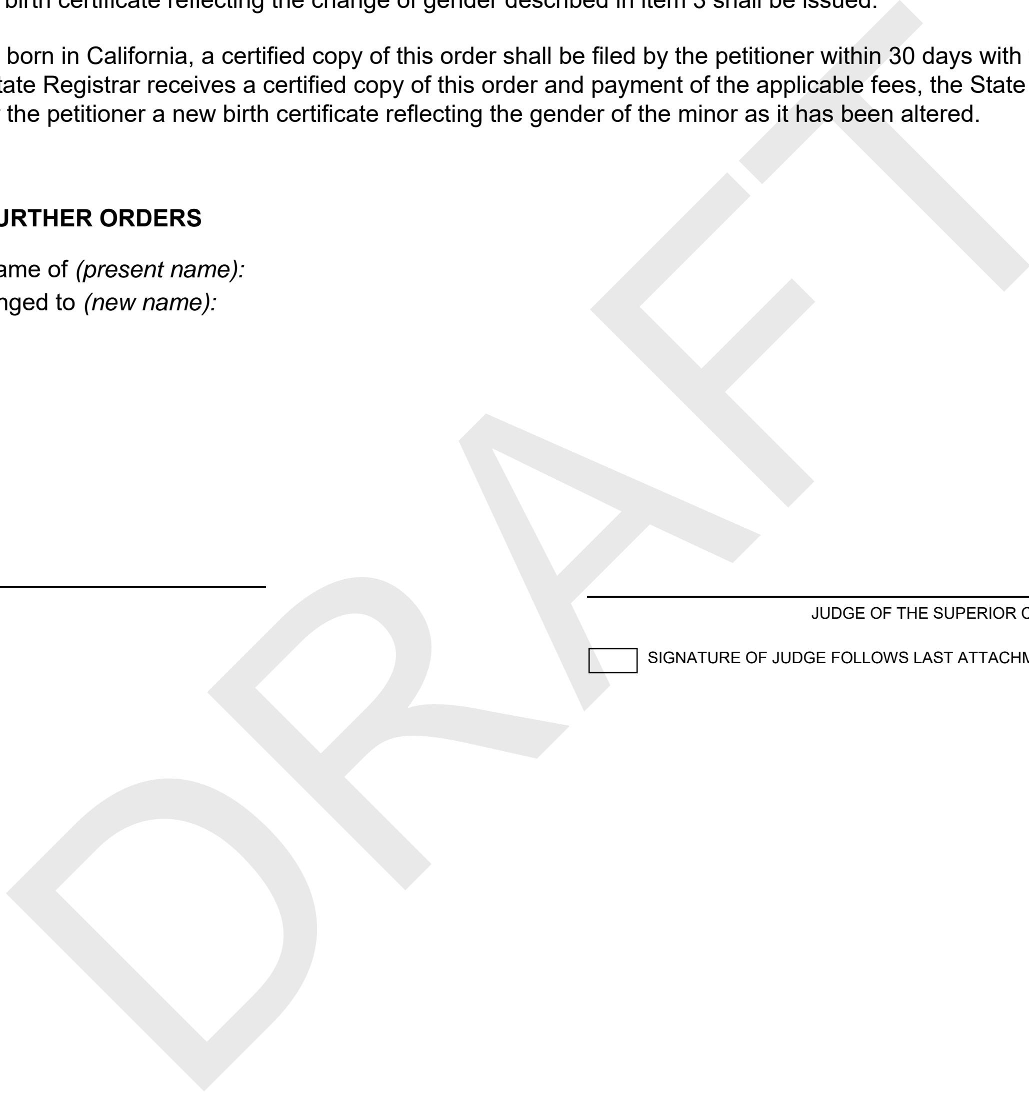
3. The gender of the minor has been changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

4. ☐ A new birth certificate reflecting the change of gender described in item 3 shall be issued.

5. If minor was born in California, a certified copy of this order shall be filed by the petitioner within 30 days with the State Registrar. When the State Registrar receives a certified copy of this order and payment of the applicable fees, the State Registrar shall establish for the petitioner a new birth certificate reflecting the gender of the minor as it has been altered.

THE COURT FURTHER ORDERS

6. ☐ The name of *(present name):*
   is changed to *(new name):*



Date: ____________________________

____
JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE OF JUDGE FOLLOWS LAST ATTACHMENT

Item number: 08

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: October 19, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Protective Orders: Gun Violence Restraining Order Forms
Revise Judicial Council forms EPO-002, GV-100-INFO, GV-100, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, and GV-800-INFO.

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Commitee

Staff contact (name, phone and e-mail): Kristi Morioka, 916-643-7056, kristi.morioka@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved by RUPRO Chair, Justice Hull, on behalf of RUPRO, on September 28, 2018.
Project description from annual agenda: Sb 1200 - Penal Code § 18105 mandates that the council adopt forms to implement provisions in that division of the Penal Code. For the forms that have been adopted to be in compliance with the law, they must be revised to be referred to as "gun violence" restraining orders (rather than the current "firearm" restraining orders); and to reflect that no filing fees are required; and to reflect that the parties must be provided free service by sheriffs.

If requesting July 1 or out of cycle, explain:
Senate Bill 1200 (Stats. 2018, ch. 898) was signed by the governor on September 28, 2018, with an effective date of January 1, 2019. Without imemdiate form revisions, the forms will be out of compliance with the Penal Code, and several important items such as required stautory warnings to restrained persons, free service of process by the sheriff and no filing fees, would not be known to the restrained party or the persons seeking gun violence restraining orders. The advisory committee recommends that the mandatory forms be revised by January 1, 2019, so that they will be in compliance with the new laws when they become effective.

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 29 and 30, 2018:

Title
Protective Orders: Gun Violence Restraining Order Forms

Rules, Forms, Standards, or Statutes Affected
Revise Judicial Council forms EPO-002, GV-100-INFO, GV-100, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, and GV-800-INFO.

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, chair

Agenda Item Type
Action Required

Effective Date
January 1, 2019

Date of Report
October 15, 2018

Contact
Kristi Morioka
916-643-7056
kristi.morioka@jud.ca.gov

Anne M. Ronan
415-865-8933,
anne.ronan@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends revising various Judicial Council gun violence restraining order (GVRO) forms to reflect recently enacted legislative amendments that go into effect January 1, 2019. Recently enacted Senate Bill 1200 (Stats. 2018, ch. 898) prescribes that orders under Penal Code section 18100 et seq. must be referred to as gun violence restraining orders, expands the definition of ammunition to include a magazine, prohibits a filing fee for GVRO forms and documents, requires a law enforcement officer to make a specific request when serving a gun violence restraining order, and provides that parties do not need to pay the sheriff for service of a GVRO. The bill also requires a court hearing within 21 days of issuing an emergency protective order to determine if a restraining order after notice and hearing should be issued. The advisory committee recommends that the mandatory

forms be revised by January 1, 2019, so that the mandatory forms will be in compliance with the new laws when they become effective.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council revise the following forms, effective January 1, 2019:

- *Gun Violence Emergency Protective Order* (form EPO-002),
- *Petition for Gun Violence Restraining Order* (form GV-100),
- *Petition for Gun Violence Restraining Order* (form GV-100-INFO),
- *Notice of Court Hearing* (form GV-109),
- *Temporary Gun Violence Restraining Order* (form GV-110),
- *Request to Continue Court Hearing for Gun Violence Restraining Order* (form GV-115),
- *Notice of New Hearing Date* (form GV-116),
- *Response to Petition for Gun Violence Restraining Order* (form GV-120),
- *How Can I Respond to a Petition for Gun Violence Restraining Order?* (form GV-120-INFO),
- *Gun Violence Restraining Order After Hearing* (form GV-130),
- *Proof of Personal Service* (form GV-200),
- *What Is "Proof of Personal Service"?* (form GV-200-INFO),
- *Proof of Service by Mail* (form GV-250),
- *Request to Terminate Gun Violence Restraining Order* (form GV-600),
- *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* (form GV-610),
- *Response to Request to Terminate Gun Violence Restraining Order* (form GV-620),
- *Order on Request to Terminate Gun Violence Restraining Order* (form GV-630),
- *Request to Renew Gun Violence Restraining Order* (form GV-700),
- *Notice of Hearing on Request to Renew Gun Violence Restraining Order* (form GV-710),
- *Response to Request to Renew Gun Violence Restraining Order* (form GV-720),
- *Order on Request to Renew Gun Violence Restraining Order* (form GV-730), and
- *How Do I Turn In, Sell, or Store My Firearms?* (form GV-800-INFO).

All the forms are being revised to reflect the legislative mandate that issued under Penal Code section 18100 et seq. they must be referred to as gun violence restraining orders. Form EPO-002 is being revised to reflect the new requirement that the court hold a hearing within 21 days of issuing an ex parte gun violence restraining order to determine whether an order should be issued after notice and hearing. Forms GV-100-INFO, GV-100, GV-110, GV-130, GV-730, and EPO-002 are also being revised to reflect the expanded definition of ammunition, including magazine, defined as ammunition feeding devices, and the revised mandated notice to the restrained party. The information sheets and the order forms are also being revised to reflect the statute's new provisions eliminating filing fees and fees to the parties for service of orders by the sheriff.

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The revised forms are attached at pages 7-56.

Relevant Previous Council Action

The Gun Violence Restraining Orders Act,[1] enacted in 2014 and operative January 1, 2016, provided a civil process to obtain a court order requiring a person who poses an imminent significant danger of personal injury to himself, herself, or others to surrender—and prohibiting him or her from possessing—firearms and ammunition before the person uses a firearm to commit a crime. At the December 11, 2015 meeting, the Judicial Council adopted 23 new gun violence restraining order (GVRO) forms, effective January 1, 2016, to implement that act, including an amendment to the original act the allowed parties subject to GVROs to store firearms with gun dealers, rather than sell them or hand them over to law enforcement.[2]

There have been minor revisions to the forms since that time. Form GV-116, *Notice of New Hearing Date*, was revised effective January 1, 2017, to structure it as a court order so that it can be entered into the California Law Enforcement Telecommunications System (CLETS). The *Petition for Firearms Restraining Order* (form GV-100) was revised effective January 1, 2018 to clarify that references to an "immediate order" were to a temporary restraining order, and to note whether a request for such an order was with notice. Form GV-120, *Response to Petition for Gun Violence Restraining Order*, was revised effective January 1, 2018 to include additional space so that if a responding party disagrees with the request, he or she may provide an explanation why directly on the form.

Analysis/Rationale

Following the passage of Senate Bill 1200 (Stats. 2018, ch. 898), almost all the GVRO forms require revisions to comply with the new legislation, which is effective January 1, 2019.[3] This bill requires that orders pursuant to this section are referred to as gun violence restraining orders, it expands the definition of ammunition to include a magazine, and it prohibits a filing fee for GVRO forms and documents. This bill also requires a law enforcement officer to verbally inquire whether the restrained person has any firearms, ammunition, or magazines in their possession or within their custody or control when serving a gun violence restraining order, and it provides that parties do not need to pay the sheriff for service of a GVRO.

The changes that have been made to the proposed GVRO forms are described below.

Change in form titles

Section 18105 of the Penal Code is amended by SB 1200 to require that all "forms, orders, and documents shall refer to any order issued pursuant to this chapter as a gun violence restraining order," necessitating a name change for all of the forms that are currently titled as "firearms

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[1] See Stats. 2014, ch. 872; AB 1014, sometimes referred to as "the Skinner Bill.". (Pen. Code, § 18100, et. seq.).
[2] See AB 950 (Stats. 2015, ch. 205), amending Penal Code section 18120.

[3] Senate Bill 1200 may be viewed at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1200.* References hereafter to the provisions of the bill are to "new Penal Code § ___".

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restraining orders" and revisions to the other GVRO forms where these forms are referenced by name. This change is applicable to all of the GVRO forms that the committee is recommending be revised.

Expanded definition of ammunition

Section 18100 of the Penal Code is amended by SB 1200 to expand the definition of ammunition to include a magazine as defined in Penal Code section 16980, which is "any ammunition feeding device." The statutory amendments also require expanding the currently mandated language on several forms regarding surrendering firearms and ammunition to specifically include magazines. This new language must be included in the emergency GVRO (new Penal Code, section 18135), the temporary GVRO (new Penal Code, section 18160), and the gun violence restraining order after hearing (new Penal Code, section 18180). The forms that need to be revised as a result of these changes are the following:

- *Petition for Gun Violence Restraining Order* (form GV-100)[4] (item 6),
- *Petition for Gun Violence Restraining Order* (form GV-100-INFO) [5] (items: What do I have to prove to get the order? And How can I convince the judge?),
- *Temporary Gun Violence Restraining Order* (form GV-110), (items 4, 5, Warnings and Notices to the Respondent, After You Have Been Served with a Temporary Order, and Instructions for Law Enforcement),
- *Gun Violence Restraining Order After Hearing* (form GV-130) (items 5, 6, Warnings and Notices to the Respondent, and Instructions for Law Enforcement),
- *Order on Request to Renew Gun Violence Restraining Order* (form GV-730) (items 4a. and 4c.), and
- *Gun Violence Emergency Protective Order* (form EPO-002) (items 2, 4, 5, Warnings and Information to the Restrained Person, and To law enforcement).

Elimination of filing fees

Section 18121 is added to the Penal Code, which provides that there are no filing fees for an application, a responsive pleading, an order to show cause, or a subpoena filed in connection with the application for a gun violence restraining order. The forms that need to be revised to reflect this change are the following:

- *Petition for Gun Violence Restraining Order* (form GV-100) (item 8),
- *Petition for Gun Violence Restraining Order* (form GV-100-INFO) (item: Will I have to pay a filing fee to request the order?), and
- *How Can I Respond to a Petition for Gun Violence Restraining Order?* (form GV-120-INFO) (item: Will I have to pay a filing fee?).

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[4] The committee corrected the numbering of this form starting with item number 4.

[5] While revising this form to reflect the statutory changes, the committee also corrected a reference to the Domestic Violence Prevention Act in the question, "Will the order protect me in other ways, such as keeping the person from coming near me?"

DRAFT

New instruction to law enforcement
Sections 18135 and 18160 of the Penal Code are amended by SB 1200 to add a requirement that, when serving a temporary or gun violence restraining order after hearing, the law enforcement officer must "verbally ask the restrained person if he or she has any firearm, ammunition, or magazine in his or her possession or under his or her custody or control." This requirement is being added to the instructions to law enforcement on the GVRO order forms. The forms on which the instructions are being revised as a result of these amendments are the following:

- *Temporary Gun Violence Restraining Order* (form GV-110), (on page 4),
- *Gun Violence Restraining Order After Hearing* (form GV-130) (on page 4), and
- *Gun Violence Emergency Protective Order* (form EPO-002) (on page 2).

Information about new hearing requirement for Emergency Protective Orders.
New Penal Code section 18148 is added by SB 1200 and requires the court that issues the order or another court in the same jurisdiction to hold a hearing within 21 days after the date on the order to determine if a gun violence restraining order should be issued after notice and hearing. The *Gun Violence Emergency Protective Order* (form EPO-002) is being revised on page 2 to provide information to the restrained party that such a hearing will be held and that the court might extend the GVRO at that time.

Free service of process by the sheriff.
Section 6103.2 of the Government Code is amended by SB 1200 to provide that parties do not need to pay the sheriff for service of a GVRO; such service is added to the types of service for which sheriffs are to be reimbursed by the court. This information is being added to the information sheet and petitions for the parties. The following forms are being revised to reflect this statutory change.

- *Petition for Gun Violence Restraining Order* (form GV-100) (item 8),
- *Petition for Gun Violence Restraining Order* (form GV-100-INFO) (item: How will the person to be restrained know about the order?),
- *Temporary Gun Violence Restraining Order* (form GV-110) (item 5),
- *Notice of New Hearing Date* (form GV-116) (item 6),
- *Gun Violence Restraining Order After Hearing* (form GV-130) (item 6),
- *What Is "Proof of Personal Service"?* (form GV-200-INFO) (item: Who can serve?).

Comments
The forms have not yet been circulated for comments but must be approved expeditiously because the new law will be in effect in January 1, 2019, and at that time the current forms will not be correct. Under the current forms, the notices to the parties will be not be as mandated by statute, and the instructions to law enforcement will be incomplete. Without the revised forms, those bringing petitions for gun violence restraining orders will not know that the restraining order can be filed for free, and if granted, also served for free by the sheriff.

DRAFT

The committee will request that the Rules and Projects Committee approve circulation for comment after adoption in the winter cycle, and will return to the council with recommendations for further modifications if appropriate.

Alternatives considered

Because the forms will be incorrect under the new laws if not revised, the only alternative considered was when to recommend approval of the proposed revisions. As discussed above, the committee concluded it was better to amend now than to circulate for comment first and have incorrect forms in use for the next several months.

Fiscal and Operational Impacts

There will need to be training for clerks, judicial officers, and court legal services and self-help offices on the new statutory requirements, and how these new and revised forms reflect those changes. However, because the statutory changes will be in effect by January 1, the courts will need the revised forms to be in effect by that time.

Attachments and Links

1. Judicial Council forms EPO-002, GV-100-INFO, GV-100, GV-109, GV-110, GV-115, GV-116, GV-120, GV-120-INFO, GV-130, GV-200, GV-200-INFO, GV-250, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, GV-720, GV-730, GV-800-INFO at pages 7-56.

2. Link: Senate Bill 1200 (Stats. 2018, ch. 898), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1200.*

DRAFT

EPO-002
GUN VIOLENCE EMERGENCY PROTECTIVE ORDER

DRAFT 10/16/18

LAW ENFORCEMENT CASE NUMBER:

1. **RESTRAINED PERSON** *(insert name of subject):* ______

Sex: ☐ M ☐ F Ht.: ______ Wt.: ____ Hair color: ____ Eye color: ____ Race: _______ Age: ____ Date of birth: ______

2. **TO THE RESTRAINED PERSON** *(Also see important Warnings and Information on Page 2)*: **YOU MUST NOT** own, possess, purchase, receive, or attempt to purchase or receive any firearms, ammunition, or magazines (any ammunition feeding devices). If you have any firearms, ammunition, or magazines, you **MUST IMMEDIATELY SURRENDER THEM IN A SAFE MANNER TO LAW ENFORCEMENT ON REQUEST.** If no request has been made, you must surrender any firearms, ammunition, or magazines in a safe manner to your local law enforcement agency or sell them to or store them with a licensed gun dealer **within 24 hours** of being served with this order. You must **file a receipt proving surrender, sale, or storage with the Court listed below within 48 hours,** or if the court is closed, then on the next business day after the firearms, ammunition, or magazines are surrendered or sold. **FAILURE TO TIMELY FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**
(Name and address of court):

3. **THIS ORDER WILL EXPIRE ON:** ______ **TIME** ______
INSERT DATE OF 21st CALENDAR DAY (DO NOT COUNT DAY THE ORDER IS GRANTED)

4. Reasonable grounds for the issuance of this Order exist, and a Gun Violence Emergency Protective Order (1) is necessary because the Restrained Person poses an immediate danger of causing personal injury to himself or herself or to another by having custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines; **and** (2) less restrictive alternatives were ineffective or have been determined to be inadequate or inappropriate under the circumstances.

5. **To the Restrained Person: This order will last until the expiration date and time noted above. You are required to surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine while this order is in effect. However a more permanent gun violence restraining order may be obtained from the court. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.**

Judicial officer *(name):* granted this Order on *(date):* at *(time):*

APPLICATION

6. Officer has a reasonable cause to believe that the grounds set forth in item 4, above, exist *(state supporting facts and dates; specify weapons—number, type and location):*

7. ☐ Firearms were ☐ observed ☐ reported ☐ searched for ☐ seized.
☐ Ammunition (including magazines) was ☐ observed ☐ reported ☐ searched for ☐ seized.

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

By: ______ (PRINT NAME OF LAW ENFORCEMENT OFFICER) ▶ ______ (SIGNATURE OF LAW ENFORCEMENT OFFICER)

Agency: Telephone No.: Badge No.:

PROOF OF SERVICE

8. Person served *(name):* ______
9. I personally delivered copies of this Order to the person served as follows: Date: ______ Time: ______
Address:
10. At the time of service, I was at least 18 years of age. ☐ I am a California law enforcement officer.
11. My name, address, and telephone number are *(this does not have to be server's home telephone number or address):*

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

Date: ______ ______ (TYPE OR PRINT NAME OF SERVER) ▶ ______ (SIGNATURE OF SERVER)

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GUN VIOLENCE EMERGENCY PROTECTIVE ORDER
WARNINGS AND INFORMATION

TO THE RESTRAINED PERSON: You are prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm, ammunition, or a magazine. (Pen. Code, § 18125 et seq.) A violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.)

Within 24 hours of receipt of this order, you must turn in all firearms, ammunition, and magazines to a law enforcement agency or sell them to or store them with a licensed firearms dealer until the expiration of this order. (Pen. Code, § 18125 et seq.) A receipt proving surrender, sale, or storage must be filed with the court within 48 hours of receipt of this order, or on the next court business day if the 48 hour period ends on a day when the court is closed. You must also file the receipt with the law enforcement agency that served you with this Order. You may use Form GV-800, *Proof of Firearms Turned In, Sold, or Stored* for this purpose.

This Gun Violence Emergency Protective Order is effective when made. It will last until the date and time in item 3 on the front. The court will hold a hearing within 21 days to determine if a longer term order should be issued.

A law enforcement officer or agency or a family member may seek a more permanent restraining order from the court.

If you violate this order, you will also be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for an additional five-year period, to begin on the expiration of the more permanent gun violence restraining order. (Pen. Code, § 18205.)

This protective order must be enforced by all law enforcement officers in the State of California who are aware of it or shown a copy of it. The terms and conditions of this order remain enforceable regardless of the acts or any agreement of the parties; it may be changed only by order of the court.

A la persona restringida: Tiene prohibido ser dueño de un arma de fuego, municiones o cargadores, poseer, comprar o tratar de comprar, recibir o tratar de recibir u obtener un arma de fuego, municiones o cargadores de alguna otra manera. (Código Penal, §§ 18125 y siguientes). Una violación de esta orden está sujeta a una multa de $1000 y encarcelamiento de seis meses o ambos. (Código Penal, §§ 19 y 18205.)

Dentro de las 24 horas de recibir esta orden, tiene que entregar sus armas de fuego, municiones y cargadores a una agencia del orden público o venderlos a, o almacenarlos con, un comerciante de armas autorizado hasta el vencimiento de esta orden. (Código Penal, §§ 18125 y siguientes). Dentro de las 48 horas de recibir esta orden, se tiene que presentar a la corte una prueba de haberlos entregado, vendido, o almacenado. Se puede usar el formulario GV-800, *Prueba de entrega, venta o almacenamiento de armas de fuego*, por este propósito.

Esta orden de protección de emergencia de armas de fuego entra en vigencia en el momento en que se emite. Durará hasta la fecha y hora indicadas en el punto 3 al otro lado. Se realizará una audiencia dentro de 21 días para determinar si es necesario emitir una orden que dure por más tiempo.

Un agente o agencia del orden público o un familiar puede solicitar una orden de restricción más permanente de la corte. Si está en violación de este orden de restricción, se le prohibirá tener en su posesión o control, comprar, poseer o recibir, o intentar comprar o recibir un arma de fuego, municiones o cargadores por otro periodo de cinco años más, comenzando a partir del vencimiento de la orden de restricción de armas de fuego más permanente. (Código Penal, § 18205.)

Todo agente del orden público del estado de California que tenga conocimiento de la orden o a quien se le muestre una copia de la misma deberá hacer cumplir esta orden de protección. Los términos y condiciones de esta orden se podrán hacer cumplir independientemente de las acciones de las partes; solo la corte podrá cambiar esta orden.

To law enforcement: The Gun Violence Emergency Protective Order must be served on the restrained person by the officer if the restrained person can reasonably be located. Ask the restrained person if he or she has any firearms, ammunition, or magazines in his or her possession or under his or her custody or control. A copy must be filed with the court as soon as practicable after issuance. Also, the officer must have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice.

The provisions in this Temporary Gun Violence Emergency Protective Order do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

GV-100 Petition for Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT

10-15-18

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

Read *Can a Gun Violence Restraining Order Help Me?* (form GV-100-INFO) before completing this form.

1 Petitioner

a. Your Full Name: ______________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______________________

b. Your Lawyer *(if you have one for this case):*
Name: ______________________ State Bar No.: ________
Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*
Address: ______________________
City: ______________ State: ____ Zip: ________
Telephone: ______________ Fax: ______________
E-Mail Address: ______________________

2 Respondent

Full Name: ______________________ Age: ______
Address *(if known):* ______________________
City: ______________ State: ____ Zip: ________

3 Venue

Why are you filing in this county? *(Check all that apply):*
a. ☐ The Respondent lives in this county.
b. ☐ Other *(specify):* ______________________

4 Other Court Cases

a. Are you aware of any other court cases, civil or criminal, involving the Respondent?
☐ Yes ☐ No *If yes, on the next page, check each kind of case and give as much information as you know as to where and when each was filed:*

This is not a Court Order.

4 a.

	Kind of Case	Filed in *(County/State)*	Year Filed	Case Number *(if known)*
(1)	☐ Civil Harassment			
(2)	☐ Domestic Violence			
(3)	☐ Divorce, Nullity, Legal Separation			
(4)	☐ Paternity, Parentage, Child Custody			
(5)	☐ Elder or Dependent Adult Abuse			
(6)	☐ Eviction			
(7)	☐ Workplace Violence			
(8)	☐ Criminal			
(9)	☐ Other *(specify)*:			

b. Are there now any protective or restraining orders in effect relating to Respondent?
☐ Yes ☐ No ☐ I don't know *If yes, attach a copy if you have one.*

5 Description of Respondent's Firearms, Ammunition, or Magazines

If you have reason to believe that the respondent is in possession of firearms, ammunition, or magazines, answer (a) or check (b).

a. ☐ I am informed, and on that basis believe, that Respondent currently possesses or controls the following firearms, ammunition or magazines. (*Describe the number, types, and locations of any firearms, ammunition, or magazines that you believe that the Respondent currently possesses or controls)*:

b. ☐ I am informed, and on that basis believe, that Respondent currently possesses or controls firearms, ammunition, or magazines, but I have no further specific information as to the number, types, and locations of those firearms, ammunition, or magazines.

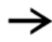
6 Grounds for Issuance of a Gun Violence Restraining Order

I have reasonable cause to believe both of the following are true:

a. The Respondent poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm, ammunition, or a magazine.

This is not a Court Order.

DRAFT



6 b. A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

c. The facts supporting the above statements are set forth:

☐ Below

☐ On the attached form MC-031, *Attached Declaration*

7 Request for Gun Violence Restraining Order

I request that the court issue an order prohibiting Respondent from having in his or her custody or control, owning, purchasing, possessing or receiving, or attempting to purchase or receive, any firearms, ammunition, or magazines. I further request that Respondent be ordered to immediately surrender all firearms, ammunition, and magazines currently in his or her possession to a law enforcement officer or to sell the firearms, ammunition, and magazines to or store them with a licensed gun dealer.

8 No Fee to Serve (Notify) Restrained Person

If you want the sheriff or marshal to serve (notify) the restrained person about the orders, he or she will do it for free.

9 Request for Hearing

I request that the court set a hearing in this matter for the purpose of issuing a gun violence restraining order that will last for one year.

This is not a Court Order.

DRAFT

10 ☐ Temporary Restraining Order

I request that a Temporary Gun Violence Restraining Order (TRO) be issued against the Respondent to last until the hearing. I am presenting form GV-110, *Temporary Restraining Order,* for the court's signature together with this Petition.

Has the Respondent been told that you were going to court to seek a TRO against him/her?

☐ Yes ☐ No *(If you answered no, explain why below):*

☐ Reasons stated in Attachment 9.

____

____

____

11 ☐ Request to Give Less Than Five Days' Notice of Hearing

You must have your papers personally served on Respondent at least five calendar days before the hearing, unless the court orders a shorter time for service. (Form GV-200-INFO explains What Is "Proof of Personal Service"? *Form GV-200,* Proof of Personal Service*, may be used to show the court that the papers have been served.)*

If you want there to be fewer than five days between service and the hearing, explain why below:

☐ Reasons stated in Attachment 10.

____

____

____

____

____

____

____

12 Number of pages attached to this form, if any: ______

Date: ______________________________

______________________________ ▶ ______________________________

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: ______________________________

______________________________ ▶ ______________________________

Type or print your name *Sign your name*

This is not a Court Order.

DRAFT

GV-100-INFO Can a Gun Violence Restraining Order Help Me?

These instructions cannot cover all of the questions that may arise in a particular case. If you do not know what to do to protect your rights, you should see a lawyer or a self-help center.

What is a gun violence restraining order?

It is a court order that prohibits someone from having any guns, ammunition, or magazines (ammunition feeding devices). The person must surrender all guns, ammunition, and magazines that he or she currently owns.

Can I get a gun violence restraining order against someone?

You can ask for one against a person who is an immediate family member. Immediate family members include (1) your spouse or domestic partner; (2) your parents, children, siblings, grandparents, and grandchildren and their spouses, including any stepparent or stepgrandparent; (3) your spouse's parents, children (your stepchildren), siblings, grandparents, and grandchildren; and (4) any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household. If you do not have the necessary relationship, advise a law enforcement officer of the situation. The officer may investigate and file the petition if he or she finds that the grounds exist.

Will the order protect me in other ways, such as keeping the person from coming near me?

No, the only order the court can make is to force the person to not have firearms, ammunition, or magazines. If you need personal protection from a family member, you should proceed under the Domestic Violence Prevention Act. See Form DV-500-INFO, *Can a Domestic Violence Restraining Order Help Me?,* for information on how to proceed.

Will I have to pay a filing fee to request the order?

No.

What forms do I need to get the order?

You must fill out all of Form GV-100, *Petition for Gun Violence Restraining Order*, and Form CLETS-001, *Confidential CLETS Information*. You must also fill out items 1 and 2 on Form GV-109, *Notice of Court Hearing,* and items 1 and 2 on Form GV-110, *Temporary Gun Violence Restraining Order.*

Where can I get these forms?

You can get the forms from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find them at your local courthouse or county law library.

What do I need to do to get the order?

You must go to the superior court in the county where the person to be restrained lives. At the court, ask where you should file your request for a gun violence restraining order. (A self-help center or legal aid association may be able to assist you in filing your request.) Give your forms to the clerk of the court. The clerk will give you a hearing date on the *Notice of Court Hearing* form.

How soon can I get the order?

You can ask for a *Temporary Gun Violence Restraining Order*, which will be effective right away if granted. The court may decide whether or not to grant the temporary order based only on the facts that you have stated in your petition. If so, the court will decide within 24 hours whether or not to make the temporary order. Sometimes the court will want to examine you personally under oath. The clerk will tell you whether you should wait to talk to the judge or come back later to find out if the court has signed a temporary order.

If you don't ask for a temporary restraining order, you will have to wait until the hearing, at which the court will decide whether to make an order that will last for one year.

How will the person to be restrained know about the order?

If the court issues a temporary restraining order, someone age 18 or older—**not you**—must personally "serve" (give) the person to be restrained a copy of the order. The server must then fill out Form GV-200, *Proof of Personal Service,* and give it to you to file with the court. If the person to be restrained attends the hearing, no further proof of service is required. But if he or she does not attend the hearing, then any order issued at the hearing must also be personally served. For help with service, ask the court clerk for Form GV-200-INFO, *What Is "Proof of Personal Service?"* Note: A sheriff or marshal can serve the order a no cost to you.

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What do I have to prove to get the order?

You will have to convince the judge that the person to be restrained poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines.

You will also have to convince the judge that a gun violence restraining order is needed to prevent personal injury to the person to be restrained or to another person because less restrictive alternatives either have been tried and haven't worked, or are inadequate or inappropriate for the current circumstances.

How can I convince the judge?

You will need to give the judge specific information. You should tell the judge everything that you know about the firearms, ammunition or magazines that the person to be restrained currently owns, including how many the person owns, the types, and where they are kept.

Then you will need to present facts to show that the person to be restrained is dangerous. This could be information about any threat of violence that the person to be restrained has made, any violent incident in which the person has been involved, or any crime of violence the person has committed. It could also be evidence that the person to be restrained has violated a protective order or abuses controlled substances or alcohol. It could also be evidence of the unlawful and reckless use, display, or brandishing of a firearm or the recent acquisition of a firearm. Or it could be evidence that the person to be restrained has been identified by a mental health provider as someone prohibited from purchasing, possessing or controlling any firearms.

You should include all of this information in your Petition and also be prepared to present it to the judge at the hearing.

Do I have to go to court?

Yes. Go to court on the date the clerk gives you.

Will I see the restrained person at the court hearing?

If the person comes to the hearing, yes. If you are afraid, tell the court officer.

Can I bring someone with me to court?

Yes. You can bring someone to sit with you during the hearing, but that person cannot speak for you in court. Only you or your lawyer (if you have one) can speak for you.

Do I need to bring a witness to the hearing?

Witnesses are not required, but it helps to have more proof than just your word. For example, consider bringing:

- Witnesses
- Written statements from witnesses made under oath
- Photos
- Medical or police reports
- Damaged property
- Threatening letters, e-mails, or telephone messages

The court may or may not let witnesses speak at the hearing. So, if possible, you should bring their written statements under oath to the hearing. (You can use Form MC-030, *Declaration,* for this purpose.)

GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Petitioner

a. Your Full Name: ______

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by *(name of law enforcement agency)*: ______

b. Your Lawyer *(if you have one for this case):*
Name: ______ State Bar No.: ______
Firm Name: ______

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*
Address: ______
City: ______ State: ___ Zip: ______
Telephone: ______ Fax: ______
E-Mail Address: ______

2 Respondent

Full Name: ______

3 Hearing

The court will complete the rest of this form.

Hearing Date → Date: ______ Time: ______
Dept.: ______ Room: ______

Name and address of court if different from above: ______

4 Temporary Gun Violence Restraining Order *(Any order granted is on Form GV-110, served with this notice.)*

a. A Temporary Gun Violence Restraining Order as requested in Form GV-100, *Petition for Gun Violence Restraining Order*, is *(check only one box below):*
(1) ☐ **GRANTED** until the court hearing.
(2) ☐ **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

Judicial Council of California, www.courts.ca.gov
Rev. January 1, 2019, Mandatory Form
Penal Code, § 18100 et seq.
Approved by DOJ

Notice of Court Hearing
(Gun Violence Prevention)

GV-109, Page 1 of 3 →

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required and you are not entitled to a free court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

How long does the order last?

If the court makes a temporary order, it will last until your hearing date, which must be within 21 days of the date of the temporary order. If at the hearing the court issues a more permanent order, it will last for one year. It may be renewed for additional one-year periods.

What if the restrained person does not obey the order?

Call the police. The restrained person can be arrested and charged with a crime.

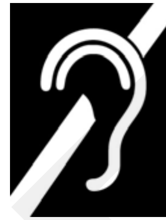
Can I agree with the restrained person to terminate the order?

No. Once the order is issued, only the judge can change or terminate it. The restrained person would have to file a request with the court to terminate the order.

What if I need help to understand English?

When you file your papers, ask your court's clerk or self-help center if your court will provide an interpreter for you at no cost. If not, you will have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?



Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

DRAFT

GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

DRAFT
10-15-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Petitioner

a. Your Full Name: ______________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______________________

b. Your Lawyer *(if you have one for this case):*
Name: ______________ State Bar No.: ________
Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*
Address: ______________________
City: ______________ State: _____ Zip: ________
Telephone: ______________ Fax: ______________
E-Mail Address: ______________________

2 Respondent

Full Name: ______________________

3 Hearing

The court will complete the rest of this form.

Hearing Date → Date: __________ Time: __________
Dept.: __________ Room: __________

Name and address of court if different from above:
____
____
____
____

4 Temporary Gun Violence Restraining Order *(Any order granted is on Form GV-110, served with this notice.)*

a. A Temporary Gun Violence Restraining Order as requested in Form GV-100, *Petition for Gun Violence Restraining Order,* is *(check only one box below):*

(1) ☐ **GRANTED** until the court hearing.

(2) ☐ **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

b. Reasons for denial of a Temporary Gun Violence Restraining Order as requested in Form GV-100, *Petition for Gun Violence Restraining Order,* are:

(1) ☐ The facts as stated in Form GV-100 do not show that there is a substantial likelihood that both of the following are true:

Respondent poses a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

(2) ☐ Other *(as set forth):* ☐ Below ☐ On Attachment 4b(2).

____

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5 Service of Documents on Respondent

At least ☐ **five** ☐ ________ **calendar days before the hearing**, a law enforcement officer or someone age 18 or older—**and not a party to the action**—must personally give (serve) a court file-stamped copy of this Form GV-109 to the Respondent, along with a copy of all the forms indicated below:

a. GV-100, *Petition for Gun Violence Restraining Order* (file-stamped)

b. ☐ GV-110, *Temporary Gun Violence Restraining Order* (file-stamped) **IF GRANTED**

c. GV-120, *Response to Petition for Gun Violence Restraining Order* (blank form)

d. GV-120-INFO, *How Can I Respond to a Request for a Gun Violence Restraining Order?*

e. GV-250, *Proof of Service of Response by Mail* (blank form)

f. ☐ Other *(specify):* ______________________________

Date: ______________________ ______________________________

Judicial Officer

To the Petitioner in 1 :

- The court cannot make an order at the court hearing unless the Respondent has been personally given (served) a copy of the Petition and a temporary order if issued. To show that the Respondent has been served, the person who served the forms must fill out a proof of service form. Form GV-200, *Proof of Personal Service,* may be used.
- For information about service, read Form GV-200-INFO, *What Is "Proof of Personal Service"?*
- If you are unable to serve the Respondent in time, you may ask for a later hearing date, which will give you more time to serve the documents. Use Form GV-115, *Request to Continue Court Hearing for Gun Violence Restraining Order*.

Case Number:

To the Respondent:

- If you want to respond to the *Petition for Gun Violence Restraining Order* in writing, file Form GV-120, *Response to Petition for Gun Violence Restraining Order* and have someone age 18 or older—**not you**—mail it to the Petitioner.
- The person who mailed the form must fill out a proof of service form. Form GV-250, *Proof of Service by Mail,* may be used. File the completed form with the court before the hearing and bring a copy with you to the court hearing.
- Whether or not you respond in writing, go to the hearing if you want the judge to hear from you before making an order. You may tell the judge why you agree or disagree with the order requested.
- You may bring witnesses and other evidence.
- At the hearing, the judge may order you to turn in to law enforcement, or sell to or store with, a licensed gun dealer, any firearms, ammunition, or magazines that you own or possess. If issued, the order will last for one year.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Court Hearing* is a true and correct copy of the original on file in the court.

Clerk's Certificate
[seal]

Date: ______________________________

Clerk, by ______________________________, Deputy

DRAFT

GV-110 Temporary Gun Violence Restraining Order

Petitioner must complete items (1) and (2) only.

Clerk stamps date here when form is filed.

DRAFT

10-15-18

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Petitioner

a. Your Full Name: ______________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______________________

b. Your Lawyer *(if you have one for this case):*
Name: ______________ State Bar No.: ________
Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*
Address: ______________________
City: ______________ State: ____ Zip: ________
Telephone: ______________ Fax: ______________
E-Mail Address: ______________________

(2) Respondent

Full Name: ______________________
Description:

Sex: ☐ M ☐ F Height: ________ Weight: ________ Date of Birth: ______________
Hair Color: ________ Eye Color: ________ Age: ____ Race: ______________
Home Address *(if known)*: ______________________
City: ______________ State: ______ Zip: ________
Relationship to Petitioner: ______________________

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at the end of the hearing scheduled for the date and time below:

Date: ______________ Time: ______________ ☐ a.m. ☐ p.m.

This is a Court Order.

4 Findings

☐ Having examined ☐ Petitioner ☐ and other witnesses under oath,

☐ Having considered the declarations of ☐ Petitioner ☐ and other witnesses under penalty of perjury,

a. The court finds that there is a substantial likelihood that both of the following are true:

(1) Respondent poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines.

(2) A temporary gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that Respondent owns or possesses one or more firearms, ammunition, or magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

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☐ See the attached Form MC-025, *Attachment*

5 No Fee to Serve (Notify) Restrained Person

If the sheriff or marshal serves this order, he or she will do it for free.

This is a Court Order.

(6) Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition, including magazines (ammunition feeding devices).

b. The court has received credible information that you own or possess one or more firearms that have not been surrendered or sold. You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to him or her, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this order. You may do so by:

(1) surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or

(2) selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or

(3) storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order or any more permanent order granted at the hearing in item (3) is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms have been turned in, sold, or stored. *(You may use Form GV-800,* Proof of Firearms Turned In, Sold, or Stored *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

(7) Number of pages attached to this Order, if any: ______

Date: ______________________________

____
Judicial Officer

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. You are required to surrender all firearms, ammunition and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, a firearm, ammunition, or magazine while this order is in effect. A hearing will be held on the date and at the time noted on Page 1 to determine if a more permanent gun violence restraining order should be issued. Failure to appear at the hearing may result in a court making an order against you that is valid for one year. You may seek the advice of an attorney as to any matter connected with the Order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

Violation of this Order is a misdemeanor. If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be changed only by an order of the court.

This is a Court Order.

Case Number:

After You Have Been Served With a Temporary Order

- Obey the order by turning in all firearms, ammunition, and magazines to a law enforcement agency or selling them to or storing them with a licensed gun dealer.
- Read Form GV-120-INFO, *How Can I Respond to a Petition for Gun Violence Restraining Order?,* to learn how to respond to this Order.
- If you want to respond, fill out Form GV-120, *Response to Petition for Gun Violence Restraining Order,* and file it with the court clerk.
- You must have Form GV-120 served by mail on the Petitioner or the Petitioner's attorney. You cannot do this yourself. The person who does the mailing should complete and sign Form GV-250, *Proof of Service of Response by Mail*. File the completed proof of service with the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and have declarations served, signed by you and other persons who have personal knowledge of the facts. You may use Form MC-030, *Declaration,* for this purpose. It is available from the clerk's office at the court shown on page 1 of this form or at *www.courts.ca.gov/forms*. If you do not know how to prepare a declaration, you should see a lawyer.
- Whether or not you file a response, you should attend the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, the judge can make a gun violence restraining order against you that lasts for one year. Tell the judge why you disagree with the order requested.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Respondent must do the following:

- Ask the restrained person if he or she has any firearms, ammunition, or magazines in his or her possession or under his or her custody or control.
- Order the Respondent to immediately surrender all firearms, ammunition, and magazines to him or her.
- Issue a receipt to the Respondent for all firearms, ammunition, or magazines that he or she has surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms, Ammunition, or Magazines

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the termination or expiration of this Order or of any other gun violence restraining order issued by the court.
- On the expiration of this Order or of any later gun violence restraining order issued by the court, return the firearms, ammunition, or magazines to the respondent as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.

This is a Court Order.

Instructions for Law Enforcement

(continued)

- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, or magazines to him or her as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with section 33850).

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The Respondent was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the Respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Temporary Gun Violence Restraining Order* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Temporary Gun Violence Restraining Order* is a true and correct copy of the original on file in the court.

Date: ________________ Clerk, by ________________________________, Deputy

This is a Court Order.

GV-115 Request to Continue Court Hearing for Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 Party Seeking Continuance

a. Full Name: ______________________________

Your Lawyer *(if you have one for this case):*

Name: ______________________ State Bar No.: ____________

Firm Name: ______________________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________________

City: ______________________ State: _____ Zip: ____________

Telephone: ________________ Fax: ________________

E-Mail Address: ______________________________

2 Other Party

Full Name: ______________________________

Address *(if known):* ______________________________

City: ______________________ State: _____ Zip: ____________

3 Request to Continue Hearing

I ask the court to continue the hearing currently scheduled for *(date):* ______________

a. ☐ A *Temporary Gun Violence Restraining Order* (Form GV-110) was issued on *(date):* ______________
Please attach a copy of the order.

b. I request that the hearing be continued because *(check one or both)*:

(1) ☐ The Respondent could not be served before the hearing date.

(2) ☐ Other reasons as stated: ☐ below ☐ on Attachment 3b(2)

____

____

____

____

c. (1) ☐ This is the first request for a continuance.

(2) ☐ The hearing has previously been continued ____ times.

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

Date: ______________________________

______________________________ ▶ ______________________________

Type or print your name *Sign your name*

This is not a Court Order.

GV-116 Order for Continuance and Notice of New Hearing Date

Clerk stamps date here when form is filed.

DRAFT
10-09-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Party seeking continuance complete items (1), (2), and (3) a.

(1) Party Seeking Continuance

a. Full Name: ____________________

Your Lawyer *(if you have one for this case):*

Name: ____________________ State Bar No.: __________

Firm Name: ____________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ____________________

City: ____________________ State: ______ Zip: __________

Telephone: ____________________ Fax: ____________________

E-Mail Address: ____________________

(2) Other Party

Full Name: ____________________

(3) New Hearing Date

a. A hearing in this case is currently set for *(date):* ____________________ at *(time):* __________

b. The court orders a new hearing date:

(1) ☐ at the request of the Petitioner (2) ☐ at the request of the Respondent (3) ☐ in its discretion

c. Because:

(1) ☐ the Respondent could not be served before the current hearing date.

(2) ☐ the parties have agreed to postpone the hearing and ask for a new hearing date.

(3) ☐ for the reasons stated ☐ below ☐ on Attachment 3c

____
____
____

(4) Order for Continuance and Notice of Hearing

The court hearing on the *Petition for Gun Violence Restraining Order* (Form GV-100) is continued and rescheduled:

Hearing Date → Date: __________ Time: __________
Dept.: __________ Room: __________

Name and address of court if different from above:

____
____
____
____

Case Number:

5 Extension of Temporary Restraining Order

a. ☐ No Temporary Restraining Order was issued in this case.

b. ☐ The Temporary Restraining Order (TRO; form GV-110) issued on *(date):* ______________________ is extended until the new hearing date.

6 No Fee to Serve

If the sheriff or marshal serves this order, he or she will do it for free.

Warning and Notice to the Respondent:

If a *Temporary Gun Violence Restraining Order* (Form GV-110) was issued, it remains in full force and effect until the new hearing date. You must continue to obey it until the end of the hearing.

7 Service of Order

A copy of this Order must be served by the requesting party on the other party at least ____ days before the hearing unless both parties were in court at the time the continuance was granted.

A copy of form GV-100, *Petition for Gun Violence Restraining Order,* and form GV-110, *Temporary Gun Violence Restraining Order,* must also be served on the Respondent if he or she was not previously served. A proof of service should be filed with the court before the original hearing date.

Date: ______________________

____
Judicial Officer

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Notice of New Hearing Date* is a true and correct copy of the original on file in the court.

Date: ______________ Clerk, by ______________________________ , Deputy

DRAFT

GV-120 Response to Petition for Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-15-18
Not approved by the Judicial Council

Use this form to respond to the *Petition* (form GV-100)

- Read *How Can I Respond to a Petition for Gun Violence Restraining Order?* (form GV-120-INFO) to protect your rights.
- Fill out this form and take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner or to his or her lawyer. *(Use form GV-250,* Proof of Service by Mail.*)*

Fill in court name and street address:

Superior Court of California, County of

See Petition for case number and fill in:

Case Number:

1 Petitioner

Name of person seeking order *(see form GV-100, item 1)*: ____________________

2 Respondent

a. Your Name: ____________________

Your Lawyer *(if you have one for this case)*
Name: ____________________ State Bar No.: __________
Firm Name: ____________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ____________________
City: __________ State: ____ Zip: ______
Telephone: __________ Fax: __________
E-mail Address: ____________________

Be prepared to present your opposition at the hearing. Write your hearing date, time, and place from form GV-109 item 3 here:

Hearing Date → Date: __________ Time: ________
Dept.: ________ Room: ________

If a Temporary Gun Violence Restraining Order was issued, you must obey it until the hearing. At the hearing, the court may make an order against you for one year.

3 Gun Violence Restraining Order

☐ I do not agree to the order requested in the Petition because:

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3—Reasons I Disagree" as a title. You may use form MC-025,* Attachment.

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4 ☐ Denial

I did not do anything described in item 5 of form GV-100.

5 ☐ **Justification or Excuse**

If I did some or all of the things that the Petitioner has accused me of, my actions were justified or excused for the following reasons *(explain):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 5–Justification or Excuse" as a title. You may use form MC-025,* Attachment.

6 **Surrender of Guns, Ammunition, and Magazines**

If a *Temporary Gun Violence Restraining Order* (form GV-110) was issued, you cannot own or possess any guns, other firearms, ammunition, or magazines. (See item 6 of form GV-110.) You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns, other firearms, ammunition, or magazines in your immediate possession or control within 24 hours of being served with form GV-110. You must file a receipt with the court. You may use form GV-800, *Proof of Firearms Turned In, Sold, or Stored* for the receipt.

a. ☐ I do not own or control any guns, other firearms, ammunition, or magazines.

b. ☐ I have turned in my guns, other firearms, ammunition and magazines to a law enforcement officer or agency, or sold them to or stored them with a licensed gun dealer. A copy of the receipt
☐ is attached. ☐ has already been filed with the court.

7 Number of pages attached to this form, if any: _______

Date: ________________________________

____
Lawyer's name (if any)

____
Lawyer's signature

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: ________________________________

____
Type or print your name

____
Sign your name

DRAFT

How Can I Respond to a Petition for a Gun Violence Restraining Order?

DRAFT
10/15/18

What is a gun violence restraining order?

It is a court order that prohibits someone from having any guns, ammunition or magazines (any ammunition feeding device). The person must surrender all guns, ammunition, and magazines that he or she currently owns.

Who can ask for a gun violence restraining order?

The petition must have been filed by a law enforcement officer or an immediate family member of yours. Immediate family members include (1) your spouse or domestic partner; (2) your parents, children, siblings, grandparents, and grandchildren and their spouses, including any stepparent or stepgrandparent; (3) your spouse's parents, children (your stepchildren), siblings, grandparents, and grandchildren; and (4) any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

I've been served with a *Petition for a Gun Violence Restraining Order*. What do I do now?

Read the papers served on you very carefully. The *Notice of Court Hearing* tells you when to appear in court. There may also be a *Temporary Gun Violence Restraining Order* prohibiting you from having any guns, ammunition, or magazines and requiring you to surrender, sell, or store any guns, ammunition, or magazines that you currently own or possess. You must obey the order until the hearing.

What if I don't obey the temporary order?

The police can arrest you. You can go to jail and pay a fine.

What if I don't agree with what the order says?

If you disagree with the order that the Petitioner is asking for, fill out Form GV-120, *Response to Petition for Gun Violence Restraining Order,* before your hearing date and file it with the court. You can get the form from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find it at your local courthouse or county law library.

Will I have to pay a filing fee?

No.

Do I have to serve the other person with a copy of my response?

Yes. Have someone age 18 or older—**not you**—mail a copy of completed Form GV-120 to the person who asked for the order (or that person's lawyer). (This is called "service by mail.")

The person who serves the form by mail must fill out Form GV-250, *Proof of Service by Mail.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

Should I go to the court hearing?

Yes. You should go to court on the date listed on Form GV-109, *Notice of Court Hearing*. If you do not go to the hearing, the judge can extend the order against you for up to one year without hearing from you.

GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

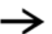
Case Number:

1. **Petitioner**
   a. Your Full Name: ____
   I am: ☐ A family member of the Respondent
   ☐ A law enforcement officer employed by (*name of law enforcement agency*): ____
   b. Your Lawyer (*if you have one for this case*):
   Name: ____ State Bar No.: ____
   Firm Name: ____
   c. Your Address (*If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.*)
   Address: ____
   City: ____ State: ____ Zip: ____
   Telephone: ____ Fax: ____
   E-Mail Address: ____
2. **Respondent**
   Full Name: ____
3. **Hearing**
   The court will complete the rest of this form.
   Hearing Date → Date: ____ Time: ____
   Dept.: ____ Room: ____
   Name and address of court if different from above: ____
4. **Temporary Gun Violence Restraining Order** (*Any order granted is on Form GV-110, served with this notice.*)
   a. A Temporary Gun Violence Restraining Order as requested in Form GV-100, *Petition for Gun Violence Restraining Order,* is (*check only one box below*):
   (1) ☐ **GRANTED** until the court hearing.
   (2) ☐ **DENIED** until the court hearing. (*Specify reasons for denial in b, below.*)

Judicial Council of California, www.courts.ca.gov
Rev. January 1, 2019, Mandatory Form
Penal Code, § 18100 et seq.
Approved by DOJ

Notice of Court Hearing
(Gun Violence Prevention)

GV-109, Page 1 of 3 →



Will I see the person who asked for the order at the court hearing?

Yes. Assume that the person who is asking for the order will attend the hearing. It is probably best not to talk to him or her unless the judge or that person's attorney says that you can.

Can I bring a witness to the court hearing?

Yes. You can bring witnesses or documents that support your case to the hearing. But if possible, you should also bring the witnesses' written statements of what they saw or heard. Their statements must be made under penalty of perjury. (You can use Form MC-030, *Declaration,* for this purpose.)

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required, and you are not entitled to a free court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

How long does the order last?

If the court issued a temporary restraining order before the hearing, it will last until your hearing date. At that time, the court will decide whether to issue a gun violence restraining order that can last for one year.

Can I agree with the protected person to terminate the order?

No. Once the order is issued, only the judge can change or terminate it. You would have to file a request with the court to terminate the order.

What if I need help to understand English?

When you file your papers, ask your court's clerk or self-help center if your court will provide an interpreter for you at no cost. If not, you will have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five court days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

DRAFT

GV-130 Gun Violence Restraining Order After Hearing

Clerk stamps date here when form is filed.

DRAFT
10-15-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name: ______________________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______________________________

b. Your Lawyer *(if you have one for this case):*
Name: ______________________ State Bar No.: ________
Firm Name: ______________________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: ______________________________
City: ______________________ State: _____ Zip: ________
Telephone: ________________ Fax: ________________
E-Mail Address: ______________________________

(2) Respondent

Full Name: ______________________________
Description:

Sex: ☐ M ☐ F Height: ________ Weight: ___________ Date of Birth: ________________
Hair Color: ____________ Eye Color: ___________ Age: _____ Race: ________________
Home Address *(if known)*: ______________________________
City: ______________________________ State: ______ Zip: __________
Relationship to Petitioner: ______________________________

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at:

(Time):____________ ☐ a.m. ☐ p.m. ☐ midnight on *(Date)*: ______________________________

If no expiration date is written here, this Order expires one year from the date of issuance.

This is a Court Order.

4 Hearing

a. There was a hearing on *(date):* ______________ at *(time):* __________ in Dept.:________ Room: __________.
(Name of judicial officer): ___________________________________ made the orders at the hearing.

b. These people were at the hearing:

(1) ☐ The Petitioner (3) ☐ The lawyer for the Petitioner *(name):* ___________________________

(2) ☐ The Respondent (4) ☐ The lawyer for the Respondent *(name):* ___________________________

5 Findings

a. The court finds by clear and convincing evidence that both of the following are true:

(1) Respondent poses a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that the Respondent owns or possesses one or more firearms, ammunition, or one or more magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

____
____
____
____
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____
____
____

☐ See the attached Form MC-025, *Attachment*

6 No Fee to Serve

If the sheriff or marshal serves this order, he or she will do it for free.

This is a Court Order.

DRAFT

7 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine (any ammunition feeding device).

b. You must:

(1) Surrender all firearms, ammunition, and magazines in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms, ammunition, and magazines to him or her, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must dispose of all of your firearms, ammunition, and magazines within 24 hours of receiving notice of this order. You may do so by either: (1) surrendering all of your firearms, ammunition, and magazines in a safe manner to the local law enforcement agency; or (2) selling all of your firearms, ammunition, and magazines to a licensed gun dealer; or (3) storing all of your firearms, ammunition, and magazines with a licensed gun dealer for as long as this Order is in effect.

(2) Within 48 hours of receiving this Order, or if the court is closed, then on the next business day, file a receipt with the court that proves that all of your guns or firearms, ammunition, and magazines have been turned in, sold, or stored. *(You may use Form GV-800,* Proof of Firearms Turned In, Sold, or Stored *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

8 Service of Order on Respondent

a. ☐ The Respondent personally attended the hearing. No other proof of service is needed. The clerk has provided the Respondent with a blank copy of Form GV-600, *Request to Terminate Gun Violence Restraining Order.*

b. ☐ The Respondent did not attend the hearing. The Respondent must be personally served with a court file-stamped copy of this Order and a blank copy of Form GV-600, *Request to Terminate Gun Violence Restraining Order*, by a law enforcement officer or someone age 18 or older - **and not a party to the action.**

9 Number of pages attached to this Order, if any: ______

Date: ______________________________

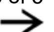
____
Judicial Officer

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this Order is in effect. Pursuant to section 18185, you have the right to request one hearing to terminate this Order at any time during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

This is a Court Order.

DRAFT



Violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, any firearm, ammunition, or magazines for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this Order on the Respondent must do the following:

- Ask the restrained person if he or she has any firearm, ammunition, or magazines in his or her possession or under his or her custody or control.
- Order the Respondent to immediately surrender all firearms, ammunition, and magazines to him or her.
- Issue a receipt to the Respondent for all firearms, ammunition, and magazines that he or she has surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms and Ammunition

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the expiration of this order or of any other gun violence restraining order issued by the court.
- On the expiration of this order or of any later gun violence restraining Order issued by the court, return the firearms and ammunition to the Respondent as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.
- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, and magazines to him or her as provided by Chapter 2 of Division 11 of Title 4 of the Penal Code (commencing with section 33850).

DRAFT

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The respondent was informed of the Order by an officer.
- Item 8a is checked.

This is a Court Order.

Instructions for Law Enforcement

(continued)

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Gun Violence Restraining Order After Hearing* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

DRAFT

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Gun Violence Restraining Order After Hearing* is a true and correct copy of the original on file in the court.

Date: ____________________ Clerk, by ________________________________ , Deputy

This is a Court Order.

GV-200 Proof of Personal Service

Clerk stamps date here when form is filed.

DRAFT
10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 Petitioner

Name: ______________________________

2 Respondent

Name: ______________________________

3 Notice to Server

The server must:

- Be 18 years of age or older.
- Not be the Petitioner unless the Petitioner is a law enforcement officer.
- Give a copy of all documents checked in ④ to the Respondent. (You cannot send them by mail.) Then complete and sign this form and give or mail it to the Petitioner.

PROOF OF PERSONAL SERVICE

4 I personally gave the Respondent a copy of the forms checked below:

a. ☐ GV-100, *Petition for Gun Violence Restraining Order*
b. ☐ GV-109, *Notice of Court Hearing*
c. ☐ GV-110, *Temporary Gun Violence Restraining Order*
d. ☐ GV-116, *Notice of New Hearing Date*
e. ☐ GV-120, *Response to Petition for Gun Violence Restraining Order* (blank form)
f. ☐ GV-120-INFO, *How Can I Respond to a Petition for Gun Violence Restraining Order?*
g. ☐ GV-130, *Gun Violence Restraining Order After Hearing*
h. ☐ GV-600, *Request to Terminate Gun Violence Restraining Order* (blank form)
i. ☐ GV-800, *Proof of Firearms Turned In, Sold, or Stored* (blank form)
j. ☐ Other *(specify)*: ______________________________

5 I personally gave copies of the documents checked above to the Respondent:

a. On *(date)*: ____________ b. At *(time)*: ________ ☐ a.m. ☐ p.m.

c. At this address: ______________________________

City: ____________________ State: ________ Zip: ________

6 Server's Information

Name: ______________________________

Address: ______________________________

City: ____________ State: ________ Zip: ________

Telephone: ____________

(If you are a registered process server):

County of registration: ____________ Registration number: ____________

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

Date: ____________ ____________________ ▶ ____________________

Type or print server's name *Server to sign here*

What is "service"?

Service is the act of giving your legal papers to the other party. There are many kinds of service—in person, by mail, and others. This form is about personal or "in-person" service. The *Petition for Gun Violence Restraining Order* (Form GV-100), the *Notice of Court Hearing* (Form GV-109), and the *Temporary Gun Violence Restraining Order* (Form GV-110) must be served "in person." That means that someone must personally "serve" (give) a copy of the forms to the respondent (the person to be prohibited from having guns).

These forms cannot be served by mail; they must be given to the respondent personally.

Service lets the respondent know:
- Why you are asking for a Gun Violence Restraining Order;
- The hearing date;
- How to respond.

Why do I have to get the orders served?

- The police cannot arrest anyone for violating an order unless that person knows about the order.
- No hearing can be held to extend the order for a year unless the respondent was served and knows about the hearing.

Don't serve it by mail!

Who can serve?

Any law enforcement officer may serve the respondent, even if the petition was filed by a law enforcement officer. **It is recommended that you ask a law enforcement officer to serve the forms because of the potential for gun violence. A sheriff or marshal will serve the order at no cost to you.**

However, service may also be by any person who is at least 18 years old and not a party to the action. That means that if the petitioner is a family member rather than a law enforcement officer, that person may not serve the forms on the respondent. You may use a process server. A "registered process server" is a business that you pay to deliver court forms. Look for "Process Serving" in the Yellow Pages or on the Internet.

How to serve

Ask the server to:
- Make personal contact with the person to be served.
- Make sure it is the right person. Ask the person's name.
- Give the person copies of all papers checked on Form GV-200, *Proof of Personal Service*.
- Fill out and sign the *Proof of Personal Service* form.
- Give the signed *Proof of Personal Service* to you.

What if the person won't take the papers or tears them up?

- If the person won't take the papers, just leave them near him or her.
- It doesn't matter if the person tears them up. Service is still complete.

When do the orders have to be served?

It depends. To know the exact date, you have to look at two things on Form GV-109, *Notice of Court Hearing:*

First, look at the hearing date on page 1 of Form GV-109.

(3) Hearing

Hearing Date → Date: ________
Dept.: ________

Next, look at the number of days in item (5) on page 2 of Form GV-109.

(5) Service of Documents on Respondent

At least ☐ five ☐ ______ calendar days before the hearing.

Look at a calendar. Subtract the number of days in (5) from the hearing date. That is the final date to have the orders served. It is always OK to serve earlier than that date. If nothing is checked or written in (5), you must serve the orders at least five days before the hearing.

Who signs the *Proof of Personal Service?*

Only the person who serves the forms can sign Form GV-200, *Proof of Personal Service*. You do not sign it; the restrained person does not need to sign it.

What do I do with the completed *Proof of Personal Service?*

If someone other than a law enforcement officer serves the papers, you should:

- Make several copies.
- File the original with the court before your hearing.
- Bring a copy of the completed *Proof of Personal Service* to your hearing.
- Always keep an extra copy of the restraining orders with you for your safety.

What happens if I can't get the orders served before the hearing date?

You will need to ask the court to “continue” (postpone and reschedule) the hearing until after you are able to have the respondent served. Fill out and file Form GV-115, *Request to Continue Court Hearing for Gun Violence Restraining Order*. If the court grants you a continuance, the *Temporary Gun Violence Restraining Order* (Form GV-110) will remain in effect until the new hearing date.

DRAFT

GV-250 Proof of Service by Mail

Clerk stamps date here when form is filed.

DRAFT
10-04-08
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

① Petitioner

Full Name: ______________________________

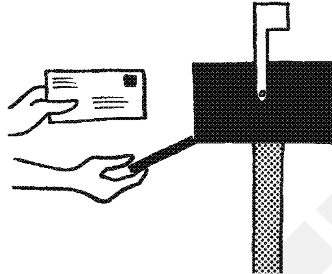
② Respondent

Full Name: ______________________________

③ Notice to Server

The server must:

- Be 18 years of age or older.
- Live or be employed in the county where the mailing took place.
- Not be a party to the case.
- Mail a copy of all documents checked in ④ to the person in ①.
- Complete and sign this form and give it to the person in ②.



④ PROOF OF SERVICE BY MAIL

I am 18 years of age or older and not a party to this case. I live or am employed in the county where the mailing took place. I mailed the ☐ Petitioner ☐ Respondent a copy of all documents checked below:

a. Form GV-120, *Response to Petitioner for Gun Violence Restraining Orders*

b. ☐ Other *(specify)*: ______________________________

____

⑤ I placed copies of the documents above in a sealed envelope and mailed them as described below:

a. Mailed to *(name)*: ______________________________

b. To this address: ______________________________

City: ______________ State: ______ Zip: ______

c. On *(date)*: ______________ Mailed from: City: ______________ State: ______

⑥ Server's Information

Name: ______________________ Telephone: ______________

Address: ______________________________

City: ______________ State: ______ Zip: ______

(If you are a registered process server):

County of registration: ______________ Registration number: ______________

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

Date: ______________

____
Type or print server's name

▶ ______________________________
Server to sign here

GV-600 Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 Respondent

a. Full Name: ______________________________

b. Your Lawyer *(if you have one for this case):*

Name: ______________________ State Bar No.: ________

Firm Name: ______________________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________________

City: ______________________ State: ______ Zip: ________

Telephone: __________________ Fax: __________________

E-Mail Address: ______________________________

2 Petitioner

a. Full Name: ______________________________

b. Address *(if known)*: ______________________________

City: ______________________ State: ________ Zip: ________

3 ☐ Request to Terminate Restraining Order

a. I ask the court to terminate the

☐ *Gun Violence Restraining Order After Hearing* (Form GV-130)

☐ *Order on Request to Renew Gun Violence Restraining Order* (Form GV-730)

because *(give reasons below):*

☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3—Reasons to Terminate Order" for a title. You may use Form MC-025,* Attachment.

____
____
____
____
____
____
____
____
____
____

b. ☐ A copy of the current order is attached.

This is not a Court Order.

c. ☐ I have not previously requested that the court terminate the Order.

☐ The Order has been renewed. I have not previously requested that the court terminate the Order since it was renewed.

(You may only request termination of a gun violence restraining order once during the initial period while the order is in effect and once during any period of renewal. If the court denies your request, you may not request termination again unless the order is renewed for another year.)

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

Date: ______________________________

______________________________ ▶ ______________________________

Type or print your name *Sign your name*

DRAFT

This is not a Court Order.

GV-610 Notice of Hearing on Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Respondent completes items (1) and (2).

1 Respondent

a. Full Name: ______________________

b. Your Lawyer *(if you have one for this case):*

Name: ______________________ State Bar No.: __________

Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________

City: ______________ State: ______ Zip: ______

Telephone: ______________ Fax: ______________

E-Mail Address: ______________________

2 Petitioner

a. Full Name: ______________________

b. Address *(if known)*: ______________________

City: ______________________ State: ________ Zip: ________

3 Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect unless terminated by the court.

Hearing Date → Date: __________ Time: __________

Dept.: __________ Room: __________

Name and address of court if different from above:

____

To the Respondent:

4 Service

Someone age 18 or older—**not you**—must serve a copy of the following forms on the Petitioner:

- GV-600, *Request to Terminate Gun Violence Restraining Order;*
- GV-610, *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* (this form); and
- GV-620, *Response to Request to Terminate Gun Violence Restraining Order* (blank copy).

This is a Court Order.

- ☐ The forms must be personally served on the Petitioner _______ days before the hearing.
- ☐ The forms may be served by mail on the Petitioner or the Petitioner's attorney _______ days before the hearing.

The person who serves the forms must fill out either Form GV-200, *Proof of Personal Service,* or Form GV-250, *Proof of Service by Mail.* Have the person who served sign the original. Take the completed proof-of-service form back to the court clerk for filing or bring it with you to the hearing. For help with personal service, see Form GV-200-INFO, *What is "Proof of Personal Service"?*.

Date: ___________________________

____
Judicial Officer

To the Petitioner:

If you wish to make a written response to this request to terminate the current firearms restraining order, you may fill out Form GV-620, *Response to Request to Terminate Gun Violence Restraining Order.* File the original with the court before the hearing and have someone age 18 or older—**not you**— mail a copy of it to the other party at the address in (1) at least _______ days before the hearing. Also file Form GV-250, *Proof of Service by Mail,* with the court before the hearing.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* is a true and correct copy of the original on file in the court.

Clerk's Certificate [seal]

Date: ______________________________________

Clerk, by ___________________________________, Deputy

This is a Court Order.

DRAFT

GV-620 Response to Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Use this form to respond to the *Request to Terminate Gun Violence Restraining Order* (Form GV-600).

- Fill out this form and then take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Respondent at the address in (2) below. Use Form GV-250, *Proof of Service of Response by Mail.*

The court will consider your response at the hearing. Write your hearing date, time, and place from Form GV-610 item (3) here.

Hearing Date → Date: ______ Time: ______

Dept.: ______ Room: ______

(1) Petitioner

a. Your Name: ______

I am: ☐ A family member of the Respondent.
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______

Your Lawyer *(if you have one for this case):*

Name: ______ State Bar No.: ______

Firm Name: ______

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: ______

City: ______ State: ______ Zip: ______

Telephone: ______ Fax: ______

E-Mail Address: ______

(2) Respondent

Name: ______

Address: ______

City: ______ State: ______ Zip: ______

(3) Response

a. ☐ I do not oppose termination of the order.

b. ☐ I oppose termination of the order for the following reasons *(specify below)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3b—Reasons Not to Terminate" for a title. You may use Form MC-025,* Attachment.

______

______

______

______

______

______

Date: ___________________________________

___________________________________ ▶ ___________________________________
Lawyer's name, if you have one *Lawyer's signature*

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

Date: ___________________________________

___________________________________ ▶ ___________________________________
Type or print your name *Sign your name*

To the Petitioner:

Have someone age 18 or older—**not you**—mail a copy of this completed Form GV-620 to the Respondent or to the Respondent's lawyer, if any. This is called "service by mail." The person who serves the form by mail must fill out Form GV-250, *Proof of Service by Mail.* Have the person who did the mailing sign the original. Take the completed Proof of Service form back to the court clerk or bring it with you to the hearing.

DRAFT

GV-630 Order on Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT

10/15/18

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Prevailing party completes items ① and ②. If the Order is granted, the Respondent is the prevailing party. If the Order is denied, the Petitioner is the prevailing party.

① Respondent

a. Full Name: ______________________

b. Your Lawyer *(if you have one for this case):*

Name: ______________________ State Bar No.: ________

Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________

City: ______________ State: ______ Zip: ______

Telephone: ______________ Fax: ______________

E-Mail Address: ______________________

② Petitioner

Full Name: ______________________

Address *(if known)*: ______________________

City: ______________ State: ______ Zip: ______

③ Hearing

There was a hearing on *(date)*: __________ at time:______ ☐ a.m. ☐ p.m. Dept.: _____Room: ______

(Name of judicial officer): ______________________ made the orders at the hearing.

These people were at the hearing:

a. ☐ The Petitioner

b. ☐ The Respondent

c. ☐ The lawyer for the Petitioner *(name):* ______________

d. ☐ The lawyer for the Respondent *(name):* ______________

④ Findings

☐ The court finds that there is no longer clear and convincing evidence that:

Respondent poses a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines; and

This is a Court Order.

A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

☐ There remains clear and convincing evidence that grounds continue to exist to support the order.

5 Order on Request to Terminate

The request to terminate the *Gun Violence Restraining Order After Hearing* (Form GV-130), originally issued on *(date)*:__________________ ☐ and most recently renewed on *(date)*: __________________________, is:

a. ☐ **GRANTED**. The order is terminated as of *(date of hearing)* _________________

b. ☐ **DENIED**. The order and expiration date remain in effect.

To the Prevailing Party:

6 Service of Order

If service is required, someone age 18 or older—**not you**—must serve a copy of this order on the other party. If a party is represented, you are required to serve the attorney instead of the party.

☐ **Order Granted**—The Petitioner attended the hearing. **No further service is required.**

☐ **Order Granted**—The Petitioner did not attend the hearing. **Service is required:** This Order:

- ☐ Must be personally served on the Petitioner within _____ days of the date of this Order.
- ☐ May be served by mail on the Petitioner within 5 days of the date of this Order.

☐ **Order Denied**—If the Petitioner did not attend the hearing -- **Service by Mail:** The Petitioner may be served with this Order by mail.

Date: _________________________ ______________________________________

Judicial Officer

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Order on Request to Terminate Gun Violence Restraining Order* is a true and correct copy of the original on file in the court.

Date: _______________ Clerk, by ______________________________, Deputy

This is a Court Order.

DRAFT

GV-700 Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-04-18

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 Petitioner

a. Your Full Name: ______________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*): ______________________

b. Your Lawyer *(if you have one for this case):*
Name: ______________ State Bar No.: ________
Firm Name: ______________________

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: ______________________
City: ______________ State: ____ Zip: ________
Telephone: ______________ Fax: ______________
E-Mail Address: ______________________

2 Respondent

Full Name: ______________________
Address (if known): ______________________
City: ______________ State: ______ Zip: ____________

3 Request to Renew Restraining Order

I ask the court to renew the *Gun Violence Restraining Order After Hearing* (Form GV-130) for an additional period of one year. A copy of the order is attached.

a. The order currently will end on *(date):* ______________
(If the order has already expired, you must file a new petition.)

b. ☐ This is my first request to renew the order.
☐ The order has been renewed ______ times.

c. I ask the court to renew the order because *(explain below):*
☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3c—Reasons to Renew Order" for a title. You may use Form MC-025,* Attachment.

____
____

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

Date: __________

______________________ *Type or print your name*

▶ ______________________ *Sign your name*

This is not a Court Order.

GV-710 Notice of Hearing on Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT
10-15-18

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Petitioner completes items ① and ② .

① Petitioner

a. Your Full Name: ______________________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*):
____

Your Lawyer *(if you have one for this case):*
Name: ____________________ State Bar No.: __________
Firm Name: ______________________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)*

Address: ______________________________
City: ____________________ State: ______ Zip: ________
Telephone: ______________ Fax: ______________
E-Mail Address: ______________________________

② Respondent

Full Name: ______________________________
Address *(if known)*: ______________________________
City: ____________________ State: ______ Zip: ________

③ Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect.

Hearing Date → Date: __________ Time: __________
Dept.: __________ Room: __________

Name and address of court if different from above:
____
____
____
____

This is a Court Order.

Case Number:

To the Petitioner:

(4) Service on Respondent

Someone age 18 or older—**not you**—must serve a copy of the following forms on the Respondent

- GV-700, *Request to Renew Gun Violence Restraining Order;*
- GV-710, *Notice of Hearing on Request to Renew Gun Violence Restraining Order* (this form);
- GV-720, *Response to Request to Renew Gun Violence Restraining Order* (blank copy);

☐ The forms must be personally served on the Respondent _______ days before the hearing.
☐ The forms may be served by mail on the Respondent or the Respondent's attorney _______ days before the hearing.

Date: ______________________ ______________________________________
Judicial Officer

To the Respondent:

At the hearing, the judge can renew the current restraining order for another year. You *must* continue to obey the current restraining order. At the hearing, you can tell the judge if you do not want the order against you renewed. If the restraining order is renewed, you *must* continue to obey the order even if you do not attend the hearing.

If you wish to make a written response to the request to renew the restraining order, you may fill out Form GV-720, *Response to Request to Renew Gun Violence Restraining Order.* File the original with the court before the hearing and have someone age 18 or older—**not you**—mail a copy of it to the Petitioner at the address in (1) at least ________ days before the hearing. Also file Form GV-250, *Proof of Service by Mail,* with the court before the hearing or bring it with you to the hearing.

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Notice of Hearing on Request to Renew Gun Violence Restraining Order* is a true and correct copy of the original on file in the court.

Date: ____________________________________

Clerk, by ______________________________ , Deputy

This is a Court Order.

DRAFT

GV-720 Response to Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT

10-04-18
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Use this form to respond to the *Request to Renew Gun Violence Restraining Order* (Form GV-700).

- Fill out this form and then take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner at the address in (1) below. Then file Form GV-250, *Proof of Service by Mail* with the court.

The court will consider your *Response* at the hearing. Write your hearing date, time, and place from Form GV-710 item (3) here.

Hearing Date → Date: ____________ Time: ____________

Dept.: __________ Room: __________

You must continue to obey the current restraining order until the hearing. At the hearing, the court can extend the order against you for another year.

(1) Petitioner *(From Form GV-700, item (1))*

Name: ______________________________

Address: ______________________________

City: ____________________ State: _____ Zip: _________

(2) Respondent

a. Your Name: ______________________________

Your Lawyer *(if you have one for this case):*

Name: ____________________ State Bar No.: _________

Firm Name: ______________________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________________

City: ____________________ State: _____ Zip: _________

Telephone: ______________ Fax: ______________

E-Mail Address: ______________________________

(3) Response

a. ☐ I do not oppose renewal of the order.

b. ☐ I oppose renewal of the order for the following reasons *(specify below)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3b—Reasons Not to Renew" for a title. You may use Form MC-025,* Attachment.

____
____
____
____
____
____
____

Date: ______________________________

____
Lawyer's name, if you have one

▶ ______________________________
Lawyer's signature

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

Date: ______________________________

____
Type or print your name

▶ ______________________________
Sign your name

To the Respondent:

Have someone age 18 or older—**not you**—mail a copy of this completed Form GV-720 to the Petitioner or to the Petitioner's lawyer, if any. This is called "service by mail." The person who serves the form by mail must fill out Form GV-250, *Proof of Service of Response by Mail.* Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

DRAFT

GV-730 Order on Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT

10.15.18

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

Prevailing party completes items ① and ②. If the Order is granted, the Petitioner is the prevailing party. If the Order is denied, the Respondent is the prevailing party.

① Petitioner

a. Your Full Name: ______________________

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (*name of law enforcement agency*):

____

Your Lawyer *(if you have one for this case):*
Name: ______________ State Bar No.: ________
Firm Name: ______________________

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: ______________________

City: ______________ State: _____ Zip: ________

Telephone: ______________ Fax: ______________

E-Mail Address: ______________________

② Respondent

Full Name: ______________________

Address *(if known)*: ______________________

City: ______________ State: _____ Zip: ________

③ Hearing

There was a hearing on *(date)*: __________ at time: ______ ☐ a.m. ☐ p.m. Dept.: _____ Room: _____

(Name of judicial officer): ______________________ made the orders at the hearing.

These people were at the hearing:

a. ☐ The Petitioner

b. ☐ The Respondent

c. ☐ The lawyer for the Petitioner *(name):* ______________

d. ☐ The lawyer for the Respondent *(name):* ______________

This is a Court Order.

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4 Order on Request for Renewal

The request to renew the attached *Gun Violence Restraining Order After Hearing* (Form GV-130), originally issued on *(date)*: ______________________, is:

☐ **DENIED**. The attached order expires as stated in item (3) of the order.

☐ **GRANTED**. The attached order is renewed for one year and will now expire:

on *(date)*: ____________________ at *(time)*: __________ ☐ a.m. ☐ p.m. or ☐ midnight

If no expiration date is written here, the order expires one year from the date of the hearing in item (3).

a. The court finds by clear and convincing evidence that both of the following are true:

(1) Respondent continues to pose a significant danger of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order remains necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The facts as stated in the *Request to Renew Gun Violence Restraining Order* (Form GV-700) and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order.

and/or for the reasons set forth below.

____

____

____

____

____

____

☐ See the attached Form MC-025, *Attachment*

c. **To the Respondent: If this order is renewed, it will last until the date and time noted above. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this order is in effect. Pursuant to section 18185, you have the right to request one hearing to terminate this Order at any time during its effective period. You may seek the advice of an attorney as to any matter connected with the order.**

This is a Court Order.

To the Prevailing Party:

5 Service of Order

Someone age 18 or older—**not you**—must serve a copy of this order on the other party.

☐ **Order Granted—**The Respondent attended the hearing. **No further service is required**.

☐ **Order Granted—**The Respondent did not attend the hearing. **Personal service is required**. The Respondent must be personally served with this Order. *(After the Respondent has been served, file Form GV-200,* Proof of Personal Service *with the court clerk. For help with service, read Form GV-200-INFO, What is "Proof of Personal Service"?.)*

☐ **Order Denied—Service by Mail—**If the Petitioner did not attend the hearing, the Petitioner may be served with this Order by mail. *(After the Petitioner has been served, the person doing the mailing should fill out Form POS-030,* Proof of Service by First-Class Mail—Civil. *File the form with the court clerk. For help with service by mail, read the Information Sheet on page 2 of Form POS-030.)*

Date: ____________________________

____
Judicial Officer

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Order on Request to Renew Gun Violence Restraining Order* is a true and correct copy of the original on file in the court.

DRAFT

This is a Court Order.

1 What is a firearm?

A firearm is a:

- Handgun
- Rifle
- Shotgun
- Assault weapon

If you own or have any firearms, ammunition, or magazines, you must:

2
- If demanded, give them to the law enforcement officer when he or she serves you with the court order requiring surrender; otherwise, within 24 hours:
  - Turn them in to your local law enforcement agency; or
  - Sell them to a licensed firearms dealer.
  - Store them with a licensed firearms dealer.

3 How do I sell or store my firearms?

Find a California licensed firearms dealer in your area.
Look under "Firearms Dealers" in your local Yellow Pages or on the Internet. Make sure the dealer is licensed.

4 How do I surrender my firearms to law enforcement?

Call your local law enforcement agency to ask about their procedures. Take a copy of the court order with you. Go directly to the law enforcement agency. Do not go anywhere else with firearms in your vehicle!

5 If I turn my firearms in to law enforcement, how long will they keep them?

As long as any gun violence restraining order against you remains in effect.

6 After I give my firearms to law enforcement, can I change my mind?

Yes. You are allowed to sell them to a licensed gun dealer. To do this, the gun dealer must present a bill of sale to your local law enforcement agency. The law enforcement agency will give the licensed gun dealer the firearms that you are selling.

7 Do I have to pay the law enforcement agency to keep my firearm?

You may have to pay the agency for keeping your firearms. Contact your local law enforcement agency and ask if a fee is charged. The agency will tell you how much you need to pay.

8 Do I have to prove that I have turned in, sold, or stored my firearms?

Yes. Within 48 hours you must file a receipt with the court and the law enforcement agency showing that you have surrendered your firearms to a law enforcement agency or sold them to or stored them with a licensed gun dealer. You may use Form GV-800, *Proof of Firearms Turned In, Sold, or Stored* for this purpose.

9 Questions?

Call your local law enforcement agency.

(Insert local information here.)

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Criminal Law Advisory Committee
Annual Agenda[1]—2019
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	Hon. Tricia A. Bigelow, Chair; Hon. Richard Couzens (Ret.), Vice Chair
Lead Staff:	Sarah Fleischer-Ihn, Attorney, Criminal Justice Services Office

Committee's Charge/Membership:
Rule 10.42(a) of the California Rules of Court states the charge of the Criminal Law Advisory Committee, which is to make recommendations to the Judicial Council for improving the administration of justice in criminal proceedings.

The Criminal Law Advisory Committee currently has 21 voting members. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups[2]:
1. Protective Orders Working Group (POWG)

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[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.
[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[3]	
1.	***Implementation of SB 10, pretrial release or detention: pretrial services***	***Priority 1(a)*** *See footnote 4*
	Project Summary: Develop rules of court to implement SB 10, pretrial release or detention: pretrial services (Hertzberg; Stats. 2018, ch. 244) and assist criminal courts with any required implementation. ***Status/Timeline:*** It is anticipated that the rule proposals will be effective by SB 10's effective date of October 1, 2019. ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None.	
2.	***Amend California Rules of Court, rule 4.452, determinate sentence consecutive to prior determinate sentence, to incorporate legislative changes made by SB 670***	***Priority 1(a)*** *See footnote 4*
	Project Summary: Amend California Rules of Court, rule 4.452, to implement SB 670 (Jackson; Stats. 2017, ch. 287), which amended Penal Code section 1170(h), requiring courts to determine the county or counties of incarceration and supervision for defendants when imposing judgments concurrent or consecutive to another judgment or judgments previously imposed under section 1170(h) in another county or counties. SB 670 also amended section 1170.3, requiring the Judicial Council to adopt rules of court providing criteria for the consideration of trial judges at the time of sentencing when determining the county or counties of incarceration and supervision. This proposal would implement section 1170.3 by amending California Rules of Court, rule 4.452 to guide the second or subsequent court when determining the county or counties of supervision. ***Status/Timeline:*** April 2019 effective date following second circulation for comment.	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

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#	New or One-Time Projects[3]	
	Fiscal Impact/Resources: Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None.	
3.	***Immigration Consequences***	***Priority 1(a)*** *See footnote 4*
	Project Summary: Review the immigration consequences language in CR-101 (felony plea form) and CR-102 (misdemeanor domestic violence plea form) and propose appropriate amendments for the council's consideration. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment, including to immigration law related stakeholders. The committee will consult with Legal Services for additional legal resources. ***AC Collaboration:*** None.	
4.	***Technical changes to rules and forms***	***Priority 1(a)*** *See footnote 4*
	Project Summary: Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2); "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy….". Specific proposals include updating forms CR-170, CR-191, and CR-220 for technical corrections and formatting updates. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff	

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#	New or One-Time Projects[3]	
	Internal/External Stakeholders: All draft proposals will circulate for public comment. ***AC Collaboration:*** None.	
5.	***Implementation of Welfare and Institutions Code section 1731.7, Transition-Age Youth Pilot Project***	***Priority 1(b)*** *See footnote 4*
	Project Summary: Collaborate with the Family and Juvenile Law Advisory Committee on issues related to the Transition-Age Youth Pilot Project, which diverts a limited number of young adults who have committed specified crimes from adult prison to a juvenile facility; propose rules and forms as may be appropriate for the council's consideration. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** Family and Juvenile Law Advisory Committee	
6.	***Amend California Rules of Court, rule 4.130, mental competency proceedings, to incorporate legislative changes made by AB 1810***	***Priority 1(b)***[4] *See footnote 4*

[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	New or One-Time Projects[3]	
	Project Summary[5]: Amend California Rules of Court, rule 4.130, mental competency proceedings, to implement AB 1810 (Committee on Budget; Stats. 2018, ch. 34). Among other changes, AB 1810 authorizes a court to revisit a defendant's competency to stand trial if there is a belief that the defendant has regained competency while awaiting transfer to the Department of State Hospitals for restoration after previously being found incompetent, and also authorizes diversion for defendants found to be mentally incompetent based on eligibility criteria. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None	
7.	***Proof of service form***	***Priority 1(e)*** *See footnote 4*
	Project Summary: Develop a proof of service form for use in criminal proceedings. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** Consultation with Court Executives Advisory Committee	
8.	***Confidentiality of experts' reports in mental competency proceedings***	***Priority 1(e)*** *See footnote 4*

[5] A key objective is a strategic aim, purpose, or "end of action" to be achieved for the coming year.

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#	New or One-Time Projects[3]	
	Project Summary: Consider whether to recommend rule or legislative changes addressing the confidentiality of court-appointed experts' reports on a criminal defendant's competency to stand trial. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None	
9.	***Amend California Rules of Court, rule 4.551, habeas corpus proceedings***	***Priority 1(f)*** *See footnote 4*
	Project Summary: Consider whether to recommend rule change requiring habeas corpus petitions filed in the superior court to contain copies of any petition pertaining to the same judgment and petitioner that was previously filed in any state court or any federal court, similar to California Rules of Court, rule 8.384(b)(1). ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None	
10.	***Monitor implementation of SB 384, sex offenders: registration***	***Priority 2*** *See footnote 4*

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#	New or One-Time Projects[3]	
	Project Summary: Monitor implementation efforts of SB 384, sex offenders: registration (Wiener; Stats. 2017, ch. 541) and assist criminal courts with any required implementation. ***Status/Timeline:*** SB 384 goes into effect in 2021 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** California Department of Justice ***AC Collaboration:*** None	
11.	***Amend CR-184, order for dismissal (military personnel)***	***Priority 2(a)*** *See footnote 4*
	Project Summary: Amend CR-184, order for dismissal (military personnel), to reflect that misdemeanors are eligible for relief under Penal Code section 1170.9(h). ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** None	
12.	***Implementation of Penal Code section 236.14, vacatur relief for human trafficking victims***	***Priority 2(a)*** *See footnote 4*
	Project Summary: Consider whether to recommend rule or forms to implement Penal Code section 236.14, vacatur relief for human trafficking victims. ***Status/Timeline:*** January 1, 2020 effective date	

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#	New or One-Time Projects[3]	
	Fiscal Impact/Resources: Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment, including related stakeholders. ***AC Collaboration:*** None	
13.	***Interpreter's Statement***	***Priority 2(b)*** *See footnote 4*
	Project Summary: Review the interpreter's statement in CR-101 (felony plea form) and CR-102 (misdemeanor domestic violence plea form) and propose appropriate amendments for the council's consideration. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment. ***AC Collaboration:*** Court Interpreters Advisory Panel	
14.	***User-centered revisions to forms***	***Priority 2(b)*** *See footnote 4*
	Project Summary: Review criminal forms to determine whether user-centered revisions are appropriate, such as converting a form into "plain language," developing accompanying information sheets, or translating a form to other languages. ***Status/Timeline:*** January 1, 2020 effective date ***Fiscal Impact/Resources:*** Committee staff	

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#	New or One-Time Projects[3]
	Internal/External Stakeholders: All draft proposals will circulate for public comment. ***AC Collaboration:*** Advisory Committee on Providing Access and Fairness

#	Ongoing Projects and Activities	
1.	***Review recently enacted legislation***	***Priority 1*** *See footnote 4*
	Project Summary: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, Office of Governmental Affairs ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
2.	***Review pending legislation***	***Priority 1*** *See footnote 4*
	Project Summary: Review pending criminal law legislation and make recommendations as to whether the Judicial Council should support or oppose the legislation. Provide subject matter expertise on pending criminal law legislation. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, Office of Governmental Affairs	

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#	Ongoing Projects and Activities	
	Internal/External Stakeholders: None ***AC Collaboration:*** None	
3.	***Criminal justice and mental health***	***Priority 1*** *See footnote 4*
	Project Summary: Review pending legislation related to criminal justice and mental health, and make recommendations as to whether the Judicial Council should support or oppose the legislation. Provide subject matter expertise on pending criminal justice and mental health legislation and related issues. Propose rules and forms to assist courts with mental health issues arising in criminal cases. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee	
4.	***Working Group Participation***	***Priority 2*** *See footnote 4*
	Project Summary: Continue participation in the Protective Orders Working Group, which assists in ensuring consistency and uniformity in the different protective orders used in family, juvenile, civil, criminal, and probate proceedings, and helps to develop and update protective order forms and rules of court. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff	

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#	Ongoing Projects and Activities
	Internal/External Stakeholders: None ***AC Collaboration:*** Rules and Projects Committee, Family and Juvenile Law Advisory Committee, Civil and Small Claims Advisory Committee, Probate and Mental Health Advisory Committee, Information Technology Advisory Committee

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III. LIST OF 2018 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	**Rules and forms to implement recently enacted legislation:** At its September 2018 meeting, the Judicial Council approved revisions to CR-180 and CR-181, implementing Penal Code section 1203.42; approve CR-404 and CR-405, implementing Penal Code section 1170.22; approve CR-409, CR-409-INFO, and CR-410, implementing Penal Code section 851.91, and adopt Cal. Rule of Court, 4.131, implementing Penal Code section 1368.1(a)(2).
2.	**Pending criminal legislation:** The committee provided subject matter expertise on numerous pending criminal law bills, and reviewed and recommended positions on numerous pending criminal law bills.
3.	**Mental health:** The committee submitted public comments to proposed Department of State Hospitals regulations regarding competency related issues; provided subject matter expertise on numerous pending criminal law bills involving mental health issues; reviewed and recommended positions on numerous pending criminal law bills involving mental health issues.
4.	**Petition for writ of habeas corpus:** At its September 2018 meeting, the Judicial Council approved revisions to form HC-001 (formerly MC-275), petition for writ of habeas corpus, to incorporate changes in applicable procedure and law.

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	Position	County	Member Name	1st Term Start	1st Term End	Current Term Start	Current Term End	Replaced	Previous
	Chair	*2nd District*	*Hon. Tricia Ann Bigelow*	*11/12*	*13*	*9/18*	*9/19*	*S. Z. Perren*	*N. Epstein*
	Vice-Chair	*Placer*	*Hon. J. Richard Couzens (Ret.)*	*11/14*	*9/14/15*	*9/18*	*9/19*	*T. Bigelow*	*S. Z. Perren*
1	Appellate Court Justice	2nd District	Hon. Tricia Ann Bigelow	12/11	14	9/17	9/20	New	
2	Appellate Court Justice	3rd District	Hon. William J. Murray, Jr.	9/17	9/20			S. Z. Perren	
3	Trial Court Judicial Officer	Placer	Hon. J. Richard Couzens (Ret.)	11/14	9/17	9/17	9/20	M. D. Jacobson	D. F. De Alba
4	Trial Court Judicial Officer	Fresno	Hilary A. Chittick	11/14	9/17	9/17	9/20	S. R. V. Sicklen	G. C. Eskin
5	Trial Court Judicial Officer	Los Angeles	Hon. Drew E. Edwards	9/17	9/20			S. Lavorato, Jr.	S. W. White
6	Trial Court Judicial Officer	Contra Costa	Hon. David E. Goldstein	11/16	9/19			C. F. Olmedo	P. M. Schnegg
7	Trial Court Judicial Officer	Los Angeles	Hon. Serena R. Murillo	9/17	9/20			R. S. Coen	S. R. Bolanos
8	Trial Court Judicial Officer	San Diego	Hon. Lisa R. Rodriguez	11/16	9/19			J. Gaard	J. D. Ferguson
9	Trial Court Judicial Officer	Sacramento	Hon. Allen H. Sumner	11/10	13	11/16	9/19		
10	Judicial Administrator	Shasta	Ms. Melissa Fowler-Bradley	4/15	9/17	9/17	9/20	L. Fogerty	C. Garofalo
11	Judicial Administrator	Ventura	Ms. Cheryl Kanatzar	11/16	9/19			M. A. Urry	K. Pedersen
12	Judicial Administrator	Alameda	Ms. Tracy Wellenkamp	9/18	9/19			N. Sanchez	R. Tucker
13	Prosecutor	Alameda	Hon. Nancy E. O'Malley	11/02	05	9/17	9/20	M. Bradbury	J. Scully
14	Prosecutor	San Mateo	Mr. Stephen M. Wagstaffe	11/10	13	11/16	9/19	J. P. Fox	
15	Prosecutor	Los Angeles	Mr. Lance E. Winters	11/14	9/16	9/16	9/19	D. Gillette	
16	Criminal Defense Lawyer	Riverside	Ms. Laura Arnold	11/16	9/19			J. Kohorn	New
17	Criminal Defense Lawyer	Los Angeles	Mr. Jay Kohorn	2/15/17	9/20			R. Brown	B. D. Woods
18	Criminal Defense Lawyer	Contra Costa	Ms. Robin Lipetzky	2/15/17	9/20			J. R. Abrahams	G. Campbell
19	Probation Officer	Napa	Ms. Mary Butler	2/16	9/18	9/18	9/21		
20	Probation Officer	Sacramento	Mr. Lee Seale	3/16	9/18	9/18	9/21	M. Jenkins	L. M. Penner
21	Mental health professional with experience in criminal law issues	San Luis Obispo	Ms. Anne Robin	9/18	9/21			New	

Appointed for 3-year term staggered so 1/3 of committee will change each year.

Membership (Rule 10.42): The committee shall include at least one member from each of the following categories:

Appellate Court Justice;
Trial Court Judicial Officer;
Judicial Administrator;
Prosecutor;
Criminal Defense Lawyer;
Probation Officer; and
Mental health professional with experience in criminal law issues

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
October 5, 2018

To
Hon. Harry E. Hull, Chair, Rules and Projects Committee

From
Audrey Fancy, Principal Managing Attorney, Center for Families, Children & the Courts

Tracy Kenny, Attorney II, Center for Families, Children & the Courts

Subject
Family and Juvenile Law Advisory Committee 2019 Annual Agenda

Action Requested
Please Review

Deadline
N/A

Contact
Audrey Fancy
415-865-7706 phone
Audrey.Fancy@jud.ca.gov

Attached is the draft 2019 annual agenda for the Family and Juvenile Law Advisory Committee (Fam/Juv) that has been reviewed and approved by Center for Families, Children & the Courts Director, Charli Depner, and the Executive Office. This memorandum summarizes the key projects proposed on the Fam/Juv Annual Agenda for 2019. The committee also completed a significant volume of work in 2018 that is listed on pages 26-32 of the draft agenda.

- **Implementation of legislation enacted in the 2017-18 legislative session.** Committee staff in consultation with Government Affairs have identified 21 bills that have been enacted or sent to the Governor that may require implementation via rules, forms or education overseen by Fam/Juv. Traditionally the rules and forms work that emerges for the committee from legislation takes up the bulk of the committee's time and results in committee conference calls on a weekly basis for much of the year.

- **Review and make recommendations of grant funding within the committee's jurisdiction.** The committee will continue to make recommendations to the council for allocation of grant funds for the AB 1058 Program, CASA, and the Access to Visitation Program. The committee will also be moving forward with the recommendations on a new funding methodology for AB 1058 based on the work of the AB 1058 Joint Funding Methodology Subcommittee and will work to improve the grant application process for the future for the Access to Visitation Program's next funding cycle.

- **Continued implementation of the recommendations of prior task forces and committees.** Over time the council has referred some or all of the uncompleted work of the following groups to Fam/Juv: the Elkins Family Law Task Force, Blue Ribbon Commission on Children in Foster Care, Domestic Violence Practice and Procedure Task Force, and select recommendations requiring juvenile court implementation from the Mental Health Issues Implementation Task Force. While much of what remains is challenging to implement without additional resources, the committee remains alert to when to move these agendas forward to the extent possible.

- **Futures Commission possible referrals.** While the main recommendations on family and juvenile law have yet to be referred to the committee, it is prepared to begin work on them at the appropriate time, and to provide technical assistance as staff work on the self-help recommendations.

- **Collaboration with other advisory committees on projects of mutual interest.** The committee expects to work with the Traffic Advisory Committee as it implements the Futures Commission recommendations on traffic enforcement to ensure that more informal court based options for juvenile traffic offenders are preserved, and with the Criminal Law Advisory Committee to implement procedures for sex offenders to seek to be removed from the registry, as authorized by recent legislation.

- **Support of working groups and subcommittees.** Fam/Juv continues to provide members, staff, and support to the following standing subcommittees and working groups: Protective Order Working Group, Violence Against Women Education Program Committee, and AB 1058 Funding Allocation Joint Subcommittee.

- **Review of legislation for position recommendations and identification of court impacts.** Continue to review and provide technical assistance and position recommendations on family and juvenile law related legislation.

Family and Juvenile Law Advisory Committee
Annual Agenda[1]—2019
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	Hon. Jerilyn Borack and Hon. Mark A. Juhas, Co-chairs
Lead Staff:	Ms. Audrey Fancy and Ms. Tracy Kenny, Co-lead Staff; Ms. Carolynn Bernabe, Administrative Coordinator, Center for Families, Children & the Courts

Committee's Charge/Membership:
Rule 10.43. Family and Juvenile Law Advisory Committee of the California Rules of Court states the charge of the Family and Juvenile Law Advisory Committee, which is to make recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children. Rule 10.43. Family and Juvenile Law Advisory Committee sets forth additional duties of the committee.

The Family and Juvenile Law Advisory Committee currently has 36 voting members and one advisory member. The Family and Juvenile Law Advisory Committee website provides the composition of the committee.

Subcommittees/Working Groups[2]:
1. Protective Order Working Group (POWG)
2. Violence Against Women Education Program/Victims of Crime Act (VAWEP/VOCA)
3. Joint Juvenile Competency Issues Working Group
4. AB 1058 Funding Allocation Joint Subcommittee

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.
[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[3]	
1.	**Legislative Changes from the 2017-2018 Legislative Session**	***Priority 1***[4]
	Project Summary: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. Domestic Violence: a. AB 2694 (Rubio) Domestic violence: ex parte orders (*Ch. 219, Statutes of 2018*) Prohibits denial of an ex parte petition under the Domestic Violence Prevention Act (DVPA) solely because the other party was not provided with notice of the proceeding. b. SB 1200 (Skinner) Firearms: gun violence restraining orders (*Ch. 898, Statutes of 2018)* Makes various changes to procedures governing gun violence restraining orders, including a clarification of the definition of ammunition and a requirement that the notice to restrained persons conform with this change, and a requirement that the court hold a hearing on a one year order within 21 days of issuance of a temporary restraining order. Family: c. AB 2044 (Stone) Domestic violence: family court (*Ch. 941, Statutes of 2018)* Provides that when making a child custody determination the court must consider the safety of the child as the primary consideration. Codifies the holding in *Jaime G. v. H.L.* that the court must make specified findings on the record or in writing when rebutting the presumption against custody for a parent found to have perpetrated domestic violence. d. AB 2185 (Chiu) Civil actions: pleadings: party names (*Ch. 817, Statutes of 2018*)	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

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#	New or One-Time Projects[3]
	Allows a guardian ad litem petitioning on behalf of a minor to file the petition with a pseudonym or fictitious name. e. AB 2274 (Quirk) Division of community property: pet animals (*Ch. 820, Statutes of 2018*) Authorizes a court, upon request of a party to proceedings for dissolution of marriage or for legal separation of the parties and notwithstanding other requirements for dividing the community estate of the parties, to assign sole or joint ownership of a community property pet animal taking into consideration the care of the pet animal. Also authorizes, upon the request of a party, the court to order a party to care for the pet animal prior to the final determination of ownership. f. AB 2684 (Bloom) Parent and child relationship (*Ch. 876, Statutes of 2018*) This bill updates the Uniform Parentage Act to: ensure equal treatment of same-sex couples; update provisions regarding genetic testing for parentage; and establish a process for children conceived from donated sperm or egg donors to receive medical information of the donor, and, if the donor agrees, identifying information. g. AB 3248 (Committee on Judiciary) Judiciary omnibus (*Ch. 504, Statutes of 2018*) Extends until 2021 provision exempting local child support agencies (LCSA) from local court requirements to electronically file and serve documents unless the LCSA and the Department of Child Support Services certify that the LCSA can comply. h. SB 273 (Hill) Marriage and domestic partnership: minors (*Ch. 660, Statutes of 2018*) Creates additional requirements and court oversight before a minor may marry or establish a domestic partnership. i. SB 1129 (Monning) Spousal support award: conviction for act of domestic violence (*Ch. 850, Statutes of 2018*) Prohibits awards of spousal support, attorney fees, and community property interest in retirement, pension, or insurance benefits to individuals convicted of felony domestic violence against their spouses and creates a presumption against an award of similar benefits to those spouses convicted of misdemeanor domestic violence. Juvenile dependency: j. AB 1617 (Bloom) Juvenile case files: inspection (*Ch. 992, Statutes of 2018*) Allows certain parties involved in appeals of juvenile court orders, who previously had been granted access to the juvenile case file pursuant to a court order, to access the case file for the appeals. Requires the Judicial Council to adopt rules to implement this provision. k. AB 1930 (Stone) Foster care (*Ch. 910, Statutes of 2018*) Adopts various changes to further facilitate implementation of the Continuum of Care Reform (CCR), which was initiated in 2015 in order to better serve children and youth in California's child welfare services system.

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#	New or One-Time Projects[3]
	l. AB 2337 (Gipson) Nonminor dependents (*Ch. 539, Statutes of 2018)* Expands eligibility for extended foster care benefits to nonminors who have not yet reached 21 years of age and who would have received extended foster care benefits at age eighteen but for receiving Supplemental Security Income benefits or other similar federal aid in lieu of foster care payments. m. AB 3047 (Daly) Court fees: Indian Child Welfare Act (*Ch. 399, Statutes of 2018)* Waives the fee and renewal fee for filing pro hac vice when the applicant is an attorney representing a tribe in a child welfare matter under the federal Indian Child Welfare Act. n. AB 3176 (Waldron) Indian children (*Ch. 833, Statutes of 2018)* Updates the Indian Child Welfare Act provisions in the Welfare and Institutions Code in order to comply with recent Federal Bureau of Indian Affairs regulations. o. SB 925 (Beall) Foster care (*Ch. 151, Statutes of 2018)* Requires the Court Appointed Special Advocate to be included in the child or youth's child and family team as defined in Welfare and Institutions Code section 16501 unless the child or youth objects. Juvenile Justice: p. AB 1214 (Stone) Juvenile proceedings: competency (*Ch. 991, Statutes of 2018)* Revises and recasts statutory provisions governing the determination of competency in a juvenile delinquency proceeding. Requires the Judicial Council to adopt a rule of court governing the qualifications of experts appointed in these proceedings. q. AB 2595 (Obernolte) Wards: confinement (*Ch. 766, Statutes of 2018)* Clarifies that the limitations on the length of the physical confinement of a ward committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, do not limit the powers of the Board of Juvenile Hearings and the committing juvenile court to, set a maximum base term, retain jurisdiction of the ward, discharge a ward, and establish conditions of supervision. r. AB 2952 (Stone) Juvenile records: sealed records: access (*Ch. 1002, Statutes of 2018)* Authorizes a prosecuting attorney to access, inspect, or utilize a juvenile record that has been sealed under the automatic sealing process in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case. s. SB 439 (Mitchell) Jurisdiction of the juvenile court (*Ch. 1006, Statutes of 2018*)

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#	New or One-Time Projects[3]	
	Prohibits the prosecution of children under the age of 12 years in the juvenile court, except when a minor is alleged to have committed murder or specified sex offenses. t. SB 1281 (Stern) Juvenile records (*Ch. 793, Statutes of 2018*) Prohibits the destruction of a sealed juvenile record if an offense in that record has made the person subject to a firearms restriction until he or she turns 33 years of age, and authorizes a prosecuting attorney or the Department of Justice to inspect, to utilize those records for purposes related to the enforcement of that restriction, as specified. u. SB 1391 (Lara) Juveniles: fitness for juvenile court (*Ch. 1012, Statutes of 2018*) Repeals the authority of a prosecutor to make a motion to transfer a minor from juvenile court to adult criminal court in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction. ***Status/Timeline:*** Any rules and forms proposals required to implement legislation enacted in 2018 will be prepared for the Winter or Spring public comment cycles in 2019 as appropriate with anticipated effective dates of either September 1, 2019 or January 1, 2020. ***Fiscal Impact/Resources:*** CFCC staff, in consultation with staff from the Legal Services will prepare revised rules and forms as needed. Joint Rules Subcommittee of Trial Court Presiding Judges and Court Executive Advisory Committees (TCPJAC/CEAC JRS) will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** All draft proposals will circulate for public comment to a list of family and juvenile law related stakeholders as well as all court executives and presiding judges. ***AC Collaboration:*** For proposals that impact family and civil courts, the committee will collaborate with the Civil and Small Claims Advisory Committee. For proposals impacting tribal courts, the committee will collaborate with the Tribal Court State Court Forum. For proposals impacting the Courts of Appeal, the committee will collaborate with the Appellate Advisory Committee.	
2.	**Family First Prevention Services Act Implementation**	***Priority 1a***

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#	New or One-Time Projects[3]	
	Project Summary: The Family First Prevention Services Act (FFPSA) was signed into law as part of the Bipartisan Budget Act on February 9, 2018. This act reforms the federal child welfare financing streams, Title IV-E and Title IV-B of the Social Security Act, to provide services to families who are at risk of entering the child welfare system. The committee may be asked to provide input on required changes to California law or to develop rules and forms. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 or January 1, 2021 for rules and forms. ***Fiscal Impact/Resources:*** Legal Services and Government Affairs; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** California Department of Social Services, Chief Probation Officers of California, Child Welfare Directors Association ***AC Collaboration:*** None known	
3.	**Indian Child Welfare Act Legal Updates**	***Priority 1a***
	Project Summary: Update Indian Child Welfare Act (ICWA) rules and forms pursuant to AB 3176 (Waldron) Indian children and In re E.H. (D073635) and make any other technical amendments as appropriate. Assembly Bill 3176 update the Indian Child Welfare Act provisions in the Welfare and Institutions Code in order to comply with recent Federal Bureau of Indian Affairs regulations. *In re E.H.* noted that form ICWA-030 does not have a designated space for information pertaining to great-great-grandparents and suggests that the Judicial Council revise the form to include a designated space. In addition, judicial officers and practitioners have suggested other corrections and amendments to the ICWA rules and forms which will be considered during this cycle. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 for rules and forms. TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Fiscal Impact/Resources:***	

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#	New or One-Time Projects[3]	
	Legal Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Tribal Court–State Court Forum	
4.	**Sex Offender Registration Requirement Changes**	***Priority 1***
	Project Summary: Monitor implementation of SB 384 (Wiener; Stats. 2017, ch. 541), and assist juvenile courts with any required implementation of new sex offender registration requirements. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Criminal Justice Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Criminal Law Advisory Committee	
5.	**Fee Waiver: Changes to Rules and Forms Based on *Jameson v. Desta***	***Priority 1a***
	Project Summary: The California Supreme Court in *Jameson v. Desta*, (2018) 5 Cal.5th 594 , held that a superior court cannot withhold court reporter services from an indigent litigant, who had been granted an initial fee waiver, based on a general policy that official court reporters are not made available for civil cases. Consider implementation of changes to rules 3.55(7) and 2.956; form FW-001-INFO *(Information Sheet on Waiver of Superior Court Fees and Costs)* and form FW-001 *(Request to Waive Court Fees)* in collaboration with the Civil Small Claims Advisory Committee and Probate and Mental Health Advisory Committee. ***Status/Timeline:*** Anticipated effective date of September 1, 2019 for rules and forms. ***Fiscal Impact/Resources:*** Legal Services; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None	

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#	New or One-Time Projects[3]	
	AC Collaboration: Civil and Small Claims Advisory Committee, Probate and Mental Health Advisory Committee	
6.	**Advisement of Appellate Rights in Juvenile Law**	***Priority 2b***
	Project Summary: At the request of several counties and the Appellate Advisory Committee, to clarify the extent of appellate rights available to parties in juvenile law cases, rule 5.590 should be revised to remove the requirement of presence to receive the advisement, include a reference to additional hearing types and the applicable statutory section. In addition, one of the advisory committee comments is no longer accurate and requires revision. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 for rules and forms. ***Fiscal Impact/Resources:*** Committee staff and Appellate Advisory Committee staff; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Appellate Advisory Committee	
7.	**Juvenile Law: Update *Authorization to Release Health and Mental Health Information (Form JV-226)***	***Priority 1a***
	Project Summary: Optional form JV-226 allows parents, guardians, and youth to provide authorization for medical and mental health providers to release information about the child. This form does not address the provisions of Civil Code section 56.106 which limits the rights of a parent from whose custody the child has been removed to authorize the release of mental health information unless the court has made specified findings.	

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#	New or One-Time Projects[3]	
	Fiscal Impact/Resources: None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
8.	**AB 1058 Program Rule and Statutory Changes**	***Priority 1d***
	Project Summary: Consider implementation of rule changes and sponsored legislation to improve the fair, efficient and effective operation of the AB 1058 child support program in the courts to include: a) A new rule setting forth the minimum qualifications for an AB 1058 child support commissioner. b) Amend rule 5.330 to increase compliance with submission of federally required child support registry form. c) Amend rule 5.305(b) to clarify the requirements and timeframe for Title IV-D cases heard by a judge to be directed to the calendar of a child support commissioner. d) Amend rule 5.275 to require that child support calculators include the low-income adjustment range on the first page and to conform fee requirements for child support calculator submission to the Judicial Council with current practice of the council not to accept payment of these fees. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 for rules and forms, and introduction of legislation in 2020 for possible sponsored legislation. TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Fiscal Impact/Resources:*** Legal Services and Government Affairs; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** California Department of Child Support Services ***AC Collaboration:*** None	
9.	**Juvenile Law: Notice to Parties of Proposal to Place Child Out of County**	***Priority 1b***

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#	New or One-Time Projects[3]	
	Implement Assembly Bill 404 (Stone; Stats. 2017, ch. 732), which amended Welf. and Inst. Section 361.2 to require that notice and an opportunity to object be provided to all parties when the social worker recommends a child be place in an out of county placement. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 for rules and forms. ***Fiscal Impact/Resources:*** Legal Services Office; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
10.	**Juvenile Law: Legal Accuracy of Juvenile Forms**	***Priority 1b***
	To comply with Senate Bill 190 (Mitchell; Stats. 2017, ch. 678) remove references to payment of fees from form JV-618, along with other sunsetted provisions. Include required title IV-E dismissal findings and orders to improve the legal accuracy of form JV-364. Create a findings and orders form for the statutorily authorized process of reinstatement of reunification services. ***Status/Timeline:*** Anticipated effective date of January 1, 2020 for rules and forms. ***Fiscal Impact/Resources:*** Legal Services Office; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
11.	**Juvenile Traffic Offenders**	***Priority 2***

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#	New or One-Time Projects[3]	
	At the request of the Futures Traffic Working Group, provide subject matter expertise on the impact on juvenile traffic offenders in proposed Judicial Council sponsored legislation to implement Futures Commission recommendations that would make adult traffic offenses subject to civil rather than criminal sanctions. ***Status/Timeline:*** Develop sponsored legislation proposal to be circulated for comment in 2019. ***Fiscal Impact/Resources:*** Criminal Justice Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Futures Traffic Working Group	
12.	**Gun Violence Restraining Orders**	***Priority 1(a)***
	Project Summary Senate Bill 1200 amends the statutes relating to gun violence restraining orders (GVRO) to, among other things, mandate the title of the forms to be used in relation to the orders; add ammunition and magazines to the items to be seized; provide that service by sheriffs shall be reimbursed; and eliminate any filing fees. The GVRO forms must be amended to reflect the changes in the statutes. ***Status/Timeline:*** The statutory amendments will go into effect January 1, 2019; revised forms to be circulated in the Winter Cycle with September 1 effective date. ***Fiscal Impact/Resources:*** Legal Services and Government Affairs; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** Protective Order Working Group ***AC Collaboration:*** Civil and Small Claims Advisory Committee	
13.	**Pseudonymous Guardian Ad Litem**	***Priority 1(a)***
	Project Summary Assembly Bill 2185 (Ch. 817, Statutes of 2018) establishes a procedure for a person applying to be appointed guardian ad litem to do so using a pseudonym if the court makes certain required findings as to the need for preserving anonymity. Because applications for appointment as guardian ad litem must be made on mandatory Judicial Council forms (either a civil, family law, or probate guardian ad litem application form), development of a form for the ex parte application to proceed pseudonymously should be considered.	

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#	New or One-Time Projects[3]
	Status/Timeline: The statutory amendments will go into effect January 1, 2019; revised forms to be circulated in the Winter Cycle with September 1 effective date. ***Fiscal Impact/Resources:*** Legal Services and Government Affairs; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** Protective Order Working Group ***AC Collaboration:*** Civil and Small Claims Advisory Committee; Probate and Mental Health Advisory Committee (all pertinent committees are already part of the Joint Protective Order Working Group, so may proceed through that group)

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#	Ongoing Projects and Activities	
1.	**Privacy of Minor's Information in Protective Orders**	***Priority 1b***
	Project Summary: In 2018, the committee, working with Family and Juvenile Advisory Committee, recommended that the council adopt new rules and forms to implement Assembly Bill 953, which authorized a minor or a minor's guardian to petition the court to keep information regarding the minor that was submitted to the court for issuance of a civil harassment or domestic violence protective order in a confidential case file. There is still need for an information sheet to be developed to go along with the new rules and forms, and work to be done to clarify how best to address the issue of confidentiality in CLETS system. ***Status/Timeline:*** New rules and forms will go into effect January 1, 2019; goal is to have the information sheet and any revised forms circulate for comment in Spring 2019, with January 1, 2020 effective date. ***Fiscal Impact/Resources:*** Legal Services; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Civil and Small Claims Advisory Committee	
2.	**Family Law: Changes to Continuance Rule and Forms**	***Priority 1d***
	Project Summary: Amend rule 5.94; revise form FL-303, FL-306 and FL-307, approve forms FL-302-INFO, FL-306-INFO, and form FL-308. Propose changes to one rule of court and three forms relating to the procedure for continuing a hearing as described in rule 5.94 of the California Rules of Court. In addition, the committee proposes two new information sheets—one that explains the process associated with form FL-306 and another that describes the options for rescheduling a hearing. The changes are intended to respond to the concerns raised by courts that form FL-306, revised effective September 1, 2017, is not being used by attorneys and the parties for the limited purpose intended by the Judicial Council and provide general information to litigants about rescheduling hearings. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None	

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#	Ongoing Projects and Activities	
	AC Collaboration: None	
3.	**Juvenile Law: Guardianship Information: Revise forms JV-330 and JV-350**	***Priority 1b***
	Project Summary: Revise two forms to update legal information covering the establishment, oversight, modification, and termination of guardianships in juvenile court proceedings in language and a format easily understood by a person not trained in law. The revisions are needed to comply with an ongoing statutory mandate and to work collaboratively with Probate and Mental Health as well as the Committee on Providing Access and Fairness on issues related to court coordination and allegations of child abuse and neglect in guardianship cases. ***Status/Timeline:*** Ongoing; develop revised form for September 1, 2019 effective date. ***Fiscal Impact/Resources:*** Legal Services Office; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Probate and Mental Health, Advisory Committee on Providing Access and Fairness	
4.	**Juvenile Law: Electronic Filing and Service in Juvenile Court Matters (Implementation of AB 976)**	***Priority 1c***
	Project Summary: Develop rule and form proposal to implement Assembly Bill 976 (Berman; Stats. 2017, ch. 319), which authorizes electronic filing and service in juvenile matters, pursuant to Code of Civil Procedure section 1010.6. The bill extends the ability to conduct electronic filing and service to all juvenile matters, with some important exceptions and conditions designed to protect the confidential information of minors and to preserve paper notice of specified proceedings. The bill also requires affirmative consent to electronic service as of January 1, 2019. These statutory changes require the modifications to rules and forms recommended in this report. ***Status/Timeline:*** Anticipated effective date of January 1, 2019 for rules and forms. ***Fiscal Impact/Resources:*** Legal Services Office; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None	

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#	Ongoing Projects and Activities	
	AC Collaboration: None	
5.	**Domestic Violence Forms**	***Priority 1b***
	Project Summary: Assembly Bill 413 (Eggman; Stats 2017, ch. 191) authorizes individuals seeking domestic violence restraining orders to record confidential communications if they contain evidence germane to the restraining order request for the sole purpose of providing that evidence in support of the request. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Criminal Justice Services, Legal Services Office; TCPJAC/CEAC JRS will review proposals for court operations impacts as necessary. ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Criminal Law Advisory Committee, Civil and Small Claims Advisory Committee	
6.	**Juvenile Law: Competency Issues**	***Priority 2***
	Project Summary: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and members serving on other advisory bodies with mental health expertise, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. Continued work to secure legislative change consistent with the Governor's veto message on AB 935. ***Status/Timeline:*** January 1, 2020 ***Fiscal Impact/Resources:*** Governmental Affairs	

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#	Ongoing Projects and Activities	
	Internal/External Stakeholders: Associations representing probation officers, prosecutors, and public defenders ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee	
7.	**Court coordination and allegations of child abuse and neglect**	***Priority 1e***
	Project Summary: A proposal to work collaboratively with Probate and Mental Health as well as the Committee on Providing Access and Fairness on issues related to court coordination and allegations of child abuse and neglect in guardianship cases. Initial joint work will include updating an existing pamphlet (JV-350) concerning guardianships established in juvenile court as well as the probate guardianship pamphlet (GC-205), both of which need significant revision. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Probate and Mental Health Advisory Committee	
8.	**Proposition 47 & AB 2765, Proposition 57, and Proposition 64**	***Priority 1***
	Project Summary: Monitor implementation of three recently enacted proposition and assist juvenile courts with any required implementation: a) Proposition 47 enacted November 5, 2014, which reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767); b) Proposition 57 enacted November 8, 2016 which restructured the process for transfer of jurisdiction from juvenile to criminal court and eliminated the ability of prosecutors to directly file cases in criminal court; and c) Proposition 64 enacted November 8, 2016 which reduced most marijuana offenses for minors to misdemeanors and allows for prior offenses to be reclassified accordingly. ***Status/Timeline:*** Ongoing	

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#	Ongoing Projects and Activities	
	Fiscal Impact/Resources: Criminal Justice Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Criminal Law Advisory Committee	
9.	**Assembly Bill 1058 Child Support Program Funding**	***Priority 1***
	Project Summary: Provide recommendations to the council for allocation of funding pursuant to Family Code sections 4252(b) and 17712 ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Budget Services Office Staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Court Executives Advisory Committee	
10.	**Access to Visitation Funding and Legislative Report**	***Priority 1***
	Project Summary: Provide recommendations to the council for allocation of funding pursuant to Family Code section 3204. Additionally, the committee will provide the council with the statutorily mandated legislative report on the program due every other year. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Budget Services Office Staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	

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#	Ongoing Projects and Activities	
11.	**Court Appointed Special Advocates (CASA) grants program (Welf. & Inst. Code, § 100 et seq.)**	***Priority 1***
	Project Summary: Recommend annual funding to local programs pursuant to the methodology approved by the Judicial Council in August 2013. Conduct 5-year review of 2013 methodology and recommend changes if necessary as referred by the council. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Budget Services Office ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
12.	**Blue Ribbon Commission on Children in Foster Care (BRC) Recommendations**	***Priority 1***
	Project Summary: Continue to provide Judicial Council members input on council accepted recommendations concerning child welfare made by the BRC. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
13.	**Family Law: Elkins Family Law Task Force recommendations**	***Priority 1***
	Project Summary: Continue to provide Judicial Council members input on council accepted recommendations for family law issues addressed by the Elkins Family Law Task Force.	

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#	Ongoing Projects and Activities	
	Status/Timeline: Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
14.	**Referrals from the Commission on the Future of California's Court System**	***Priority 1***
	Project Summary: The Futures Commission made recommendations for significant reform in family and juvenile law. If those recommendations are referred to the committee it would review them and determine the next steps needed for implementation. See Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017 *Family Recommendations:* a) Provide mediation without recommendations as the first step in resolving all child custody disputes. b) Explore through pilot projects or otherwise whether additional services, including tiered mediation, would be effective in complex or contentious cases. *Juvenile Recommendations:* a) Establish a single juvenile court with consolidated jurisdiction over all juvenile court matters. b) Provide courts with jurisdiction over children and parents in all juvenile cases and provide children and parents counsel when appropriate. c) Test these proposals via pilot programs in a diverse set of courts ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Legal Services, Governmental Affairs Office ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	

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#	Ongoing Projects and Activities	
15.	**Domestic Violence**	***Priority 1***
	Project Summary: Provide recommendations to the council on statewide judicial branch domestic violence issues in the area of family and juvenile law, including projects referred from the work of the Domestic Violence Practice and Procedure Task Force and the Violence Against Women Education Program (VAWEP). Serve as lead committee for Protective Orders Working Group (POWG). Examine the need for statewide guidance and policies on access to the California Courts Protective Order Registry (CCPOR). ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Criminal Justice Services, Legal Services Office ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Civil Small Claims Advisory Committee, Criminal Law Advisory Committee	
16.	**Consider Mental Health Issues Implementation Task Force Referrals**	***Priority 2***
	Project Summary: Coordinate with Judicial Council staff and other advisory committees on developing and implementing recommendations to improve access and procedures in mental health proceedings, including review and consideration of implementation of select recommendations referred by the Judicial Council following the task force's final report to the council. Recommend appropriate action within the committee's purview. As referred by the council. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Legal Services, Criminal Justice Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee, Criminal Law Advisory Committee, Family and Juvenile Law Advisory Committee	

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#	Ongoing Projects and Activities	
17.	**Legislation**	***Priority 1***
	Project Summary: As requested by the Judicial Council Policy Coordination and Liaison Committee review and recommend positions on legislation related to family and juvenile law matters. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Governmental Affairs Office ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
18.	**Education**	***Priority 1***
	Project Summary: Contribute to planning efforts in support of family and juvenile law judicial branch education. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** CJER ***Internal/External Stakeholders:*** None ***AC Collaboration:*** CJER Governing Committee	
19.	**Review approval of training providers under 5.210, 5.225, 5.230, and 5.518.**	***Priority 1***
	Project Summary: Training providers/courses are reviewed for compliance with these rules by Judicial Council staff, in consultation with the Family and Juvenile Law Advisory Committee. As directed by the Judicial Council, result of review of delegations. ***Status/Timeline:*** Ongoing	

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#	Ongoing Projects and Activities	
	Fiscal Impact/Resources: Support Services, Legal Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
20.	**Rules Modernization Project**	***Priority 2***
	Project Summary: Continue to assist Information Technology Advisory Committee (ITAC) it its Rules Modernization Project, a collaborative multi-year effort to comprehensively review and modernize statutes and rules so that they will be consistent with and foster modern e-business practices. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Information Technology Advisory Committee	
21.	**FL-800 Joint Petition for Summary Dissolution**	***Priority 1a***
	Project Summary: Update to reflect change in cost of living per Family Code section 2400(b) as a technical change. ***Status/Timeline:*** Ongoing requirement to adjust every other year, next adjustment to be effective January 1, 2018 (approved by the Judicial Council 3/24/17 in a technical report) ***Fiscal Impact/Resources:*** Legal Services Office ***Internal/External Stakeholders:*** None	

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#	Ongoing Projects and Activities	
	AC Collaboration: None	
22.	**Serve as subject matter resource for other advisory groups to avoid duplication of efforts and contribute to development of recommendations for council action.**	***Priority 2***
	Project Summary: Such efforts may include providing family and juvenile law expertise and review to working groups, advisory committees, and subcommittees as needed. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Respective advisory bodies	
23.	**Juvenile Dependency: Court-Appointed-Counsel Workload**	***Priority 2***
	Project Summary: As referred by the council, begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act.. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Budget Services Office Staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
24.	**Court Coordination and Efficiencies**	***Priority 2***

#	Ongoing Projects and Activities	
	Project Summary: Review promising practices that enhance coordination and increase efficient use of resources across case types involving families and children including review of unified court implementation possibilities, court coordination protocols, and methods for addressing legal mandates for domestic violence coordination to provide recommendations for education content and related policy efforts. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
25.	**AB 1058 Funding Allocation Joint Subcommittee**	***Priority 1***
	Project Summary: To enrich recommendations to the council and avoid duplication of effort, members of the committee will continue to collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and make recommendations to the council for fiscal year 2019-20 allocations. In addition to approving the finalized recommendations on a funding methodology to allocate AB 1058 grant funds, the committee will examine strategies for courts to manage their existing workloads within their future funding allocations to ensure that statutory and contractual obligations for the AB 1058 child support program can be met within the reallocated funding. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Budget Services Office Staff ***Internal/External Stakeholders:*** None ***AC Collaboration:*** Trial Court Budget Advisory Committee	

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#	Ongoing Projects and Activities	
26.	**Minors and Nonminor Dependents**	***Priority 2a***
	Project Summary: Continue monitoring implementation, and recommend rule and form changes as necessary, to improve the handling of proceedings involving nonminor dependents. The Judicial Council was a cosponsor of Assembly Bill 12, the original legislation that authorized extended foster care for young adults ages 18 to 21, which was enacted in 2010, with most of its provisions effective January 1, 2012. The council has supported each of the subsequent cleanup bills to make changes to ensure smooth and effective implementation of Assembly Bill 12: Assembly Bill 212 in 2011, Assembly Bill 1712 in 2012, and Assembly Bill 787 (Stone; Stats. 2013, ch. 487) in 2013. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Legal Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
27.	**Rules and Forms: Miscellaneous Technical Changes**	***Priority 2a***
	Project Summary: Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2); “a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy….”. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Legal Services ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None	
28.	**Juvenile Law: Intercounty Transfers**	***Priority 2b***

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#	Ongoing Projects and Activities
	Project Summary: Review requests under rule 5.610(g) to approve local collaborative agreements for alternative juvenile court transfer forms in lieu of JV-550. This project originated from the Judicial Council Delegations to the Administrative Director of the Courts (October 25, 2013). ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** None ***Internal/External Stakeholders:*** None ***AC Collaboration:*** None

III. LIST OF 2018 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	**Implementation of Legislative Changes from the 2015-2016 Legislative Session (Completed by September 1, 2018 or January 1, 2019)** As directed by the Judicial Council, reviewed legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee reviewed the legislation below, and other identified legislation, and proposed rules and forms as appropriate for the council's consideration. • **Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (AB 1299 Ridley-Thomas)** *Ch.603, Statutes of 2016* Effective September 1, 2018 adopted one statewide rule and four juvenile law (JV) forms, including an information sheet. The rule and forms implement a procedural framework and are intended to provide procedural clarity for a juvenile court review hearing created by recent legislation involving foster children's access to specialty mental health services under federal Early and Periodic Screening, Diagnosis and Treatment services. The committee also recommended renumbering a JV form to keep the JV forms related to this proposal in sequential order with other JV forms related to mental health treatment for foster children, including the administration of a foster child's psychotropic medications. • **Juvenile Law: Intercounty Placements (Amend Cal. Rules of Court, rule 5.610; repeal and adopt rule 5.614; approve forms JV-555 and JV-556)** Assembly Bill 1688 (Rodriguez)

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#	Project Highlights and Achievements
	Ch. 605, Statutes 2016 Effective January 1, 2018 amended one rule of the California Rules of Court, repealed and adopted one rule, and approved two Judicial Council forms to conform to recent statutory changes regarding who a child welfare agency must notice when moving a foster child to a different county.
2.	**Implementation of Legislative Changes from the 2017-2018 Legislative Session (Completed by September 1, 2018 or January 1, 2019)** As directed by the Judicial Council, reviewed legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee reviewed the legislation below, and other identified legislation, and proposed rules and forms as appropriate for the council's consideration. Family: • **AB 264 (Low): Protective orders** *Ch. 270, Statutes of 2017* Would require the court to consider issuing a protective order restraining the defendant from any contact with a percipient witness to a crime involving domestic violence, a violation of specified sex offenses, or a violation of laws relating to criminal gangs, if it is shown by clear and convincing evidence that the witness has been harassed. Determined no rules and forms necessary. • **Family Law: Transfer of Jurisdiction (Adopt Cal. Rules of Court, rule 5.97)** Effective January 1, 2018 adopted a new rule of court to implement family law–specific transfer of jurisdiction procedures to comply with the requirements of Assembly Bill 712 (Bloom; Stats. 2017, ch. 316). The legislation required the council to adopt a rule of court to establish time frames for the transfer and receipt of jurisdiction over family law actions. • **Protective Orders: Protecting Information of People Under 18 Years Old** *Ch. 384, Statutes of 2017* Effective January 1, 2018, in collaboration with the Civil and Small Claims Advisory Committee, adopted rule of court, eight forms (a set of four in the Domestic Violence Prevention series and a set of four in the Civil Harassment Prevention series), and revised two forms, in order to implement the provisions in Assembly Bill 953 (Stats. 2017, ch. 384) that seek to protect information relating to minors in domestic violence and civil harassment restraining orders. • **AB 1396 (Burke): Surrogacy** *Ch. 326, Statutes of 2017*

#	Project Highlights and Achievements
	Clarifies that the parent and child relationship cannot be established between a child and a surrogate, as defined, by proof of having given birth. Requires the court to issue the judgment or order regarding parentage forthwith, unless specified conditions are met. Determined no statewide rules and forms necessary, process unique to each court. • **Gender change/name change implementation** **SB 179 (Atkins): Gender identity: female, male, or nonbinary** *Ch. 853, Statutes of 2017* Changes the requirements for getting a new birth certificate issued to reflect a change in gender designation. New forms proposed by the Civil and Small Claims Advisory Committee with input from this committee. Will need to change sex to gender and related changes on forms in 2019 and future cycles. • **Protective Orders: Entry of Interstate and Tribal Protective Orders, Canadian Protective Orders, and Gun Violence Restraining Orders into CLETS** *Ch. 98, Statutes of 2017* Effective January 1, 2018, in collaboration with the Civil and Small Claims Advisory Committee, amended two rules of the California Rules of Court relating to protective orders to (1) include the registration of interstate and tribal court protective orders, Canadian protective orders, and gun violence restraining orders as protective orders that must be submitted to the court with a completed California Law Enforcement and Telecommunications System (CLETS) confidential information form; and (2) add records in gun violence prevention proceedings to the list of electronic court records that are accessible only at the courthouse and not remotely. These changes implement new statutory requirements. The Family and Juvenile Law Advisory committee also recommended the adoption of a new mandatory form to implement the requirements of Senate Bill 204, which allows domestic violence protection orders issued in a Canadian civil court to be registered and enforced in California. • **SB 469 (Skinner D): Child support guidelines: low-income adjustments** *Ch. 730, Statutes of 2017* Extends existing low-income adjustment on the net disposable income threshold for child support obligors from 1/1/2018 to 1/1/2021. Determined no rules and forms necessary. • **Family Law: Income and Expense Declaration** Effective January 1, 2018, amended *Income and Expense Declaration* (form FL-150) to implement recent changes to the tax treatment of alimony (spousal support) under the Internal Revenue Code (IRC) of 1986. In addition, the committee updated the reference to a military housing allowance acronym in the form to clarify the meaning of the term.

#	Project Highlights and Achievements
	Juvenile Dependency: • **Juvenile Law: Dependency Hearings—Continued Condensing of the Rules of Court** Effective January 1, 2018, amend Cal. Rules of Court, rules 5.526, 5.678, 5.690, 5.695, and 5.708 to delete some sections that unnecessarily repeat statutory language or replace them with references to the relevant code sections to enhance the brevity and accuracy of the rules. a) **AB 404 (Stone): Foster care** *Ch. 732, Statutes of 2017* Makes changes to procedures relating to the placement of dependent children, including, among other things, by revising the preference to make a placement with specified relatives and, instead, to grant a preference for placement with any relative. b) **AB 1332 (Bloom): Juveniles: dependents: removal** *Ch. 665, Statutes of 2017* Would prohibit the removal of a child from the physical custody of his or her parent with whom the child did not reside at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent to live with the child or otherwise exercise the parent's right to physical custody, and there are no reasonable means available by which the child's physical and emotional health can be protected without removing the child from the child's parent's physical custody. c) **AB 1401 (Maeinschein): Juveniles: protective custody warrant** *Ch. 262, Statutes of 2017* Would authorize the court to issue a protective custody warrant, without filing a petition in the juvenile court alleging that the minor comes within the jurisdiction of the juvenile court as a dependent, if there is probable cause to believe the minor comes within the jurisdiction of the juvenile court as a dependent, there is a substantial danger to the safety or physical health of the child, and there are no reasonable means to protect the child's safety or physical health without removal. • **Juvenile Law: Vacatur of Convictions Related to Human Trafficking and Preservation of Extended Foster Care Eligibility** *Ch. 707, Statutes of 2017* Effective January 1, 2018, amended three rules and adopted one new rule of the California Rules of Court, revising eight Judicial Council forms, and approving two new Judicial Council forms to implement Assembly Bill 604 (Gipson; Stats. 2017, ch. 707), which clarified that extended foster care benefits are available to young people who have adjudications that are eligible for vacatur pursuant to Penal Code section 236.14. The committee further proposes revising form JV-462 to include certain changes necessitated by recent legislation, making a technical change to form JV-462, and revising form JV-367 to reflect how the form is typically used. Finally, the committee proposes amending rules 5.903 and 5.906 to clarify who may attend status review hearings for former wards who have become nonminor dependents.

#	Project Highlights and Achievements
	• **AB 1371 (Stone): Juveniles: ward, dependent, and nonminor dependent parents** *Ch. 666, Statutes of 2018* Extends prohibition for program of supervision from being undertaken until the parent has consulted with his or her counsel to a parent who is a nonminor dependent or ward of the juvenile court. Determined no rules and forms necessary. • **SB 213 (Mitchell): Placement of children: criminal records check** *Ch. 733, Statutes of 2017* Prohibits final approval for adoption, placement, and licensure (for foster care providers and resource families) if a person in the house has been convicted of certain crimes. Determined no rules and forms necessary. Juvenile Delinquency: • Juvenile Law: Information for Parents Effective January 1, 2018, revise information for parents pamphlet; effective September 1, 2018 revised two Judicial Council forms to update advisements to parents of a child who is the subject of juvenile court wardship proceedings, in order to provide these parents with accurate information about the limits of their responsibility to pay for the costs of services and support provided to their child by the court and county as required by SB 190, (Mitchell) *Ch. 678, Statutes of 2017.* • **Juvenile Law: School Notification of Delinquency Court Adjudication** Effective January 1, 2018, revised Judicial Council form JV-690 to correct inaccuracies in the listed offenses and to conform the form to Welfare and Institutions Code section 827(b)(1). The proposed changes reflect closely the language of Welfare and Institutions Code section 827(b) and give the court the option to indicate the specific code section of the offense that was adjudicated. The form would also be revised to include notice under Education Code section 48267. • **Juvenile Law: Decriminalization of Penal Code section 647f** Effective January 1, 2018, approved two new forms to comply with Senate Bill 239, which requires the Judicial Council to promulgate forms to implement the legislation that repeals Penal Code section 647f and vacates convictions that were based on that code section. The forms allow those who are eligible for relief to request that their Penal Code 647f convictions be vacated and dismissed and that they be resentenced, if appropriate.

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#	Project Highlights and Achievements
	• **AB 90 (Weber): Criminal gangs** *Ch. 695, Statutes of 2017* Clarifies requirements to petition the court to be removed from state managed gang database. Provided subject matter expertise to Civil and Small Claims Advisory Committee on implementation. • **Juvenile Law: Sealing of and Access to Records** Effective September 1, 2018, new and amended rules and new and revised forms to conform to recently enacted statutory provisions concerning the sealing of juvenile records. The proposal updated recently adopted rules and forms to implement sealing of records under Welfare and Institutions Code section 786 to include recent changes to that section, modify forms to reflect the authority of the court to seal records for section 707(b) offenses, and adopted a new rule and optional form for use by probation to seal records under newly enacted section 786.5. a) **AB 529 (Stone): Juveniles: sealing of records** *Ch. 685, Statutes of 2017* Would require, if a person who has been alleged to be a ward of the juvenile court and has his or her petition dismissed or if the petition is not sustained by the court after an adjudication hearing, the court to seal all records pertaining to that dismissed petition that are in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. b) **SB 312 (Skinner): Juveniles: sealing of records** *Ch. 679, Statutes of 2017* Expands the exception to sealing of juvenile court records to include those cases where a finding on a serious or violent offense is reduced to a misdemeanor. c) **SB 462 (Atkins): Juveniles: case files: access** *Ch. 462, Statutes of 2017* Expands the list of who can be allowed to access an otherwise sealed juvenile case file to include law enforcement agencies, probation departments, or other specified agencies for the purposes of data collection and research, provided the court is satisfied that identifying information is protected.
3.	**Rules Modernization Project and Implementation of AB 976 (Completed January 1, 2018)** Each advisory committee was asked to include in their annual agendas for 2015 and 2016 an item providing for the drafting of proposed amendments to modernize the California Rules of Court related to their subject matter areas. This effort was undertaken in coordination with ITAC, which is responsible for developing and completing the overall rules modernization project. Implementation of council sponsored legislation (AB 976 (Berman) Electronic filing and service) that emerged from this project necessitated rule and form changes noted above.

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#	Project Highlights and Achievements
4.	**Dual-Status Youth (Completed January 1, 2018)** Pursuant to Assembly Bill 1911 ([Eggman]; Stats. 2016, ch. 637) convene a group of stakeholders to define data elements and outcome tracking for youth involved in the dependency and delinquency system and report to the legislature by January 1, 2018.
5.	**Appellate Rule and Forms (Completed January 1, 2018)** Work with the Appellate Advisory Committee on the development of rules and forms regarding appellate procedures related to juvenile and family law proceedings. For 2018 this may include a family law specific form for preparing a Proposed Statement on Appeal.
6.	Updated guardianship materials to ensure coordination between courts addressing child abuse and neglect issues via proposed revised guardianship pamphlets circulated for comment (Juvenile Law: Guardianship Forms – Spring 2018 rules and forms proposal).
7.	Provided technical assistance and position recommendations on family and juvenile related proposed legislation via numerous legislative review calls.
8.	Approved list of training providers for court connected child custody mediators, recommending counselors, and evaluators as directed by the Judicial Council.
9.	Worked with Appellate Advisory Committee to develop forms for a self-represented appellant to prepare a settled statement (Spring 2018 cycle: Appellate Procedure and Family Law: Settled Statements in Unlimited Civil Cases).
10.	Worked with the Information Technology Advisory Committee to develop proposed rules of court for remote access to court records by parties and others for records not accessible to the general public remotely (Spring 2018 cycle: Technology: Remote Access to Electronic Records).
11.	Prepared rules and forms to implement legislation allowing for electronic filing and service in juvenile matters in furtherance of the Rules Modernization Project and to implement council sponsored legislation (Spring 2018 cycle: Juvenile Law: Electronic Filing and Service in Juvenile Court Matters (Implementation of AB 976)).
12.	AB 1058 Funding related activities: in addition to making recommendations to the council for ongoing funding allocations and midyear reallocations, the committee also provided members and a co-chair to the AB 1058 Funding Allocation Joint Subcommittee which continues to work on a new workload-based methodology for allocating funds for child support commissioners and family law facilitators.
13.	Submitted report to legislature pursuant to legislative directive on youth involved in the child welfare and juvenile justice systems.
14.	Provided recommendations to the Judicial Council for allocation of funding for the Access to Visitation Grant Program and submitted a report to the legislature on the grant program for council approval.
15.	Provided recommendations to the Judicial Council for allocation of funding for CASA programs, including a new CASA funding allocation methodology.
16.	Provided support for the activities and meetings of the Violence Against Women Education Program and hosted a statewide users forum for the California Courts Protective Order Registry.

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#	Project Highlights and Achievements
17.	Began process of considering a comprehensive update of the attorney workload data and time standards in the current workload model by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act.
18.	Updated guardianship materials to ensure coordination between courts addressing child abuse and neglect issues via proposed revised guardianship pamphlets circulated for comment (Juvenile Law: Guardianship Forms – Spring 2018 rules and forms proposal).
19.	Provided technical assistance and position recommendations on family and juvenile related proposed legislation via numerous legislative review calls.
20.	Approved list of training providers for court connected child custody mediators, recommending counselors, and evaluators as directed by the Judicial Council.
21.	Worked with Appellate Advisory Committee to develop forms for a self-represented appellant to prepare a settled statement (Spring 2018 cycle: Appellate Procedure and Family Law: Settled Statements in Unlimited Civil Cases).
22.	Worked with the Information Technology Advisory Committee to develop proposed rules of court for remote access to court records by parties and others for records not accessible to the general public remotely (Spring 2018 cycle: Technology: Remote Access to Electronic Records).
23.	Prepared rules and forms to implement legislation allowing for electronic filing and service in juvenile matters in furtherance of the Rules Modernization Project and to implement council sponsored legislation (Spring 2018 cycle: Juvenile Law: Electronic Filing and Service in Juvenile Court Matters (Implementation of AB 976)).
24.	AB 1058 Funding related activities: in addition to making recommendations to the council for ongoing funding allocations and midyear reallocations, the committee also provided members and a co-chair to the AB 1058 Funding Allocation Joint Subcommittee which continues to work on a new workload-based methodology for allocating funds for child support commissioners and family law facilitators.
25.	Submitted report to legislature pursuant to legislative directive on youth involved in the child welfare and juvenile justice systems.
26.	Provided recommendations to the Judicial Council for allocation of funding for the Access to Visitation Grant Program and submitted a report to the legislature on the grant program for council approval.
27.	Provided recommendations to the Judicial Council for allocation of funding for CASA programs, including a new CASA funding allocation methodology.
28.	Provided support for the activities and meetings of the Violence Against Women Education Program and hosted a statewide users forum for the California Courts Protective Order Registry.
29.	Began process of considering a comprehensive update of the attorney workload data and time standards in the current workload model by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act.
30.	Updated guardianship materials to ensure coordination between courts addressing child abuse and neglect issues via proposed revised guardianship pamphlets circulated for comment (Juvenile Law: Guardianship Forms – Spring 2018 rules and forms proposal).

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JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
October 5, 2018

To
Hon. Harry E. Hull, Jr., Chair
Rules and Projects Committee

From
Corby Sturges, Attorney
Center for Families, Children & the Courts

Subject
Probate and Mental Health Advisory Committee 2019 Annual Agenda

Action Requested
Please Review

Deadline
N/A

Contact
Corby Sturges
415-865-4507 phone
corby.sturges@jud.ca.gov

Attached is the draft annual agenda for 2019 for the Probate and Mental Health Advisory Committee (PMHAC) that has been reviewed and approved by Center for Families, Children & the Courts Director, Charli Depner, and the Executive Office. This memorandum summarizes the key projects proposed on the PMHAC Annual Agenda for 2019.

- **Continue to review and develop recommendations to improve access and procedural fairness in the probate guardianship process.** The committee's Guardianship Process Working Group will develop a workplan and timeline for its ongoing review of the judicial process for appointment of a guardian to promote due process and access to the courts. Specific projects under this working group's umbrella include revising the guardianship information forms (GC-205, GC-505, and GC-510), developing an information form for parents, revising forms to improve notice of a guardianship proceeding to parents and give them an opportunity to respond, and developing simplified forms for accountings when all estate funds are held in a blocked account.
- **Study the relationship of expert clinical evaluations of mental and physical ability to judicial determinations of legal capacity in conservatorship proceedings and develop**

recommendations to improve the alignment of the two processes. The committee's Legal Capacity Working Group will study clinical evaluations of a person's mental and physical ability and the standards for judicial determinations of legal capacity to make decisions and perform actions; develop recommendations to improve the applicability of clinical evaluations to legal capacity determinations, including potential legislative amendments, rule amendments, and revision of applicable Judicial Council forms, such as *Capacity Declaration—Conservatorship* (form GC-335) and *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A); solicit input from psychiatrists and clinical psychologists to facilitate communication of their evaluations and conclusions in terms that track the legal capacity standards; and provide expressly for the confidentiality of capacity declarations filed in a judicial proceeding.

- **Simplify and streamline the fee waiver process in guardianship and conservatorship proceedings.** The committee will collaborate with the Civil and Small Claims Advisory Committee to develop a recommendation to revoke the special fee waiver forms for use in guardianship and conservatorship proceedings and, if necessary, to revise the civil fee waiver forms to accommodate the statutory distinction, in a guardianship or a conservatorship proceeding, between the *petitioner* and the fee waiver *applicant*.
- **Support mental health process improvement in coordination with other advisory committees.** The committee will coordinate with Judicial Council staff and other advisory committees on recommendations to improve access and procedures in mental health proceedings, including implementing recommendations 24–27 of the Mental Health Issues Implementation Task Force.
- **Review enacted legislation to determine need for implementation through rules, forms, or education.** Committee staff in consultation with Government Affairs have identified several bills that have been enacted or sent to the Governor that may require implementation via rules, forms, or education overseen by PMHAC. Few of these bills are likely to require significant changes or updates.
- **Review pending legislation for position recommendations and identification of court impacts.** The Legislation Subcommittee and staff will continue to review and provide technical assistance and position recommendations on legislation affecting guardianships, conservatorships, decedents' estates, trusts, and civil mental health proceedings.

Probate and Mental Health Advisory Committee
Annual Agenda[1]—2018–2019
Approved by Rules and Projects Committee: October 19, 2018

I. COMMITTEE INFORMATION

Chair:	Hon. John H. Sugiyama, Judge, Superior Court of California, County of Contra Costa
Lead Staff:	Mr. Corby Sturges, Attorney, Center for Families, Children & the Courts

Committee's Charge/Membership:

Rule 10.44 of the California Rules of Court states the charge of the Probate and Mental Health Advisory Committee (PMHAC), which is to make recommendations to the council for improving the administration of justice in proceedings involving decedents' estates, trusts, conservatorships, guardianships, and other probate matters, as well as mental health and developmental disability issues.

The committee is also charged with coordinating activities and work with the Family and Juvenile Law Advisory Committee in areas of common concern and interest.

PMHAC currently has 17 voting members and 1 advisory member. The attached terms of service chart describes the composition of the committee.

Subcommittees/Working Groups[2]:

1. Legislation Subcommittee
2. Guardianship Process Working Group
3. Legal Capacity Working Group
4. Civil Mental Health Issues Subcommittee

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30(c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

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II. COMMITTEE PROJECTS

#	New or One-Time Projects[3]	
1.	***Qualifications and training of counsel appointed in protective proceedings***	***Priority 1(a), 1(e)***[4] *[See footnote 4]*
	Project Summary[5]***:*** Recirculate proposal to amend rule 7.1101 and revise forms GC-010 and GC-011 to improve implementation of Probate Code section 1456's requirements concerning qualifications and continuing education requirements for counsel appointed by the court in conservatorship, guardianship, and other protective proceedings. ***Status/Timeline:*** Recirculate in winter 2019 cycle, with amendments and revisions anticipated to take effect September 1, 2019, or January 1, 2020. ***Fiscal Impact/Resources:*** Committee staff, Joint Rules Subcommittee of Trial Court Presiding Judges and Court Executive Advisory Committees (TCPJAC/CEAC JRS) ***Internal/External Stakeholders:*** Legal Services ***AC Collaboration:*** None	
2.	***Fee waiver process for guardianships and conservatorships***	***Priority 1(a), 1(e)*** *[See footnote 4]*
	Project Summary: Collaborate with the Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee to consider revising the civil fee waiver forms and associated rules of court to conform to the Supreme Court's decision in *Jameson v. Desta* (2018) 5 Cal.5th 594 and to accommodate the statutory distinction between the *petitioner* in a guardianship or conservatorship proceeding and the fee waiver *applicant* introduced by Assembly Bill 2747 (Stats. 2014, ch. 913). Request public	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.
[5] A key objective is a strategic aim, purpose, or "end of action" to be achieved for the coming year.

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#	New or One-Time Projects[3]	
	comment on whether to revoke the special fee waiver forms for use in guardianship and conservatorship proceedings to avoid duplication and confusion on the part of self-represented litigants. ***Status/Timeline:*** Revised forms and amended rules are anticipated to take effect no sooner than September 1, 2019. ***Fiscal Impact/Resources:*** Committee staff, TCPJAC/CEAC JRS ***Internal/External Stakeholders:*** Legal Services ***AC Collaboration:*** Civil and Small Claims Advisory Committee and staff; Family and Juvenile Law Advisory Committee and staff	
3.	***Rules on reimbursement of graduated filing fees***	***Priority 1(a)*** *[See footnote 4]*
	Project Summary: Examine rules 7.151 and 7.550(b)(10) of the California Rules of Court, which apply to graduated filing fees for petitions in decedents' estates cases, to determine whether they should be repealed. The underlying graduated filing fees were held unconstitutional in *Estate of Claeyssens* (2008) 161 Cal.App.4th 465, and the Judicial Council repealed rules 7.552 and 7.553, which also addressed those fees, effective January 1, 2015. ***Status/Timeline:*** Repeal, if recommended, could take effect as soon as July 1, 2019. ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Legal Services ***AC Collaboration:*** None	
4.	***Probate guardianship information for petitioners and parents***	***Priority 1(e)*** *[See footnote 4]*
	Project Summary: Revise and update form GC-205, the probate *Guardianship Pamphlet* for petitioners, form GC-505, *Forms You Need to Ask the Court to Appoint a Guardian of the Person,* and form GC-510, *What is Proof of Service in a Guardianship?* to reflect current law and increase accessibility for self-represented petitioners; develop an information form for parents of children who are subject to	

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#	New or One-Time Projects[3]	
	guardianship petitions; revise guardianship petitions and accompanying forms to ensure that all persons entitled to personal service receive proper notice of the proceedings and an opportunity to be heard. ***Status/Timeline:*** New form and revisions to related forms anticipated to take effect September 1, 2019, or January 1, 2020 ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Superior Court Self-Help Centers ***AC Collaboration:*** None	
5.	***Information about home ownership by a conservatee or ward to support a petition to waive an accounting***	***Priority 2(b)*** *[See footnote 4]*
	Project Summary: Develop a rule of court to (1) require a declaration in support of a petition under Probate Code section 2628 for waiver of an accounting in a guardianship or conservatorship to disclose whether the ward or conservatee owns a home and, if so, (2) require the declarant to attach documents showing current payments of the mortgage or other loan guaranteed by the home, all property taxes, and home insurance premiums. In the alternative, consider proposing an amendment to section 2628 to require the declaration supporting the petition to include that documentation. If this requirement is adopted, it will save the homes of many conservatees from being lost through foreclosure, tax sale, or an uncompensated fire loss. ***Status/Timeline:*** Rule anticipated to take effect January 1, 2020. ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Committee staff, RUPRO Committee and staff ***AC Collaboration:*** None	
6.	***Simplified guardianship accountings when all funds are in blocked account***	***Priority 2(b)*** *[See footnote 4]*

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#	New or One-Time Projects[3]	
	Project Summary: Consider amending rules of court or developing new Judicial Council forms for simplified guardianship accounting in proceedings in which all estate funds are held in a blocked account. ***Status/Timeline:*** On hold pending time and resources, development of guardianship process workplan ***Fiscal Impact/Resources:*** Committee staff, PMHAC Guardianship Process Working Group, TCPJAC/CEAC JRS ***Internal/External Stakeholders:*** ***AC Collaboration:*** None	
7.	***Costs of funeral as expense of administering decedent's estate***	***Priority 2*** *[See footnote 4]*
	Project Summary: Consider developing proposal for legislation to authorize the treatment of the costs of a decedent's funeral as expenses of administering the decedent's estate and therefore payable without submitting a creditor's claim against the estate. ***Status/Timeline:*** On hold pending time and resources. ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Governmental Affairs, Legal Services ***AC Collaboration:*** None	
8.	***Judicial Council forms for court approval of minor's compromise***	***Priority 2(b)*** *[See footnote 4]*
	Project Summary: Revise and renumber the Judicial Council forms adopted for use in proceedings to approve compromise of a claim on behalf of a minor or person with a disability or withdrawal of funds from a blocked account. ***Status/Timeline:*** Revised and renumbered forms anticipated to take effect January 1, 2020 ***Fiscal Impact/Resources:*** Committee staff	

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#	New or One-Time Projects[3]
	Internal/External Stakeholders: Legal Services ***AC Collaboration:*** Civil and Small Claims Advisory Committee

#	Ongoing Projects and Activities	
1.	***Review and recommend restructuring of probate guardianship process***	***Priority 1, 1(e)*** *[See footnote 4]*
	Project Summary: The Guardianship Process Working Group will develop a workplan and timeline for its ongoing review of the judicial process for appointment of a guardian to promote due process and access to the courts. The workplan will include provision for: (a) identifying elements of the process that need to be simplified, brought up to date, or restructured; (b) determining whether statutory amendments are needed and, if so, developing a proposal for legislation; (c) identifying necessary or appropriate amendments to the California Rules of Court that govern guardianship proceedings and developing those amendments; (d) identifying necessary or appropriate revisions to Judicial Council forms adopted or approved for use in probate guardianship proceedings and developing those revisions, including one-time projects ; (e) identifying any new rules or forms needed to clarify the process or bring it into conformity with current law. ***Status/Timeline:*** Ongoing. ***Fiscal Impact/Resources:*** Committee staff, Governmental Affairs staff ***Internal/External Stakeholders:*** Superior Court Self-Help Centers, translation services ***AC Collaboration:*** PMHAC Guardianship Process Working Group; Family and Juvenile Law Advisory Committee	
2.	***Study the relationship of clinical evaluations of mental and physical abilities and judicial determinations of legal capacity and need for assistance, including appointment of a conservator; develop recommendations for updated legal standards***	***Priority 1(e), 2*** *[See footnote 4]*

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#	Ongoing Projects and Activities	
	Project Summary: The Legal Capacity Working Group will study the relationship between clinical evaluations of a person's mental and physical abilities and judicial determinations of the person' legal capacity or need for assistance, including appointment of a conservator; solicit input from clinicians and lawyers to identify areas of misalignment between the relevant clinical and legal standards; develop recommendations to improve the alignment of clinical evaluations of ability to judicial determinations of legal capacity, including potential legislation, rules of court, and Judicial Council forms, including possible revisions of *Capacity Declaration—Conservatorship* (form GC-335) and *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A). Consider providing expressly for the confidentiality of capacity declarations filed in judicial proceedings. ***Status/Timeline:*** Ongoing. Initial form revisions could take effect September 1, 2020, or January 1, 2021. ***Fiscal Impact/Resources:*** Committee staff; PMHAC Legal Capacity Working Group ***Internal/External Stakeholders:*** Legal Services; Psychiatrists and clinical psychologists ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee	
3.	***Support judicial branch efforts to improve access to mental health proceedings***	***Priority 1*** *[See footnote 4]*
	Project Summary: Cooperate with Judicial Council staff and other advisory committees in developing and implementing recommendations to improve access and procedures in mental health proceedings, including recommendations 24–27 of the Mental Health Issues Implementation Task Force. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, staff to other advisory committees ***Internal/External Stakeholders:*** Governmental Affairs, Legislature ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee, Criminal Law Advisory Committee, Family and Juvenile Law Advisory Committee	
4.	***Review suggestions***	***Priority 1*** *[See footnote 4]*

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#	Ongoing Projects and Activities	
	Project Summary: As mandated by rule 10.21(c), review suggestions from members of the judicial branch and the public for improving judicial administration, practice, and procedure in decedents' estate, trust, guardianship, conservatorship, and other proceedings under the Probate Code and recommend action by the council or one of its committees. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** As appropriate based on proposal received ***AC Collaboration:*** As appropriate based on proposal received	
5.	***Review pending legislation***	***Priority 1*** *[See footnote 4]*
	Project Summary: Review pending legislation affecting probate court administration, practice, or procedure in proceedings under the Probate Code and the Lanterman-Petris-Short Act, and make recommendations to the council's Policy Coordination and Liaison Committee, as required by rule 10.34(a)(3). ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff, Governmental affairs staff ***Internal/External Stakeholders:*** As appropriate based on subject of legislation ***AC Collaboration:*** Collaborative Justice Courts Advisory Committee and others as appropriate based on subject of legislation	
6.	***Review enacted legislation***	***Priority 1*** *[See footnote 4]*
	Project Summary: Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs staff that may affect issues within the advisory committee's purview and, where appropriate, propose to the council rules and forms to implement the legislation or to bring rules and forms into conformity with it. This year, bills that may need implementation through rules and forms include AB 1290 (lawyer-client privilege), SB 909 (trusts), AB 2426 (trusts), AB 3248 (judiciary), and the bills discussed in item 7, below.	

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#	Ongoing Projects and Activities	
	Status/Timeline: Ongoing ***Fiscal Impact/Resources:*** Committee staff, Governmental affairs staff ***Internal/External Stakeholders:*** As appropriate based on subject of legislation ***AC Collaboration:*** As appropriate based on subject of legislation	
7.	***Monitor Developments in California Guardianship Law Related to Immigrant Children***	***Priority 1*** *[See footnote 4]*
	Project Summary: Monitor the implementation, in probate guardianship proceedings, of the directives in section 155 of the Code of Civil Procedure (added by Stats. 2014, ch. 685, § 1), section 1510.1 of the Probate Code (added by Stats. 2015, ch. 694), and other provisions concerning judicial findings to support (proposed) wards' petitions for Special Immigrant Juvenile (SIJ) status in federal immigration proceedings. Statutes that may require implementation in 2019 include AB 2090, which amended Probate Code section 1510.1 to authorize a parent to petition for appointment of a guardian for an adult child; AB 2185, which added section 372.5 to the Code of Civil Procedure to authorize a guardian ad litem to appear under a pseudonym in specified circumstances; and AB 2642, which added section 2104.1 to the Probate Code to authorize appointment of an out-of-state nonprofit corporation as guardian of a child "in connection with a petition regarding special immigrant juvenile status." ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Legal Services ***AC Collaboration:*** Civil Mental Health Issues Subcommittee; Family and Juvenile Law Advisory Committee	
8.	***Support rules modernization***	***Priority 2(b)*** *[See footnote 4]*

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#	Ongoing Projects and Activities	
	Project Summary: Support and assist the Information Technology Advisory Committee (ITAC) in its efforts to review and modernize rules of court so that they will be consistent with and foster modern e-business practices. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** Legal Services ***AC Collaboration:*** ITAC	
9.	***Provide subject-matter expertise***	***Priority 2(b)*** *See footnote 4*
	Project Summary: Serve as subject-matter resource for other advisory groups to avoid duplication of efforts and contribute to the development of recommendations for council action. These efforts may include providing probate and mental health procedural expertise and review to working groups, advisory committees, subcommittees, and Judicial Council staff, as needed. ***Status/Timeline:*** Ongoing ***Fiscal Impact/Resources:*** Committee staff ***Internal/External Stakeholders:*** As appropriate based on inquiry ***AC Collaboration:*** As appropriate based on inquiry	

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III. LIST OF 2017–2018 PROJECT ACCOMPLISHMENTS

#	Project Highlights and Achievements
1.	Recommended Judicial Council approval of two optional forms to request and appoint counsel probate guardianship and conservatorship proceedings
2.	Recommended Judicial Council approval of six optional forms to facilitate interstate transfer of conservatorship proceedings under the California Conservatorship Jurisdiction Act (CCJA)
3.	Recommended Judicial Council adoption of revisions to eight forms to implement Senate Bill 413 (Stats. 2017, ch. 122), which incorporated the term "major neurocognitive disorder" into the law
4.	Reviewed and provided technical assistance on more than 30 bills introduced in 2018 that affect or would have affected proceedings under the Probate Code
5.	Recommended the amendment of rule 10.44(c) of the California Rules of Court to add a category for a public interest lawyer to the committee's membership
6.	Participated on ITAC Joint ad hoc Subcommittee on Remote Access to develop rules of court to govern remote access to court records by parties, attorneys, and justice partners.

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Traffic Advisory Committee_Annual Agenda[1]—2019
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	Hon. Gail Dekreon
Lead Staff:	Jamie Schechter, Attorney, Criminal Justice Services Office

Committee's Charge/Membership:

Rule 10.54 of the California Rules of Court states the charge of the Traffic Advisory Committee, which is to make recommendations to the Judicial Council for improving the administration of justice in the area of traffic procedure, practice, and case management and in other areas as set forth in the fish and game, boating, forestry, public utilities, parks and recreation, and business licensing bail schedules.

The Traffic Advisory Committee currently has 13 members. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups[2]:

1. Advisory Committee on Providing Access and Fairness's Gender Expression/Identity Joint Ad Hoc Working Group, approved by the Executive and Planning Committee.

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[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.
[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[3] *[Group projects by priority number.]*	
1.	***Revising Traffic Instructions and Citations (TR-INST, TR-100, TR-106, TR-108, TR-115, TR-120, TR-130, TR-135, TR-145)***	***Priority 2(b)***[4]
	Project Summary[5]***:*** Traffic citation forms fall within the purview of the Traffic Advisory Committee. The forms were last modified in 2015. The forms are confusing and some sections are out of date. In 2019, the Traffic Advisory Committee proposes to examine and begin revising citations using plain language. Because of the potential Futures Traffic Working Group recommendation for civil adjudication of traffic citations, the Traffic Advisory Committee would not propose actually revising the citations until a legislative proposal has been adopted. ***Status/Timeline:*** October 2020. ***Fiscal Impact/Resources:*** Committee staff. ***Internal/External Stakeholders:*** Law enforcement agencies. ***AC Collaboration:*** Futures Traffic Working Group.	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.
[5] A key objective is a strategic aim, purpose, or "end of action" to be achieved for the coming year.

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#	Ongoing Projects and Activities *[Group projects by priority number.]*	
1.	***2019 Bail Schedules Revision***	***Priority 1***
	Project Summary: The Traffic Advisory Committee is required to revise and update the Uniform Bail and Penalty Schedules annually to conform with new laws, as required by Penal Code section 1269b and California Rule of Court 4.102. However, the current document should be modified to be easier for courts to use. The committee hopes to thoroughly retool the Uniform Bail and Penalties Schedule in 2019. ***Status/Timeline:*** December 2019. ***Fiscal Impact/Resources:*** Committee staff. ***Internal/External Stakeholders:*** N/A. ***AC Collaboration:*** N/A.	
2.	***Support Recommendations of the Futures Traffic Working Group for Civil Adjudication of Traffic Infractions***	***Priority 1***
	Project Summary: The Chief Justice has directed the Futures Traffic Working Group to consider a proposal to implement and evaluate a civil model for adjudication of minor vehicle infractions. In addition, the working group was directed to explore, evaluate, and recommend options for online processing for all phases of traffic infractions. The Traffic Advisory Committee has supported the Futures Traffic Working Group in this effort. The committee will continue to support the recommendations from the Futures Traffic Working Group on civil adjudication, including proposing legislation, and modifying rules and forms as appropriate. ***Status/Timeline:*** Ongoing. ***Fiscal Impact/Resources:*** Committee staff. ***Internal/External Stakeholders:*** Law enforcement agencies, California District Attorneys Association, Advocacy groups. ***AC Collaboration:*** Futures Traffic Working Group.	

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#	**Ongoing Projects and Activities** *[Group projects by priority number.]*	
3.	***Review Pending and Enacted Legislation***	***Priority 1***
	Project Summary: Review pending and enacted legislation that may have an impact on traffic court administration. Provide subject matter expertise on legislation, including fiscal impacts for the courts. Propose rules and forms necessary to comply with legislation or other directives. ***Status/Timeline:*** Ongoing. ***Internal/External Stakeholders:*** N/A. ***Fiscal Impact/Resources:*** Committee Staff, Governmental Affairs. ***AC Collaboration:*** N/A.	
4	***Rules Modernization Project***	***Priority 1***
	Project Summary: In collaboration with Information Technology Advisory Committee (ITAC), identify and develop priorities for potential rule and statutory modifications so that the rules and statutes will be consistent with modern business practices. (For example, consider electronic notification to replace mail, paying fines online, etc.). Review rules and statutes in a systematic manner and develop recommendations for comprehensive changes. ***Status/Timeline:*** Ongoing. ***Internal/External Stakeholders:*** N/A. ***AC Collaboration:*** **N/A.** ***Fiscal Impact/Resources:*** Committee Staff, ITAC.	
5	***Traffic Bench Officer and Temporary Judge Training***	***Priority 1***

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#	**Ongoing Projects and Activities** *[Group projects by priority number.]*
	Project Summary: Provide advice as requested by the Center for Judicial Education and Research (CJER) with development of traffic training programs and materials for bench officers and temporary judges assigned to traffic proceedings. ***Status/Timeline:*** Ongoing. ***Internal/External Stakeholders:*** N/A. ***Fiscal Impact/Resources:*** Committee Staff. ***AC Collaboration:*** CJER Governing Committee.

III. LIST OF [PREVIOUS YEAR] PROJECT ACCOMPLISHMENTS

#	**Project Highlights and Achievements** *[Provide brief, broad outcome(s) and completed date.]*
1.	The committee updated the Uniform Bail and Penalties Schedule to be consistent with 2017 legislation, completed December 2017.
2.	The committee provided Government Affairs subject matter expertise on numerous pending traffic bills, including operational and fiscal impacts of proposed legislation, ongoing.
3.	The committee has supported the Futures Traffic Working Group in the effort to move minor vehicle infractions to a civil model, ongoing.
4.	The committee assisted in developing rules for remote access to court records by parties, their attorneys, and justice partners, and participated in the Joint Ad-Hoc Subcommittee on Remote Access authorized by RUPRO that developed these rules.

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Item number: 13

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 19, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings. Adopt Cal. Rules of Court, rules 8.390 – 8.398; amend rule 8.380; and adopt form HC-200

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:
Project description from annual agenda: The working group's charge is available at the "about" tab at: http://www.courts.ca.gov/prop66-working-group.htm.

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 October 22 and ending on November 19 The working group's goal is to present this proposal to the Judicial Council for adoption at its March meeting in order to meet the statutory deadline of adoption of the rules by April 25, 2019.

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

SP18-22

Title
Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 8.390 – 8.398; amend rule 8.388; and adopt form HC-200

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

Action Requested
Review and submit comments by Monday, November 19, 2018

Proposed Effective Date
April 25, 2019

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

Michael Giden, 415-865-7977
michael.giden@jud.ca.gov

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

Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing amendments to an existing rule relating to appeals from decisions in habeas corpus proceedings and the adoption of several new rules and a form specifically addressing appeals from superior court decisions on death penalty–related habeas corpus petitions. These proposed rules and the form are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66 by establishing procedures for this new type of appeal.

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. Among other things, the act made several changes to the procedures for hearing death penalty–related habeas corpus petitions, including that such petitions are generally to be heard in the superior court. The act also provided for an appeal to the Court of Appeal by either party from a superior court decision in such a

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.

habeas proceeding as the only mechanism for seeking relief from the such a decision. New Penal Code section 1509.1 adopted as part of the act does the following, among other things:

- Authorizes either party to appeal the decision of a superior court on an initial habeas corpus petition in a capital case;
- Sets the time for filing the notice of appeal in these cases;
- Limits the issues that can be considered by the Court of Appeal in such an appeal to:
    - Claims raised in the superior court; and
    - Claims of ineffective assistance of trial counsel that were not raised in the habeas corpus petition.
- Authorizes the People to appeal a decision granting relief on a successive habeas corpus petition;
- Provides that the petitioner may only appeal a denial of relief on a successive habeas corpus petition if either the superior court or the Court of Appeal issues a certificate of appealability;
- Limits the circumstances in which a certificate of appealability may be issued to when the petitioner has shown both:
    - A substantial claim of relief; and
    - A substantial claim of actual innocence or ineligibility for the death penalty;
- Sets the time for the courts to grant or deny a certificate of appealability;
- Limits the claims that can be considered by the Court of Appeal in appeals by petitioners in successive petition cases to those identified in the certificate of appealability or added by the Court of Appeal by a specified deadline.

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 act. The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including, among other things, those governing the procedures for appeals of the superior court's rulings on capital habeas corpus petitions to the Court of Appeal.

Preexisting law relating to appeals from superior court habeas corpus decisions

Prior to the enactment of Proposition 66, Penal Code section 1506 authorized appeals by the People to the Court of Appeal of a superior court decision granting relief in a habeas corpus

proceeding. Section 1506 provided that in a capital case, the appeal must made to the Supreme Court. No appeal was permitted when a habeas corpus petition was denied, but a petitioner could file another habeas corpus petition in a higher court. In *Briggs*, *supra,* 3 Cal.5th 808, the Supreme Court concluded that Proposition 66 implicitly repealed this provision in section 1506.

Rule 8.388 addresses the procedures for People's appeals of superior court decisions granting relief in non-capital habeas corpus proceedings under Penal Code section 1506. This rule generally provides that, with the exception of the contents of the record on appeal, the general rules relating to appeals in felony cases, rules 8.304–8.368, apply to these appeals of superior court habeas corpus decisions.

The Proposal

This proposal is intended to help fulfill the Judicial Council's rule-making obligations under Proposition 66 by proposing rules and a form establishing procedures for appeals under new Penal Code section 1509.1 from superior court decisions on death penalty–related habeas corpus petitions. The proposed rules adopt the overall approach embodied in current rule 8.388, generally applying many of the rules applicable to felony appeals. However, the proposed rules also include many distinct provisions that reflect the unique requirements of Penal Code section 1509.1, including special requirements for appeals from decisions regarding successive habeas corpus petitions and appeals that include claims of ineffective assistance of trial counsel not raised in the superior court. While, as a general matter, the California Rules of Court typically do not repeat statutory provisions, in these proposed rules some statutory requirements are repeated to provide context for related rule provisions.

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 rules. These notes are published with this proposal to help readers better understand the proposal and will not be included in any rules ultimately adopted by the Judicial Council.

Qualifications of counsel appointed by the Court of Appeal

Proposed new rule 8.391 would specify the qualifications of counsel appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under Penal Code section 1509.1. Because these appeals will involve considering issues raised and potentially not raised in a capital habeas corpus proceeding, the working group's view is that it is important that such an attorney be fully conversant in capital habeas corpus representation. The working group is therefore proposing that an attorney must meet the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding (Please see proposed rule 8.652 as circulated for comment in http://www.courts.ca.gov/documents/SP18-12.pdf.). The working group would particularly appreciate comments regarding whether these are the appropriate qualifications for appointed counsel in these appeals.

Notice of appeal
Penal Code section 1509.1 provides that an appeal from a superior court decision on an initial habeas corpus petition "shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition." Similarly, this section provides that an appeal of a superior court decision on a successive habeas corpus petition "shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision." Proposed rule 8.393 implements these statutory provisions by providing that a notice of appeal must be filed within 30 days after the making of the order being appealed. This proposed rule would apply to appeals by both the petitioner and the People and, unlike under rule 8.308(b), the rule does not provide additional time for the filing of a cross-appeal because Penal Code section 1509.1 does not appear to permit such an extension of the time to appeal. The working group would appreciate comments on whether it would be helpful to include an advisory comment to this rule that highlights that all appeals must be filed within the 30-day time period.

Certificate of appealability
As noted above, Penal Code section 1509.1 provides that the petitioner may only appeal a denial of relief on a successive habeas corpus petition if either the superior court or the Court of Appeal issues a certificate of appealability. Subdivision (c) of this code section contains detailed requirements regarding these certificates, including that:

- The superior court must grant or deny a certificate of appealability concurrently with a decision denying relief on the petition.
- The Court of Appeal must grant or deny a request for a certificate of appealability within 10 days of an application for a certificate.
- If a certificate is issued, the substantial claim for relief must be indicated in the certificate; and
- The jurisdiction of the Court of Appeal is limited to the claims identified in the certificate and any additional claims added by the Court of Appeal within 60 days of the notice of appeal.

Proposed new rule 8.392(b) contains provisions designed to implement these requirements. Among other things, this provision requires that:

- The appellant's notice of appeal from a superior court decision regarding a capital habeas corpus petition indicate:
  - If the appeal is from a superior court decision denying relief on a successive petition; and
  - Whether the superior court granted or denied a certificate of appealability.
- If the superior court denied a certificate of appealability, the petitioner must attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability that

identifies the petitioner's claim or claims for relief and explains how the requirements of Penal Code section 1509(d) have been met; and

- Any certificate of appealability issued by a court must identify the substantial claim for relief shown by the petitioner.

Proposed new *Petitioner's Notice of Appeal - Death Penalty–Related Habeas Corpus Decision* (form HC-200) is designed to help implement several of these requirements. This proposed form includes a notice that, if a certificate of appealability was not issued by the superior court, the appellant must submit a request to the Court of Appeal for a certificate. In addition, the second page of the form can be used to make such a request.

Record on appeal
Proposed new rule 8.395 addresses the record in these appeals.

Contents of the record
Subdivision (a) of proposed new rule 8.395 addresses the contents of the record on appeal. It is modeled in large part on rule 8.388(b), relating to the contents of the record in appeals by the People under Penal Code section 1506 from superior court decisions granting habeas corpus relief. The language from rule 8.388(b) has been modified to reflect the fact that, under Penal Code section 1509.1, appeals from superior court decisions on habeas corpus petitions in capital cases may be taken by either the People from orders granting relief or by the petitioner from orders denying relief, and that the denial being appealed may have occurred with or without issuance of an order to show cause. Thus, the proposal requires inclusion in the record of any order to show cause, return, denial, or traverse. In addition, the language from rule 8.388(b) has been modified to specifically require that the record include any informal response to the petition, any statement of decision required by Penal Code section 1509(f), the supporting documents accompanying the habeas corpus petition filed in the superior court, and any certificate of appealability required under Penal Code section 1509.1.

Stipulations for limited record
Subdivision (b) of proposed new rule 8.395 is modeled on rule 8.320(f), relating to stipulations for limited records in non-capital felony appeals. The working group would particularly appreciate comments about whether, as a practical matter, such stipulations are likely to be used or helpful in appeals under Penal Code section 1509.1, and thus whether to include this provision in the rule.

When record preparation begins
Subdivisions (c) and (d) of proposed new rule 8.395 are modeled on rule 8.336, relating to the preparation of the record in non-capital felony appeals. Similar to the way felony cases in which a certificate of probable cause is required are handled under rule 8.336, for appeals from a superior court decision denying relief on a successive habeas corpus petition when the superior court did not issue a certificate of appealability, the proposed rule would provide that preparation

of the transcripts would not begin unless and until the superior court clerk receives a copy of a certificate of appealability issued by the Court of Appeal. However, unlike under rule 8.336, the proposed rule would generally provide that in other appeals under Penal Code section 1509.1, the superior court would not begin preparing the record on appeal until after a notice of appeal has been filed. Under rule 8.336, in contrast, in felony cases where there is a trial on the merits, preparation of the record generally begins immediately after a verdict or finding of guilt of a felony is announced, the superior court does not wait for the filing of a notice of appeal. The working group considered that waiting until the notice of appeal is filed would provide time for the parties to consider whether to stipulate to a limited record on appeal. The working group would particularly appreciate comments on when record preparation should begin in these cases.

When record preparation must be completed

The timeframe for completion of the clerk's and reporter's transcripts in subdivisions (c) and (d) of proposed new rule 8.395 – within 20 days after the notice of appeal is filed – and the provision in subdivision (e) regarding extensions of this deadline are also modeled on rule 8.336. In addition, the draft of the proposed rule incorporates language from rule 8.616(d)(2), relating to preparation of the record for the automatic appeal in capital cases, presuming good cause for extension of time for the clerk and court reporters to prepare the initial trial record when the record is over 10,000 pages. The working group would particularly appreciate comments about whether this timeframe and the extension provision are appropriate in these appeals. The working group would also appreciate comments on whether extensions of the time for preparing the record should be automatically provided when the record is over 10,000 pages, similar to the automatic extensions for time for counsel to review the record in capital appeals under amendments to rules 8.619 and 8.622 approved by the Judicial Council in September 2018.

Briefs

Proposed rule 8.396 addresses briefs in these appeals. Among other things, the rule contains provisions addressing the limitations on the issues that can be raised under Penal Code section 1509.1 in appeals from decisions regarding successive petitions. The rule's provisions regarding the timeframes for filing briefs and their length are modeled on those in rule 8.630(b) and (c), relating to briefs in capital appeals in the Supreme Court. The working group would particularly appreciate input about whether these timeframes and length limits are appropriate for these appeals, including appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition.

Claims of ineffective assistance of trial counsel not raised in the superior court

As noted above, Penal Code section 1509.1 provides that an appeal from a superior court decision on an initial capital habeas corpus petition may include a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition. Proposed rule 8.397 would establish procedures for making and handling such claims. Among other things, this rule would require that such claims be placed in a separate part of the appellant's brief and be clearly identified as addressing a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition.

Because these are claims that were not raised in the superior court proceedings, there will be no record of superior court filings, hearings, or action relating to these claims. The proposed rule would therefore require the appellant making such a claim and the respondent to provide the court with a proffer containing relevant material not in the record on appeal or of which the court has taken judicial notice. The working group would particularly appreciate comments about the content and format of this proposed proffer.

The rule also addresses the circumstances in which the Court of Appeal must order an evidentiary hearing on such a claim. The language of this provision is modeled on language from rule 8.386(f) relating to proceedings if the return in a non-capital habeas corpus proceeding is ordered to be filed in the reviewing court. The rule provides several options for how such an evidentiary hearing may take place, including through a limited remand to the superior court, as provided in Penal Code section 1509.1. The rule also permits, but does not require, that the Court of Appeal stay the proceedings on other claims raised in the appeal if it orders such a limited remand.

Alternatives Considered

The committee considered a number of alternative approaches to specific issues while it was developing these proposed rules and form.

Form for certificate of appealability

The working group considered whether to propose not only an application for a certificate of appealability, but also a form that the Court of Appeal could use to issue such a certificate. Some working group members thought that certificates of appealability would have to be so individualized to the case that a form might not be useful. It was also noted that there is no Judicial Council form for the parallel certificate of probable cause required in some non-capital felony appeals. Other members thought that a form might be helpful to remind the court of the elements that need to be addressed in any such certificate. The working group would particularly appreciate comments about whether a form for the certificate of appealability itself should be proposed.

Time for beginning preparation of the record on appeal

The working group considered whether to provide that preparation of the record should generally begin immediately upon decision by the superior court in a capital habeas corpus proceeding. The working group ultimately decided to propose that it begin when a notice of appeal is filed, in order to provide the parties with time to consider whether to stipulate to a limited record on appeal.

Access to habeas corpus counsel's file

The working group discussed the fact that counsel representing a person in an appeal under Penal Code section 1509.1 will need to review the file of counsel that represented the person in the habeas corpus proceeding in the superior court. The working group would appreciate comments

on whether the rules should require that habeas corpus consult transmit their file to appellate counsel when appellate counsel is appointed.

Transfer of appeals

The working group considered whether to propose a rule addressing possible transfer by the Supreme Court of an appeal of a superior court decision in habeas corpus proceeding in a capital case from one Court of Appeal district to another district. The working group ultimately concluded that rules on this topic were not necessary, as Article 6, section 12 of the California Constitution and Rule 10.1000 already address transfer by the Supreme Court from one Court of Appeal district to another.

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 hearing habeas corpus proceedings in these cases and providing for appeals by either party of superior court habeas corpus decisions, 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.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?
- Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?
- Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?
- Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?
- When should preparation of the record begin for these appeals?
- Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?
- Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?

- Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?
- Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?
- Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate?

The advisory 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 two 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 8.388 and 8.390 – 8.398 at pages 10-29
- Form HC-200, at pages 30-31
- 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

Rule 8.388 of the California Rules of Court would be amended, and rules 8.390–8.398 would be adopted, effective April 25, 2019, to read:

1 **Title 8. Appellate Rules**
2
3 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**
4
5 **Chapter 4. Habeas Corpus Appeals and Writs**
6
7 DRAFTERS' NOTES ON ARTICLE HEADINGS AND RULE 8.388: The proposed
8 addition of the Article 1 and Article 2 headings and the amendment to rule 8.388
9 are meant to clarify that current rules 8.380–8.388 do not apply to habeas corpus
10 proceedings related to a judgment of death.
11
12 **Article 1. Habeas Corpus Proceedings Not Related to Judgment of Death**
13
14 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by**
15 **an attorney * * ***
16
17 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party * ****
18
19 **Rule 8.385. Proceedings after the petition is filed * * ***
20
21 **Rule 8.386. Proceedings if the return is ordered to be filed in the reviewing court**
22 *** * ***
23
24 **Rule 8.387. Decision in habeas corpus proceedings * * ***
25
26 **Rule 8.388. Appeal from order granting relief by writ of habeas corpus**
27
28 **(a) Application**
29
30 Except as otherwise provided in this rule, rules 8.304–8.368 and 8.508 govern
31 appeals under Penal Code section 1506 or 1507 from orders granting all or part of
32 the relief sought in a petition for writ of habeas corpus. This rule does not apply to
33 appeals under Penal Code section 1509.1 from superior court decisions in death
34 penalty–related habeas corpus proceedings.
35
36 **(b)** * * *
37
38

Article 2. Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

DRAFTERS' NOTES ON PROPOSED RULE 8.390: This proposed new rule is modeled on rule 8.388. As in 8.388, subdivision (b) would make some of the rules relating to general felony appeals applicable to appeals from superior court decisions in death penalty–related habeas corpus proceedings. However, this proposed rule would make fewer of those felony appeal rules applicable. Not made applicable are:

- Rule 8.304. Filing the appeal; certificate of probable cause
- Rule 8.308. Time to appeal
- Rule 8.312. Stay of execution and release on appeal
- Rule 8.320. Normal record; exhibits
- Rule 8.324. Application in superior court for addition to normal record
- Rule 8.360. Briefs by parties and amici curiae
- Rule 8.361. Certificate of interested entities or persons

What would be made applicable, either in whole or in part, and therefore that are only partially addressed or not addressed at all in the proposed new rules below, are:

- Rule 8.300. Appointment of appellate counsel by the Court of Appeal, with the exception that the qualifications for counsel are set by proposed rule 8.652, rather than by the Appellate Indigent Defense Oversight Advisory Committee.
- Rule 8.316. Abandoning the appeal
- Rule 8.332. Juror-identifying information
- Rule 8.336. Preparing, certifying, and sending the record (note that this topic is partially addressed in proposed rule 8.394 below)
- Rule 8.340. Augmenting or correcting the record in the Court of Appeal
- Rule 8.344. Agreed statement
- Rule 8.346. Settled statement
- Rule 8.366. Hearing and decision in the Court of Appeal
- Rule 8.368. Hearing and decision in the Supreme Court

Rule 8.390. Application

(a) Application

The rules in this article apply only to appeals under Penal Code section 1509.1 from superior court decisions in death penalty–related habeas corpus proceedings.

(b) General application of rules for criminal appeals

Except as otherwise provided in this article, rules 8.300, 8.316, 8.332–8.346, and 8.366–8.368 govern appeals subject to the rules in this article.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.391: This proposed rule would clarify that appointed counsel in appeals under this article must meet the same minimum qualifications as counsel appointed to represent a petitioner in a capital habeas corpus proceeding.

Rule 8.391. Qualifications of counsel appointed by the Court of Appeal

To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.392: This proposed new rule addresses notices of appeal and certificates of appealability.

Subdivisions (a) and (c) of this proposed new rule are modeled on rule 8.304(a), relating to the notice of appeal and notice to court reporters of the filing of an appeal in non-capital felony appeals. Paragraph (c)(2) provides that if the superior court did not issue a certificate of appealability, the clerk must not send the notification of the filing of a notice of appeal to the court reporter or reporters unless and until the clerk receives a copy of a certificate of appealability issued by the Court of Appeal. As under rule 8.304, this is designed to prevent the court reporters from beginning preparation of the reporter's transcript until it is clear that the appeal is moving forward.

Subdivision (b) is intended to implement the provisions of Penal Code section 1509.1(c) relating to certificates of appealability in petitioners' appeals from a decision denying relief on a successive petition for a writ of habeas corpus. Paragraph (b)(1) of the proposed rule restates the following language from this statutory provision:

> The petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability.

The provision in (b)(3) requiring that a petitioner's request for the Court of Appeal to issue a certificate of appealability "must identify the petitioner's claim or claims for relief and explain how the requirements of Penal Code section 1509(d) have

been met" is modeled in part on the requirement in Penal Code section 1237.5 that defendants seeking a certificate of probable cause to appeal from a felony judgment file a statement "executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds" for the appeal.

Paragraph (b)(4) providing that the People must not file an answer to a request for a certificate of appealability unless the court requests an answer is modeled on rule 8.268(b)(2), relating to answers to petitions for rehearing.

The proposed requirement in paragraph (b)(5) that any certificate of appealability issued by a court "must identify the substantial claim for relief shown by the petitioner" is based on the following two provisions in Penal Code section 1509.1(c):

> A certificate of appealability may issue under this subdivision only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, . . .

> The jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal . . .

Both of these provisions indicate that the claims need to be in any certificate issued by a court.

Paragraph (b)(6) is modeled on rule 8.304(b)(3), relating to the handling of a notice of appeal in non-capital felony appeals when no certificate of probable cause is issued.

The timeframe for notification by the clerk of the filing of an appeal in paragraph (c)(1) is modeled on language from rule 8.616(a)(1), relating to clerk's notices to court reporters to begin preparation of transcripts in capital cases.

Rule 8.392. Filing the appeal; certificate of appealability

(a) Notice of appeal

To appeal from a superior court decision in a death penalty–related habeas corpus proceeding, the petitioner or the People must serve and file a notice of appeal in that superior court. To appeal a decision denying relief on a successive habeas corpus petition, the petitioner must also comply with (b).

(b) Appeal of decision denying relief on a successive habeas corpus petition

(1) The petitioner may appeal the decision of the superior court denying relief on a successive death penalty–related habeas corpus petition only if the superior court or the Court of Appeal grants a certificate of appealability under Penal Code section 1509.1(c).

(2) The petitioner must identify in the notice of appeal that the appeal is from a superior court decision denying relief on a successive petition and indicate whether the superior court granted or denied a certificate of appealability.

(3) If the superior court denied a certificate of appealability, the petitioner must attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability. The request must identify the petitioner's claim or claims for relief and explain how the requirements of Penal Code section 1509(d) have been met.

(4) The People must not file an answer to a request for a certificate of appealability unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within five days after the order is filed unless the court orders otherwise.

(5) If the Court of Appeal grants a certificate of appealability, the certificate must identify the substantial claim(s) for relief shown by the petitioner. The Court of Appeal clerk must send a copy of the certificate to the attorney for the petitioner or, if unrepresented, to the petitioner, and to the district appellate project, the Attorney General, the district attorney, the superior court clerk, and the Supreme Court clerk.

(6) If both the superior court and the Court of Appeal deny a certificate of appealability, the Court of Appeal clerk must mark the notice of appeal "Inoperative," notify the petitioner, and send a copy of the marked notice of appeal to the superior court clerk, the Supreme Court clerk, and the district appellate project.

(c) Notification of the appeal

(1) Except as provided in (2), when a notice of appeal is filed, the superior court clerk must promptly—and no later than five days after the notice of appeal is filed—send a notification of the filing to the attorney for the petitioner, the Attorney General, the district attorney, the reviewing court clerk, the district appellate project, the Supreme Court clerk, each court reporter, and any primary reporter or reporting supervisor.

(2) If the petitioner is appealing from a superior court decision denying relief on a successive petition and the superior court did not issue a certificate of appealability, the clerk must not send the notification of the filing of a notice of appeal to the court reporter or reporters unless and until the clerk receives a copy of a certificate of appealability issued by the Court of Appeal under (b)(5).

(3) The notification must show the date it was sent, the number and title of the case, and the dates the notice of appeal was filed and any certificate of appealability was issued. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case; and

(B) The name of the party each attorney represented in the superior court.

(4) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate of appealability or denial of a certificate of appealability issued by the superior court, and the sequential list of reporters made under rule 2.950.

(5) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

(6) The sending of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(7) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

Advisory Committee Comment

Subdivision (b). This subdivision addresses issuance of a certificate of appealability by the Court of Appeal. Rule 4.576(b) addresses issuance of a certificate of appealability by the superior court.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.393: This rule is modeled on rule 8.308, relating to notices of appeal in non-capital felony cases, but the time to appeal has been changed to correspond to the requirement in Penal Code section 1509.1(a) that, "An appeal shall be taken by filing a notice of

appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition." In addition, unlike rule 8.308, it does not address cross-appeals because Penal Code section 1509.1(a) appears to set the timeframe for filing any appeal.

Rule 8.393. Time to appeal

A notice of appeal under this article must be filed within 30 days after the making of the order being appealed.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.394: This proposed new rule is modeled, in part, on rule 8.312, relating to stays in non-capital felony appeals. However, this draft rule intentionally leaves out any discussion of the showing needed to grant a stay.

Rule 8.394. Stay of execution on appeal

(a) Application

Pending appeal under this article, the petitioner may apply to the reviewing court for a stay of execution of the death penalty. The application must be served on the People.

(b) Interim relief

Pending its ruling on the application, the reviewing court may grant the relief requested. The reviewing court must notify the superior court under rule 8.489 of any stay that it grants. Notification must also be sent to the Supreme Court clerk.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.395: This proposed new rule addresses the record on appeal.

Subdivision (a) of this proposed new rule is modeled on rule 8.388(b), relating to the content of the record in appeals by the People from superior court decisions granting habeas corpus relief. It has been modified to reflect the fact that, under Penal Code section 1509.1, appeals from superior court decisions on habeas corpus petitions in capital cases may be not only from orders granting relief, but also from orders denying relief either with or without issuance of an order to show cause. The proposed rule requires that the record include "any" order to show cause, return, and traverse. In addition, the language from rule 8.388(b) has been modified to specifically require that the record include:

- Any informal response to the petition;
- Any statement of decision required by Penal Code section 1509(f);
- The supporting documents identified under proposed rule 4.571 (see accompanying invitation to comment on the proposed rules for trial court habeas corpus proceedings in capital cases); and
- Any certificate of appealability issued by the superior court or the Court of Appeal (note that the superior court would receive a copy of a certificate of appealability issued by the Court of Appeal under proposed rule 8.392(b)(5) above).

Subdivision (b) is modeled on rule 8.320(f), relating to stipulations for limited records in non-capital felony appeals.

Subdivisions (c) and (d) are modeled on rule 8.336, relating to the preparation of the record in non-capital felony appeals, but establish different triggers for the preparation of the record. Under rule 8.336, in felony cases where there is a trial on the merits, preparation of the record generally begins immediately after a verdict or finding of guilt of a felony is announced; the trial court does not wait for the filing of a notice of appeal. In appeals after a plea of guilty or nolo contendere or after an admission of probation violation, rule 8.336 provides that record preparation does not begin until the court files a certificate of probable cause. In contrast, the proposed draft below would provide that preparation in most appeals from superior court decisions on capital habeas corpus petitions would begin upon the filing of a notice of appeal. For appeals from a superior court decision denying relief on a successive petition when the superior court did not issue a certificate of appealability, however, somewhat like felony cases in which a certificate of probable cause is required, the proposed rule would provide that preparation of the transcripts would not begin unless and until the trial court clerk receives a copy of a certificate of appealability issued by the Court of Appeal.

Subdivision (e) is modeled on rule 8.336(e), but the 60-day limit on the length of the extensions of time permitted has been eliminated. In addition, the draft of the proposed rule incorporates language from rule 8.616(d)(2), relating to preparation of the record for the automatic appeal in capital cases, presuming good cause for extension of time for the clerk and court reporters to prepare the initial trial record when the record is over 10,000 pages. Note that, under the amendments to rule 8.619 approved by the Judicial Council at its September 2018 meeting, which will take effect on April 25, 2019, the deadlines for counsel to review and the court to certify the record for the automatic appeal for completeness would automatically be extended by t days for each 1,000 pages of combined transcript over 10,000 pages and, under the proposed amendments to rule 8.622, the deadlines for counsel to review and the court to certify the record for the automatic appeal for accuracy would automatically be extended by

15 days for each 1,000 pages of combined transcript over 10,000 pages (see the report to the Judicial Council at: https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938).

Paragraph (f)(1) is modeled on language that will be added to rule 8.619(f)(2), relating to the preparation of the record for the automatic appeal in a death penalty case, effective April 25, 2019 (see the report to the Judicial Council at: https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938). Paragraph (f)(2) is modeled on rule 8.336 (f), relating to the form of the record in non-capital felony appeals.

Subdivision (g) is modeled on rule 8.336(g), relating to the sending of the record in non-capital felony appeals. However, the proposal specifies that a copy of the transcripts will be sent to the Governor. Note that in cases in which a death sentence is imposed, Penal Code section 1218 specifically requires that the Governor be sent "a complete transcript of all the testimony given at the trial including any arguments made by respective counsel and a copy of the clerk's transcript."

Paragraph (i) is modeled on rule 8.386(e), relating to judicial notice in habeas corpus proceedings in which the return is heard in the Court of Appeal. Under rule 8.252, which is cross-referenced, to obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a motion in the reviewing court.

Rule 8.395. Record on appeal

(a) Contents

In an appeal under this rule article, the record must contain:

(1) The petition;

(2) Any informal response to the petition and any reply to the informal response;

(3) Any order to show cause;

(4) Any reply, return, answer, denial, or traverse;

(5) All supporting documents under rule 4.571 and any other documents and exhibits submitted to the court;

(6) The reporter's transcript of any oral proceedings;

(7) All court minutes;

(8) Any statement of decision required by Penal Code section 1509(f) or other written decision of the court;

(9) The order appealed from;

(10) The notice of appeal; and

(11) Any certificate of appealability issued by the superior court or the Court of Appeal.

(b) Stipulation for partial transcript

If counsel for the petitioner and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part must not be prepared or sent to the reviewing court.

(c) Preparation of clerk's transcript

(1) Except as provided in (2), the clerk must begin preparing the clerk's transcript immediately after the notice of appeal is filed.

(2) If the petitioner is appealing from a superior court decision denying relief on a successive petition and the superior court did not issue a certificate of appealability, the clerk must not begin preparing the clerk's transcript unless and until the clerk receives a copy of a certificate of appealability issued by the Court of Appeal under rule 8.391(b)(5).

(3) Within 20 days after the clerk is required to begin preparing the transcript under (1) or (2), the clerk must complete preparation of an original and three copies of the clerk's transcript.

(4) On request, the clerk must prepare an extra copy for the district attorney or the Attorney General, whichever is not counsel for the People on appeal.

(5) The clerk must certify as correct the original and all copies of the clerk's transcript.

(d) Preparation of reporter's transcript

(1) The reporter must begin preparing the reporter's transcript immediately on being notified by the clerk under rule 8.392(c) that the notice of appeal has been filed.

(2) The reporter must prepare an original and the same number of copies of the reporter's transcript as (c) requires of the clerk's transcript, and must certify each as correct.

(3) The reporter must deliver the original and all copies to the superior court clerk as soon as they are certified, but no later than 20 days after notice of the filing of the notice of appeal is sent to the reporter.

(e) Extension of time

(1) The superior court may not extend the time for preparing the record.

(2) The reviewing court may order one or more extensions of time for preparing the record, including a reporter's transcript, on receipt of:

(A) A declaration showing good cause. The court may presume good cause if the clerk's and reporter's transcripts combined will likely exceed 10,000 pages, not including the supporting documents submitted with the petition, any informal response, reply to the informal response, return, answer, or traverse; and

(B) In the case of a reporter's transcript, certification by the superior court presiding judge, or a court administrator designated by the presiding judge, that an extension is reasonable and necessary in light of the workload of all reporters in the court.

(f) Form of record

(1) The reporter's transcript must be in electronic form. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so.

(2) The clerk's and reporter's transcripts must comply with rules 8.45–8.47, relating to sealed and confidential records, and rule 8.144.

(g) Sending the transcripts

(1) When the clerk's and reporter's transcripts are certified as correct, the clerk must promptly send:

(A) The original transcripts to the reviewing court, noting the sending date on each original;

(B) One copy of each transcript to appellate counsel for the petitioner and to the Attorney General or the district attorney, whichever is counsel for the People on appeal;

(C) One copy of each transcript to the district attorney or Attorney General if requested under (c)(4), and

(D) One copy of each transcript to the Governor.

(2) If the petitioner is not represented by appellate counsel when the transcripts are certified as correct, the clerk must send that petitioner's counsel's copy of the transcripts to the district appellate project.

(h) Augmenting or correcting the record in the Court of Appeal

Rule 8.340 governs augmenting or correcting the record in the Court of Appeal, except that copies of augmented or corrected records must be sent to those listed in (g).

(i) Judicial notice

Rule 8.252(a) governs judicial notice in the reviewing court.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.396: This proposed new rule addresses briefs.

Paragraph (a)(1) in this proposed new rule is modeled on language that appears in both rule 8.360(a), relating to briefs in general felony appeals in the Court of Appeal, and rule 8.630(a), relating to briefs in capital appeals in the Supreme Court.

Paragraph (a)(2), in conjunction with proposed new rule 8.397 below, is designed to help implement the requirement in Penal Code section 1509.1(b) allowing

petitioners to raise ineffective assistance of counsel claims in the appeal that were not raised in the habeas corpus proceeding in the trial court.

Paragraph (a)(3) and the accompanying advisory committee comment are designed to alert rule users about the provision in Penal Code section 1509.1(c) limiting the claims that can be heard by the Court of Appeal in appeals of the denial of relief on a successive habeas corpus petition.

The brief length limits in subdivision (b) are modeled on those in rule 8.630 (b), relating to briefs in capital appeals in the Supreme Court. The limits in rule 8.360(b), relating to briefs in general felony appeals in the Court of Appeal, are considerably shorter - 25,500 words or 75 pages for all party briefs.

The timeframes for filing briefs is subdivision (c) are modeled on those in rule 8.630(c), relating to briefs in capital appeals in the Supreme Court. The time limits in rule 8.360(c), relating to briefs for general non-capital felony appeals in the Court of Appeal, are considerably shorter – 40 days after the record is filed in the reviewing court for the filing of the appellant's opening brief, 30 days after the filing of the appellant's opening brief for the respondent's brief, and 20 days after the filing of the respondent's brief for the reply brief.

Paragraphs (c)(5) – (7) and subdivisions (d) – (f) are modeled on rule 8.360 (c)(4) – (6) and subdivisions (d) – (f), relating to briefs in general felony cases, with a few small changes, including:

- Changing references from "defendant" to "petitioner;" and
- Changing the timeframe for filing a request to file an amicus brief to reflect the proposed briefing schedule in subdivision (c).

Rule 8.396. Briefs by parties and amici curiae

(a) Contents and form

(1) Except as provided in this rule, briefs in appeals governed by the rules in this article must comply as nearly as possible with rules 8.200 and 8.204.

(2) If, as permitted by Penal Code section 1509.1(b), the petitioner wishes to raise a claim in the appeal of ineffective assistance of trial counsel that was not raised in the superior court habeas corpus proceedings, that claim must be raised in the first brief filed by the petitioner. A brief containing such a claim must comply with the additional requirements in rule 8.397.

(3) If the petitioner is appealing from a decision of the superior court denying relief on a successive death penalty–related habeas corpus petition, the

petitioner may only raise claims in the briefs that were identified in the certificate of appealability that was issued and any additional claims added by the Court of Appeal as provided in Penal Code section 1509.1(c).

(b) Length

(1) A brief produced on a computer must not exceed the following limits, including footnotes:

(A) Appellant's opening brief: 102,000 words.

(B) Respondent's brief: 102,000 words. If the presiding justice permits the appellant to file an opening brief that exceeds the limit set in (1)(A) or (3)(A), respondent's brief may not exceed the length of appellant's opening brief approved by the presiding justice.

(C) Reply brief: 47,600 words.

(2) A brief under (1) must include a certificate by appellate counsel stating the number of words in the brief; counsel may rely on the word count of the computer program used to prepare the brief.

(3) A typewritten brief must not exceed the following limits:

(A) Appellant's opening brief: 300 pages.

(B) Respondent's brief: 300 pages. If the presiding justice permits the appellant to file an opening brief that exceeds the limit set in (1)(A) or (3)(A), respondent's brief may not exceed the length of appellant's opening brief approved by the presiding justice.

(C) Reply brief: 140 pages.

(4) The tables required under rule 8.204(a)(1), the cover information required under rule 8.204(b)(10), a certificate under (2), any signature block, and any attachment permitted under rule 8.204(d) are excluded from the limits stated in (1) and (3).

(5) A combined brief in an appeal governed by (e) must not exceed double the limit stated in (1) or (3).

(6) On application, the presiding justice may permit a longer brief for good cause.

(c) Time to file

(1) The appellant's opening brief must be served and filed within 210 days after the record is filed.

(2) The respondent's brief must be served and filed within 120 days after the appellant's opening brief is filed.

(3) The appellant must serve and file a reply brief, if any, within 60 days after the respondent files its brief.

(4) The time to serve and file a brief may not be extended by stipulation, but only by order of the presiding justice under rule 8.60.

(5) If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party in writing that the brief must be filed within 30 days after the notice is sent, and that failure to comply may result in sanctions specified in the notice.

(d) Service

(1) The petitioner's appellate counsel must serve each brief for the petitioner on the People and the district attorney, and must send a copy of each to the petitioner personally unless the petitioner requests otherwise.

(2) The proof of service under (1) must state that a copy of the petitioner's brief was sent to the petitioner, or counsel must file a signed statement that the petitioner requested in writing that no copy be sent.

(3) The People must serve each of their briefs on the appellate counsel for the petitioner and on the district appellate project. If the district attorney is representing the People, one copy of the district attorney's brief must be served on the Attorney General.

(4) A copy of each brief must be served on the superior court clerk for delivery to the superior judge who issued the order being appealed.

(e) When the petitioner and the People appeal

When both the petitioner and the People appeal, the petitioner must file the first opening brief unless the reviewing court orders otherwise, and rule 8.216(b) governs the contents of the briefs.

(f) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule 8.200(c), except that an application for permission of the presiding justice to file an amicus curiae brief must be filed within 14 days after the last appellant's reply brief is filed or could have been filed under (c), whichever is earlier.

Advisory Committee Comment

Subdivision (a)(3). This subdivision is intended to implement the sentence in Penal Code section 1509.1(c) providing that "[t]he jurisdiction of the court of appeal is limited to the claims identified in the certificate [of appealability] and any additional claims added by the court of appeal within 60 days of the notice of appeal."

Subdivision (b)(4). This subdivision specifies certain items that are not counted toward the maximum brief length. Signature blocks referred to in this provision include not only the signatures, but also the printed names, titles, and affiliations of any attorneys filing or joining in the brief, which may accompany the signature.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.397: This proposed new rule establishes procedures for presenting and handling claims in appeals under Penal Code section 1509.1 of ineffective assistance of counsel that were not raised in the habeas corpus proceeding in the superior court.

Subdivision (b) would require ineffective assistance of counsel claims to be addressed in a separate portion of the briefs. This is to make this section easier to find for the court and because this portion of the brief will include citations to the proposed proffer authorized by subsection (c).

Paragraph (b)(3) is modeled in part on rule 8.204(a)(1)(B).

Paragraph (b)(4) is modeled in part on rule 8.204(a)(1)(C), but the sources that can be referred to have been broadened to include the proffer and items of which the court has taken judicial notice.

Subdivision (c) addresses the proffer of evidence not in the record and not subject to judicial notice. It would require a proffer from either side when evidence outside the record or matters subject to judicial notice are being relied on either to make or respond to a claim. Paragraphs (c)(1)(A), (2) and (3) are modeled in part on rule 8.384(b), which addresses the supporting documents to a petition for a writ of habeas corpus. The language in (c)(1)(B) is modeled in part

on language in rule 8.386(f), relating to proceedings if the return in a non-capital habeas corpus proceeding is ordered to be filed in the reviewing court, which refers to what the court may consider before ordering an evidentiary hearing.

Subdivision (d) addresses evidentiary hearings. The initial language in (d) regarding when the reviewing court must order an evidentiary hearing is modeled in part on language in rule 8.386(f), relating to proceedings if the return in a non-capital habeas corpus proceeding is ordered to be filed in the reviewing court. The language in (d)(1) regarding limited remand is intended to implement the provision in Penal Code section 1509.1 providing for limited remand. The language regarding vesting jurisdiction in the superior court is modeled on language from rule 8.385, which addresses what happens when the return in a habeas corpus proceeding in a reviewing court is ordered to be made in the superior court. The language in (d)(2) is modeled in part on language in rule 8.386(f). The language in (d)(3) is modeled in part on language in rule 8.252(c) regarding the reviewing court taking evidence.

Subdivision (e) addresses what happens with respect to the appeal when a limited remand is ordered. Paragraph (1) would permit, but not require, the reviewing court to stay the remainder of the appeal pending the decision on remand. Paragraph (2) would make clear that a new notice of appeal would need to be filed if a party wanted to challenge the superior court's decision on remand. Paragraph (3) would allow the reviewing court to consolidate such an appeal with the pending appeal of the habeas corpus decision.

8.397. Claim of ineffective assistance of trial counsel not raised in the superior court

(a) Application

This rule governs claims under Penal Code section 1509.1(b) of ineffective assistance of trial counsel not raised in the superior court habeas corpus proceeding giving rise to an appeal under this article.

(b) Discussion of claim in briefs

(1) A claim subject to this rule must be raised in the first brief filed by the petitioner.

(2) All discussion of claims subject to this rule must be addressed in a separate part of briefs under a heading identifying this part as addressing claims of ineffective assistance of trial counsel that were not raised in a superior court habeas corpus proceeding.

(3) Discussion of each claim within this part of the brief must be under a separate subheading identifying the claim. Petitioner's brief must include a summary of the claim under the subheading, and each claim must be supported by argument and, if possible, by citation of authority.

(4) This part of the brief may include references to matters in:

(A) The record on appeal prepared under rule 8.395. Any reference to a matter in the record must be supported by a citation to the volume and page number of the record where the matter appears.

(B) Matters of which the court has taken judicial notice.

(C) A proffer required under (c). Any reference to a matter in a proffer must be supported by a citation to its index number or letter and page.

(c) Proffer

(1) A brief raising a claim under Penal Code section 1509.1(b) of ineffective assistance of trial counsel not raised in a superior court habeas corpus proceeding must be accompanied by a proffer of any reasonably available documentary evidence supporting the claim that is not in either the record on appeal prepared under rule 8.395 or matters of which the court has taken judicial notice. A brief responding to such a claim must be accompanied by a proffer of any reasonably available documentary evidence the People are relying on that is not in the petitioner's proffer, the record on appeal prepared under rule 8.395, or matters of which the court has taken judicial notice.

(A) If a brief raises a claim that was the subject of an evidentiary hearing, the proffer must include a certified transcript of that hearing.

(B) Other evidence may be in the form of affidavits or declarations under penalty of perjury.

(2) The proffer must comply with the following formatting requirements:

(A) The pages must be consecutively numbered.

(B) It must begin with a table of contents listing each document by its title and its index number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(C) If submitted in paper form:

(i) It must be bound together at the end of the brief or in separate volumes not exceeding 300 pages each.

(ii) It must be index-tabbed by number or letter.

(3) The clerk must file any proffer not complying with (2), but the court may notify the filer that it may strike the proffer and the portions of the brief referring to the proffer if the documents are not brought into compliance within a stated reasonable time of not less than five days.

(4) If any documents in the proffer are sealed or confidential records, rules 8.45–8.47 govern these documents.

(d) Evidentiary hearing

An evidentiary hearing is required if, after considering the briefs, the proffer, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The reviewing court may take one of the following actions:

(1) Order a limited remand to the superior court to consider the claim under Penal Code section 1509.1(b). The order for limited remand vests jurisdiction over the claim in the superior court, which must proceed under the rules for habeas corpus proceedings in capital cases in the superior court. The Court of Appeal clerk must send a copy of any such order to the Supreme Court clerk.

(2) Appoint a referee to conduct the hearing and make recommended findings of fact.

(3) Conduct the hearing itself or designate a justice of the court to conduct the hearing.

(e) Procedures following limited remand

(1) If the reviewing court orders a limited remand to the superior court to consider a claim under Penal Code section 1509.1(b), it may stay the proceedings on the remainder of the appeal pending the decision of the superior court on remand. The Court of Appeal clerk must send a copy of any such stay to the Supreme Court clerk.

(2) If any party wishes to appeal from the superior court decision on remand, the party must file a notice of appeal as provided in rule 8.392.

(3) If an appeal is filed from the superior court decision on remand, the reviewing court may consolidate this appeal with any pending appeal under Penal Code section 1509.1 from the superior court's decisions in the same habeas corpus proceeding. A copy of any consolidation order must be promptly sent to the superior court clerk. The superior court clerk must then augment the record on appeal to include all items listed in rule 8.395(a) from the remanded proceedings.

DRAFTERS' NOTES ON PROPOSED NEW RULE 8.398: This proposed new rule is intended to clarify that denials of requests for certificates of appealability are final immediately.

8.398. Finality

(a) General rule

Except as otherwise provided in this rule, rule 8.366(b) governs the finality of Court of Appeal decisions in a proceeding under this article.

(b) Denial of certificate of appealability

The Court of Appeal's denial of an application for a certificate of appealability in a proceeding under this article is final in that court on filing.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **09/27/18** **Not approved by the Judicial Council**
In re ______________________ on Habeas Corpus (NAME OF PETITIONER)	
PETITIONER'S NOTICE OF APPEAL **Death Penalty–Related Habeas Corpus Decision** **(Pen. Code, § 1509.1; Cal. Rules of Court, rule 8.391)**	CASE NUMBER:

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 30 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If you are appealing the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death, and the superior court did not grant you a certificate of appealability, you must complete the Request for Certificate of Appealability on page 2 of this form.

1. Petitioner appeals from a judgment rendered or an order made by the superior court in a death penalty–related habeas corpus proceeding.

   NAME of petitioner:

   DATE of the order or judgment:

2. ☐ This is an appeal from the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death. (*If you check this box, you must check a or b*)

   a. ☐ The superior court granted a certificate of appealability.

   b. ☐ The superior court did not grant a certificate of appealability. *(You must complete the Request for Certificate of Appealability on page 2 of this form.)*

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER OR ATTORNEY)

In re ______________________________ on Habeas Corpus (NAME OF PETITIONER)	CASE NUMBER:

REQUEST FOR CERTIFICATE OF APPEALABILITY

Penal Code section 1509.1(c) provides that a certificate of appealability may be issued only if the petitioner has shown both "a substantial claim for relief" and "a substantial claim that the requirements of subdivision (d) of Section 1509 have been met."

Penal Code section 1509(d) provides, in full:

(d) An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility. “Ineligible for the sentence of death” means that circumstances exist placing that sentence outside the range of the sentencer's discretion. Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true, a claim that the defendant was under the age of 18 at the time of the crime, or a claim that the defendant has an intellectual disability, as defined in Section 1376. A claim relating to the sentencing decision under Section 190.3 is not a claim of actual innocence or ineligibility for the purpose of this section.

1. I request that the Court of Appeal issue a certificate of appealability. My claims for relief are:

2. My claim that the requirements of Penal Code section 1509(d) have been met is:

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

Date:

______________________________	______________________________
(TYPE OR PRINT NAME)	(SIGNATURE OF PETITIONER OR ATTORNEY)

Item number: 14

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 19, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571, 4.572, 4.573, 4.574, 4.575, and 4.57)

Committee or other entity submitting the proposal:
Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Michael I. Giden, 415-865-7977, michael.giden@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: n/a

If requesting July 1 or out of cycle, explain:
The working group requests that this proposal be circulated for public comment on a shortened special cycle - starting on October 22 and ending on November 19. The working group's goal is to present this proposal to the Judicial Council for adoption at its March meeting, to become effective on April 25, 2019.

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

SP18-23

Title
Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 4.571, 4.572, 4.573, 4.574, 4.575, and 4.576

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

Action Requested
Review and submit comments by Monday, November 19, 2019

Proposed Effective Date
April 25, 2019

Contact
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Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing the adoption of six new rules of court relating to superior court procedures for death penalty–related habeas corpus proceedings. These proposed rules are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66 by establishing procedures for the superior courts' new responsibility for this type of proceeding.

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 provisions, Proposition 66 effected several changes to the procedures for filing, hearing, and making decisions on death penalty–related habeas corpus petitions. Chief among them is that superior courts will be responsible for hearing and making decisions on these petitions, unless there is good cause for another court to hear the petition. (Pen. Code, § 1509(a).) In addition, the act calls for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.

expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

The act did not take effect immediately on approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs v. Brown* became final ((2017) 3 Cal.5th 808), and the act took effect. Shortly thereafter, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition. The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including, among other things, those governing superior court procedures for death penalty–related habeas corpus proceedings.

Existing procedures for death penalty–related habeas corpus proceedings
Until the enactment of Proposition 66, death penalty–related habeas corpus petitions were almost always filed in and heard by the Supreme Court. The procedures for filing, hearing, and making decisions on these petitions in the Supreme Court are found in chapter 4 (Habeas Corpus Appeals and Writs) of division 2 (Rules Relating to the Supreme Court and Courts of Appeal) of title 8 (Appellate Rules) of the California Rules of Court (Cal. Rules of Court, rules 8.380–8.388). These are the same rules that apply to noncapital habeas petitions filed in the Supreme Court and Courts of Appeal. Additional procedures, specific to capital cases, are found in the Supreme Court Policies Regarding Cases Arising from Judgments of Death (Supreme Ct. Policies).

Changes in procedures required by Proposition 66
Chief among the changes effected by Proposition 66 is that superior courts will be hearing and making decisions on these petitions, unless there is good cause for another court to hear the petition:

> A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death. A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge.

(Pen. Code, § 1509(a).)

Proposition 66 also shortened the time frame for filing a petition for a death penalty–related writ of habeas corpus. Proposition 66 provides "[e]xcept as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the

Government Code," under which habeas corpus counsel is appointed.[1] (Pen. Code, § 1509(d).) This is considerably less time than has previously been allowed by the Supreme Court to file these petitions. Under the Supreme Court's policies, "a petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later."[2] (Supreme Ct. Policies, Policy 3, § 1-1.1.)

In addition to reducing the time in which counsel have to prepare and file an initial death penalty–related habeas corpus petition, Proposition 66 requires the dismissal of successive petitions "unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." (Pen. Code, § 1509(d).)

Proposition 66 also imposed a deadline for resolving the petition that had not previously existed. Thus, under Penal Code, section 1509(d), a superior court is to resolve the petition within one year of the filing of the petition unless the court finds that delay is necessary to resolve a substantial claim of actual innocence, but in no instance longer than two years total. In *Briggs v. Brown*, *supra*, 3 Cal.5th, pages 848–860, the Supreme Court held that this deadline is "merely directive," but may also "serve as benchmarks to guide courts, if meeting the limits is reasonably possible." (*Id.* at p. 860.)

The current practice in the Supreme Court is that a death penalty–related habeas corpus petition may be denied without an explanation of the basis for the denial. Proposition 66 provides that "[o]n decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision." (Pen. Code, § 1509(f).)

Superior court procedures in noncapital habeas corpus proceedings

Although superior courts have generally not been responsible for handling death penalty–related habeas corpus proceedings, they do preside over noncapital habeas corpus proceedings. The statutory authority for habeas corpus proceedings is found at Penal Code sections 1473–1508. This statutory framework provides little in the way of deadlines. The Judicial Council, however, has adopted three rules of court and one form that govern noncapital habeas corpus proceedings.

[1] Under Penal Code section 1509(d), an "initial petition which is untimely . . . shall be dismissed unless the court finds by a preponderance of all the available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." Under Penal Code section 1509(g), where a judgment of death was imposed but no habeas corpus petition had been filed prior to the effective date of the proposition, a petition that would otherwise have been untimely under subdivision (c) may be filed within one year of the effective date of Proposition 66 or within the time allowed under prior law, whichever is earlier.

[2] A petition filed outside these time frames "may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim." (Supreme Ct. Policies, Policy 3, § 1-1.2.)

(Cal. Rules of Court, rules 4.550, 4.551, 4.552, and *Petition for Writ of Habeas Corpus* (form MC-275).) These rules of court provide extensive deadlines and procedures for noncapital habeas corpus proceedings in the superior courts.

There are significant differences between death penalty–related and noncapital habeas corpus proceedings. Most noncapital habeas corpus petitions are drafted and filed without the assistance of an attorney. In contrast to the explicit statutory authority requiring appointment of counsel for the initial petition in a death penalty–related habeas corpus proceeding, in a noncapital proceeding a petitioner does not become entitled to counsel unless the court issues an order to show cause because the petitioner made a prima facie showing that he or she is entitled to relief. (Cal. Rules of Court, rule 4.551(c).) In addition, the scope and complexity of a death penalty–related habeas corpus proceeding is far greater than the scope and complexity of a noncapital habeas corpus proceeding. For example, most death penalty–related habeas corpus petitions raise claims of ineffective assistance of counsel, which can require review of the entire record on appeal—and the record is much larger in a capital case, often exceeding 10,000 pages. This means that that the deadlines, page limits, and other aspects of the current rules for noncapital petitions are inadequate for the new superior court death penalty–related habeas corpus proceedings.

The Proposal

This proposal is intended to help fulfill the Judicial Council's rule-making obligations under Proposition 66 by proposing rules and establishing procedures for death penalty–related habeas corpus proceedings in the superior courts under Penal Code section 1509, and would take effect on April 25, 2019. The proposed rules are modeled in large part on the current rules in title 4 for noncapital habeas corpus proceedings in the superior courts (Cal. Rules of Court, rules 4.550, 4.551, and 4.552), but borrow provisions from the rules in title 8 for habeas corpus proceedings in the Supreme Court and Courts of Appeal (Cal. Rules of Court, rules 8.384–8.387), when those are more appropriate to death penalty–related proceedings. The proposed rules also include provisions that reflect the newly enacted requirements in Penal Code section 1509, including provisions on transfers and subsequent petitions.

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 relevant information. These notes are included with this proposal to help readers better understand the proposal and will not be included in any rules ultimately adopted by the Judicial Council.

Proposed rule 4.571—Filing of the petition in the superior court

Proposed rule 4.571 governs the filing of a death penalty–related habeas corpus petition in the superior court. It is modeled after rule 8.384, which governs habeas corpus petitions filed by attorneys in the appellate courts. Like rule 8.384, proposed rule 4.571:

- Defines the supporting documents that must accompany the petition;

- Requires the petition and supporting memorandum to support any reference to the documents with a specific citation;
- Prescribes the number of copies to be filed;
- Prescribes service requirements; and
- Requires the clerk of the court to file a noncomplying petition, but also allows the court to notify the attorney that it may strike the noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days.

Proposed rule 4.571 also departs from rule 8.384 in that it incorporates by reference numerous superior court rules and practices, including rules 2.100–2.117 and rule 3.1113, which relate to the formatting of documents filed with the court; rules 2.550 and 2.551, which relate to sealed and confidential documents; and rule 2.250, which relates to electronic filing and service. Subdivision (e) is modeled after rule 4.551(a)(3)(A) and (a)(4) and provides deadlines (extendable for good cause) for the court to act on a petition or informal response, and defines what it means to act upon a petition—provisions not provided in the appellate rules. The 60-day deadline for the court to rule on the petition is triggered either by the filing of the petition in the superior court or by the transfer of a petition to the superior court.

The proposed rules depart from the model of rule 8.384 in three respects regarding the contents of the supporting documents. First, the record prepared for the direct appeal, including any exhibits admitted in evidence, refused, or lodged, are deemed part of the supporting documents for the petition as this record should already be available to the superior court that is hearing the petition, which in most cases will be the court that imposed the sentence. Second, in addition to requiring inclusion in the supporting document of any petition pertaining to the same judgment and petitioner that was previously filed in any state court or any federal court, the proposed rule also requires inclusion of any order that disposes of any claim or portion of a claim raised by those petitions. Third, the proposed rule requires inclusion among the supporting document of a certified copy of the transcript of *any* hearing (not just an "evidentiary hearing") if the petition asserts a claim that was the subject of that hearing.

Rule 4.572—Transfer of petitions

Penal Code section 1509(a) requires a petition filed in any court other than the court that imposed the sentence to be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. Proposed rule 4.572 tracks the language of the statute but also specifies that a superior court has 21 days in which to transfer a death penalty–related habeas corpus proceeding to an appropriate court. The proposed rule also requires the court to issue an order with the basis for its decision.

Rule 4.573—Proceedings after the petition is filed

Proposed rule 4.573 is modeled after rule 8.385, but consistent with the broader scope and complexity of death penalty–related habeas corpus petitions, allows more time to prepare, file, and serve the relevant papers:

- The respondent's informal response must be served and filed within 45 days of the superior court's service of a request or as the court specifies; and
- The petitioner's reply, if any, must be served and filed within 30 days or as the court specifies.

Proposed rule 4.573(a) also incorporates by reference the applicable superior court requirements for papers in proposed rule 4.571(a), (b), and (c)(1) and (2); prescribes service of the informal response on the assisting entity or counsel; and requires a request for extension of a filing deadline to explain the additional work required to file the informal response or reply.

Under proposed rule 4.573(b), the superior court must issue an order to show cause if the petitioner has made the required prima facie showing.

The proposed rule does not include subdivisions comparable to subdivision (a) (production of the record) and subdivisions (e) and (f) (returns to the superior court or reviewing court) from rule 8.385, as those provisions would be unnecessary in a capital habeas corpus proceeding in the superior court.

Rule 4.574—Proceedings following an order to show cause

Proposed rule 4.564 is generally modeled after rule 8.386, which governs proceedings when a return is ordered to be filed in the reviewing court, but consistent with the broader scope and complexity of death penalty–related habeas corpus petitions, and allows more time to prepare, file, and serve the relevant papers:

- The respondent's return must be served and filed within 45 days after the court issues the order to show cause unless the court orders otherwise; and
- The petitioner's denial (traverse), if any, must be filed and served within 30 days after the filing of the return unless the court orders otherwise.

Proposed rule 4.574 also incorporates by reference the applicable superior court requirements for papers in proposed rule 4.571(a), (b), and (c)(1) and (2), and notes that material allegations not controverted by the return or the denial are deemed admitted for purposes of the proceeding.

Evidentiary hearing. Subdivision (c)(1) is modeled after the subdivisions of both the superior court and appellate rules that govern such hearings (Cal. Rules of Court, rules 4.551(f) and 8.386(f)(1)), and requires an evidentiary hearing if, after considering the papers submitted, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. Subdivision (c)(2) is modeled after Penal Code section 190.9 and requires the reporting of proceedings. The court may order additional briefing during or following the evidentiary hearing under subdivision (d).

Submission of cause. Subdivision (e) is modeled after Los Angeles County Superior Court local rule 8.33 and deems a death penalty–related habeas corpus proceeding submitted at the

conclusion of the evidentiary hearing, if one is held, for purposes of article VI, section 19 of the California Constitution.

Rule 4.575—Decisions in death penalty–related habeas corpus proceedings

Penal Code section 1509(f), as amended by Proposition 66, requires that "[o]n decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision." Although, as a general matter, the California Rules of Court typically do not repeat statutory provisions, proposed rule 4.575 does so in this case to make the rules a more comprehensive description of the superior court's duties and to provide context for prescribing the different entities on whom the clerk must serve the statement of decision. That list includes the Supreme Court clerk/executive officer and the assisting entity or counsel.

Rule 4.576—Successive petitions

Penal Code section 1509(d), as amended by Proposition 66, requires the dismissal of successive petitions "unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." Proposed rule 4.576(a) requires a superior court that receives such a petition to provide notice to the petitioner and opportunity to respond before the court dismisses the petition. Proposed subdivision (b) provides the procedures by which the superior court must grant or deny a certificate of appealability when the court denies relief on a successive petition.

The superior court may order the parties to submit arguments on whether a certificate should be granted. If the superior court grants a certificate, the certificate must identify the substantial claim or claims shown by the petitioner. The clerk of the superior court must serve the certificate on the entities identified in the rule and must send the certificate to the Court of Appeal when it sends the notice of appeal.

Alternatives Considered

Transfer of petitions

The working group considered whether the proposed rules should address in greater detail the Supreme Court's transfer of two distinct categories of death penalty–related habeas corpus petitions to or among the superior courts. The first group included those petitions currently pending in the Supreme Court, both those with and those without counsel.[3] With respect to these petitions, the working group concluded that this was a matter best left to the judgment and policies of the Supreme Court, at least at this time.

The second category concerned petitions initially filed in the superior court that imposed the death sentence. There was a suggestion that the Supreme Court could consider transferring such petitions among the superior courts. The good cause for such transfers would be to balance out

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[3] The petitions without counsel, filed for the purpose of preserving petitioners' rights in the federal courts, are typically referred to as "*Morgan* petitions" or "shell petitions." (*In re Morgan* (2010) 50 Cal.4th 932, 941.)

the workload of these petitions. The working group elected not to propose such a rule as it considered such a procedure to be potentially inconsistent with Penal Code section 1509(d) and the intent of Proposition 66. Penal Code section 1509(d) requires that petitions be heard in the court that imposed the sentence unless there is good cause for another court to hear the petition.

Proposing a rule that allowed the Supreme Court to transfer petitions among superior courts to balance caseloads would be inconsistent with the intent of Proposition 66 to localize the resolution of death penalty–related habeas corpus petitions in the courts that imposed the sentence. The working group noted that to the extent there are issues related to workload, the Chief Justice has the discretion under article VI, section 6(e), to provide for the assignment of a superior court judge from one superior court to another, although it is outside the scope of the working group's charge to recommend that the Chief Justice exercise or not exercise this authority in connection with death penalty–related habeas corpus petitions.

Superior court form for certificate of appealability

The working group considered whether to propose a form the superior courts could use to issue a certificate of appealability. Some working group members thought that certificates of appealability would have to be so individualized to the case that a form might not be useful.

It was also noted that there is no Judicial Council form for the parallel certificate of probable cause required in some noncapital felony appeals. Other members thought that a form might be helpful to remind the court of the need to prepare the certificate and the elements that must be addressed. The working group would particularly appreciate comments about whether a form for the certificate of appealability itself should be proposed.

Challenges to methods of execution

The working group considered whether to develop proposed rules relating to challenges to methods of executions. Proposition 66 includes several statutory provisions relating to such challenges. Specifically, Penal Code section 3604.1:

- Exempts certain execution-related standards from the Administrative Procedures Act (*id*., subd. (a));
- Provides that only the sentencing court may hear a challenge to the method of execution brought by a person under judgment of death (*id*., subd. (c)); and
- Directs that, if a court concludes that a challenged method of execution is invalid, the court is to order a valid method of execution (*ibid*.).

Currently, there are no rules of court that specifically address challenges to methods of execution. The working group considered a number of possible subjects for rule-making, including the timing of raising a challenge, the mechanism or format (e.g., in a habeas corpus petition or a civil complaint), and the appropriate venue. However, as the working group observed, this area of law is characterized by uncertainty, including on basic questions of when

and in what form a challenge may be raised.[4] Thus, any proposed rule would risk being too broad or too narrow, and have the unintended consequence of permitting or foreclosing challenges beyond what is prescribed by law and was desired by the electorate in approving Proposition 66. Concluding there exists a real possibility that rule-making could get ahead of or otherwise inhibit the development of this area of the law by the courts and interested parties, the working group declined to propose rules at this time.

Department of Corrections and Rehabilitation's duties to enable executions to proceed
Proposition 66 directs that "the court which rendered the judgment of death shall order" the California Department of Corrections and Rehabilitation, if it has failed to perform any duty necessary to enable it to execute a judgment of death, to perform that duty. (Pen. Code, § 3604.1(c).) The working group considered whether to propose rules describing—in greater detail than is currently specified by the statute—procedures for requesting, granting, or denying such relief. Concluding that this area of law may be better developed by courts actually faced with the issue in practice, with the benefit of arguments by interested parties, rather than through rule-making, the working group declined to propose rules at this time.

Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures governing death penalty–related habeas corpus proceedings, particularly making the superior courts generally responsible for hearing and deciding such matters, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. The proposed new rules are likely to require some initial training for judges and court staff, and they would impose new requirements on counsel involved in death penalty–related habeas corpus proceedings. However, these rules and forms are anticipated to facilitate the transition that Proposition 66 requires the superior courts to make.

[4] See, e.g., *Nelson v. Campbell* (2004) 541 U.S. 637, 644 (declining to "reach here the difficult question of how to categorize method-of-execution claims generally"); *Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1031 (declining to resolve "dispute whether . . . challenge to the California protocol may properly be brought as a § 1983 action, or should instead be recharacterized as an application to file a second or successive petition"); see also *In re Reno* (2012) 55 Cal.4th 428, 462, n. 17 (rejecting challenge to lethal injection raised in a habeas corpus petition as premature).

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 the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide?
- Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide?
- Should the proposed rules address amendments to petitions?
- If the proposed rules were to address amendments:
  - How would amendments affect the deadlines provided in the rules?
  - Under what circumstances should amendments be permitted?
  - Should the rule address amendment of *Morgan* or shell petitions differently from other petitions?
- Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?
- Should there be a Judicial Council form for the superior court to issue a certificate of appealability?
- Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met?
- Are the deadlines included in the proposed rule for submitting papers adequate?

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 one month 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 4.571–4.576, at pages 12–18
2. 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 the linked document

Rules 4.571, 4.572, 4.573, 4.574, 4.575, and 4.576 of the California Rules of Court would be adopted, effective April 25, 2019, to read:

1 **Title 4. Criminal Rules**
2
3 **Division 6. Postconviction, Postrelease, and Writs**
4
5 **Chapter 3. Habeas Corpus**
6
7 **Article 3. Death Penalty–Related Habeas Corpus Proceedings in the Superior Court**
8
9 * * *
10
11 Drafters' Note: Proposed rule 4.571 is modeled after rule 8.384, but instead of
12 incorporating by reference appellate rules and practices, it refers to, where
13 possible, superior court rules and practices, including rules 2.100–2.117 and
14 3.1113, which relate to the formatting of documents filed with the court, rules
15 2.550 and 2.551, which relate to sealed and confidential documents, and rule
16 2.250, which relates to electronic filing and service. When there is no comparable
17 rule in the trial court rules, the rule refers to an appellate rule (rule 8.486, which
18 relates to the documents supporting the petition).
19
20 Subdivision (e) is modeled after rule 4.551(a)(3)(A) and (a)(4) and provides
21 deadlines (extendable for good cause) for the court to act on a petition.
22
23 **Rule 4.571. Filing of petition in the superior court**
24
25 **(a) Petition**
26
27 (1) A petition and supporting memorandum must comply with this rule and,
28 except as otherwise provided in this rule, with rules 2.100–2.117 relating to
29 the form of papers.
30
31 (2) A memorandum supporting a petition must comply with rule 3.1113(b), (c),
32 (f), (h), (i), and (*l*).
33
34 (3) The petition and supporting memorandum must support any reference to a
35 matter in the supporting documents or declarations, or other supporting
36 materials, by a citation to its index number or letter and page and, if
37 applicable, the paragraph or line number.
38

(b) Supporting documents

(1) The record prepared for the automatic appeal, including any exhibits admitted in evidence, refused, or lodged, are deemed part of the supporting documents for the petition.

(2) The petition must be accompanied by a copy of any petition, excluding exhibits, pertaining to the same judgment and petitioner that was previously filed in any state court or any federal court, along with any order in a proceeding on such a petition that disposes of any claim or portion of a claim.

(3) If the petition asserts a claim that was the subject of a hearing, the petition must be accompanied by a certified transcript of that hearing.

(4) If any supporting documents have previously been filed in the same superior court in which the petition is filed and the petition so states and identifies the documents by case number, copies of these documents need not be included in the supporting documents.

(5) Rule 8.486(c)(1) and (2) govern the form of any supporting documents accompanying the petition.

(6) If any supporting documents accompanying the petition or any subsequently filed paper are sealed or confidential records, rules 2.550 and 2.551 govern.

(c) Filing and service

(1) If the petition is filed in paper form, an original and one copy must be filed, along with an original and one copy of the supporting documents.

(2) A court that permits electronic filing will specify any requirements regarding electronically filed petitions as authorized under rules 2.250 et seq.

(3) Petitioner must serve one copy of the petition and supporting documents on the People.

(d) Noncomplying filings

The clerk must file a petition not complying with this rule if it otherwise complies with the rules of court, but the court may notify the attorney that it may strike the petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days.

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(e) Ruling on the petition

(1) The court must rule on the petition within 60 days after the petition is filed with the court or transferred to the court from another superior court.

(2) For purposes of this subdivision, the court rules on a petition by:

(A) Issuing an order to show cause;

(B) Denying the petition; or

(C) Requesting an informal response to the petition.

(3) The court must issue an order to show cause or deny the petition within 60 days of receipt of the informal response.

(4) On motion of any party or on the court's own motion, for good cause stated in the order, the court may shorten or extend the time for doing any act under this subdivision.

Drafters' Note: Proposed rule 4.572 tracks the language of Penal Code section 1509(a), but gives a superior court 21 days in which to transfer a habeas corpus proceeding to an appropriate court. The proposed rule requires the court to issue an order with the basis for its decision.

Rule 4.572. Transfer of petitions

Unless the court finds good cause for it to consider the petition, a petition subject to this article that is filed in a superior court other than the court that imposed the sentence must be transferred to the court that imposed the sentence within 21 days of filing. The court in which the petition was filed must enter an order with the basis for its transfer or its finding of good cause for retaining the petition.

Drafter's Note: Proposed rule 4.573 is modeled after rule 8.385. The proposed rule does not include subdivisions comparable to subdivision (a) (production of the record), and subdivisions (e) and (f) (returns to the superior court or reviewing court) from rule 8.385, as those would be unnecessary in a death penalty–related habeas corpus proceeding in the superior court.

DRAFT

1 **Rule 4.573. Proceedings after the petition is filed**
2
3 **(a) Informal response and reply**
4
5 (1) Before ruling on the petition, the court may request an informal written
6 response from the respondent. The court must send a copy of any request to
7 the petitioner.
8
9 (2) The response must be served and filed within 45 days or as the court
10 specifies. If the response is filed in paper form, the original and one copy of
11 the response and any supporting documents must be filed with the court. One
12 copy of the informal response and any supporting documents must be served
13 on the petitioner's counsel. If the response and supporting documents are
14 served in paper form, two copies must be served on the petitioner's counsel.
15 One copy must also be served on the assisting entity or counsel.
16
17 (3) A court that permits electronic filing will specify any requirements regarding
18 electronically filed papers as authorized under rules 2.250 et seq.
19
20 (4) If a response is filed, the court must notify the petitioner that a reply may be
21 served and filed within 30 days or as the court specifies. The court may not
22 deny the petition until that time has expired.
23
24 (5) The formatting of the response, reply, and any supporting documents must
25 comply with the applicable requirements for petitions in rule 4.571(a) and
26 (b). The filing of the response, reply, and any supporting documents must
27 comply with the requirements for petitions in rule 4.571(c)(1) and (2). A
28 court that permits electronic filing will specify any requirements regarding
29 electronically filed petitions as authorized under rules 2.250 et seq.
30
31 (6) If a request for an extension of a filing deadline under this subdivision is
32 requested, counsel for the party requesting the deadline must explain the
33 additional work required to file the informal response or reply.
34
35 **(b) Order to show cause**
36
37 If the petitioner has made the required prima facie showing that he or she is entitled
38 to relief, the court must issue an order to show cause. An order to show cause does
39 not grant the relief sought in the petition.
40
41 Drafters' Notes: Proposed rule 4.564 is generally modeled after rule 8.386, which
42 governs proceedings if a return is ordered to be filed in the reviewing court, but
43 incorporates aspects of trial court procedures.

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Subdivision (c)(1), which governs the evidentiary hearing, is modeled after rules 4.551(f) and 8.386(f)(1).

Subdivision (c)(2) is modeled after Penal Code section 190.9 and addresses the reporting of proceedings.

Subdivision (e) is modeled after Los Angeles County Superior Court Local Rule 8.33.

Rule 4.574. Proceedings following an order to show cause

(a) Return

(1) Unless the court orders otherwise, any return must be served and filed within 45 days after the court issues the order to show cause.

(2) The formatting of the return and any supporting documents must comply with the applicable requirements for petitions in rule 4.571(a) and (b). The filing of the return and any supporting documents must comply with the requirements for petitions in rule 4.571(c)(1) and (2). A court that permits electronic filing will specify any requirements regarding electronically filed papers as authorized under rules 2.250 et seq.

(3) The return and any supporting documents must be served on the petitioner's counsel. If the return is served in paper form, two copies must be served on the petitioner's counsel. One copy must also be served on the assisting entity or counsel.

(4) Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding.

(b) Denial

(1) Unless the court orders otherwise, within 30 days after the respondent files a return, the petitioner may serve and file a denial.

(2) The formatting of the denial and any supporting documents must comply with the applicable requirements for petitions in rule 4.571(a) and (b). The filing of the denial and any supporting documents must comply with the requirements for petitions in rule 4.571(c)(1) and (2). A court that permits electronic filing will specify any requirements regarding electronically filed papers as authorized under rules 2.250 et seq.

(3) Any material allegation of the return not denied in the denial is deemed admitted for purposes of the proceeding.

(c) Evidentiary hearing

(1) An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

(2) The court must assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this subdivision.

(A) All proceedings under this subdivision, whether in open court, in conference in the courtroom, or in chambers, must be conducted on the record with a court reporter present. The court reporter must prepare and certify a daily transcript of all proceedings.

(B) Any computer-readable transcript produced by court reporters under this subdivision must conform to the requirements of section 271 of the Code of Civil Procedure.

(3) Rule 3.1306(c) governs judicial notice.

(d) Additional briefing

The court may order additional briefing during or following the evidentiary hearing.

(e) Submission of cause

For purposes of article VI, section 19 of the California Constitution, a death penalty–related habeas corpus proceeding is submitted for decision at the conclusion of the evidentiary hearing, if one is held. If there is supplemental briefing after the conclusion of the evidentiary hearing, the matter is submitted when all supplemental briefing is filed with the court.

DRAFT

Drafters' Note: Proposed rule 4.575 restates a portion of Penal Code section 1509(f).

Rule 4.575. Decision in death penalty–related habeas corpus proceedings

On decision on the petition, the court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for its decision. The clerk of the court must serve a copy of the decision on the petitioner, respondent, the clerk/executive officer of the Supreme Court, and the assisting entity or counsel.

Drafters' Note: Proposed rule 4.576 is based on the subgroup's premise that a successive petition should not be dismissed without the court providing notice to the petitioner and providing an opportunity for petitioner to respond. The thinking is that unlike an initial petition, for which statute requires the appointment of counsel, a successive petition may be filed pro se. The opportunity to respond may allow a petitioner to cure what might otherwise have appeared to have been a defect in the petition warranting dismissal. Use of the word "respond" is intended to avoid the necessity of the court conducting a hearing or briefing by the parties.

Rule 4.576. Successive petitions

(a) Notice of intent to dismiss

Before dismissing a successive petition under Penal Code section 1509(d), a superior court must provide notice to the petitioner and an opportunity to respond.

(b) Certificate of appealability

The superior court must grant or deny a certificate of appealability concurrently with the issuance of its decision denying relief on a successive death penalty–related habeas corpus petition. Before issuing its decision, the superior court may order the parties to submit arguments on whether a certificate of appealability should be granted. If the superior court grants a certificate of appealability, the certificate must identify the substantial claim or claims for relief shown by the petitioner. The superior court clerk must send a copy of the certificate to the attorney for the petitioner or, if unrepresented, to the petitioner, the Attorney General, the district attorney, the clerk/executive officer of the Court of Appeal and the district appellate project for the appellate district in which the superior court is located, and the clerk/executive officer of the Supreme Court. The superior court clerk must send the certificate of appealability to the Court of Appeal when it sends the notice of appeal under 8.392(c).

DRAFT

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 19, 2018

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

Committee or other entity submitting the proposal:
Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Michael I. Giden, 415-865-7977, michael.giden@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 attached to the report and is also in the "About" tab at the following link: http://www.courts.ca.gov/prop66-working-group.htm
Project description from annual agenda: n/a

If requesting July 1 or out of cycle, explain:
The working group previously requested that this proposal be circulated for public comment on a shortened special cycle - starting on August 2 and ending on August 23—so that the proposal could be presented to the Judicial Council for adoption at its November meeting. RUPRO approved this request at its meeting on August 2

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This report is submitted concurrently with working group's report titled: Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, which is the subject of separate RAR.

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 29–30, 2018

DRAFT

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

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 4.550.5, 4.560, 4.561, and 4.562; amend rule 4.550; and adopt forms HC-100 and HC-101

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

Agenda Item Type
Action Required

Effective Date
April 25, 2019

Date of Report
October 11, 2019

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Executive Summary

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

Recommendation

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

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

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

2. Amend rule 4.550 to provide definitions of terms for chapter 3 and to incorporate by reference the definitions in rule 8.601, which includes terms relevant to the appointment of counsel in death penalty–related habeas corpus proceedings;

3. Adopt rule 4.550.5 to establish that article 2 governs noncapital habeas corpus proceedings in the superior courts;

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

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

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

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

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

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

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

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

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

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

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

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

d. Providing for a statewide panel of qualified counsel compiling those applicants that each committee has determined meet the minimum qualifications;

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

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

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

The text of the new and amended rules and the new forms are attached at pages 31–41.

Relevant Previous Council Action

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

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

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

Analysis/Rationale

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty (capital) cases in the California courts, many of which were focused on reducing the time spent on this review. Among other provisions, Proposition 66 effected several changes to the procedures for filing, hearing, and making decisions on death penalty–related habeas corpus petitions. Relevant here is that the act requires trial courts to offer and, unless the offer is rejected, appoint habeas corpus counsel for indigent persons subject to a judgment of death. (Pen. Code, § 1509(b); Gov. Code, § 68662.) In addition, the act calls for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

The act did not take effect immediately on approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs v. Brown* became final ((2017) 3 Cal.5th 808), and the act took effect. Shortly thereafter, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition. The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including, among other things, those governing the procedures for superior court appointment of counsel for death penalty–related habeas corpus proceedings. Copies of the working group's charge and a roster of the members are attached at pages 28–30.

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

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Existing processes for appointing counsel in habeas corpus proceedings

Death penalty–related habeas corpus proceedings

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

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

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

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

Assisting entities and counsel

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

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

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

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

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

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

Counsel in noncapital habeas corpus proceedings

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

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

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

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

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

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

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

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

The Proposition 66 model for expanding the pool of counsel

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

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

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

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

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

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

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

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

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

Goal and guiding principles of the recommendation

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

Guiding principle 1: Local control with regional and statewide support

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

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

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

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

Guiding principle 2: Prioritization of oldest judgments

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

Proposed rules and forms

Division of chapter 3 into three new articles

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

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

- Article 2 (Noncapital Habeas Corpus Proceedings in the Superior Court) would include a new rule 4.550.5 (Application of Article) clarifying that article 2 applies to non-capital habeas corpus proceedings in the superior courts, and would include existing rules 4.551 and 4.552, which govern such proceedings, without any changes or renumbering.

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

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

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

Mechanism for prioritizing the oldest judgments
Proposed new rule 4.561(b) would provide:

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

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

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

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

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

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

Appointment procedure

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

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

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

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

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

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

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

Recruitment and screening of counsel

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

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

Under the proposal, the committees would be required to:

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

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

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

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

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

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

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

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

Policy implications

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

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

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

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

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

Comments

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

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

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

indicated that they agreed with the proposal, two indicated that they agreed with the proposal if amended, one disagreed with the proposal, and the remainder did not specify an overall position on the proposal but provided comments. Many commenters agreed with parts of the proposal and disagreed with or suggested modifications to other parts.

The text of comments directly addressed to specific aspects of the proposal, along with the working group responses, are in the comment chart attached at pages 42–162. The chart begins with a list of the 19 individuals and entities that submitted comments, followed by substantive comments organized by rule number, form number, or topic. Following the chart are copies of the complete set of comments received by the working group on this proposal at pages 163–256. The name of the commenter in the first part of the comment chart links to the copy of the full text of that individual's or entity's comments.

Prioritization of oldest judgments of death

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] Penal Code section 987.2.

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

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

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

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

Number of attorneys appointed

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

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

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

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

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

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

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

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

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

A substantial majority of the working group agrees that CAP-SF has the greatest experience and expertise of any entity in providing assistance in capital cases in California state courts. A rule of court that requires a superior court to use the services of CAP-SF would, however, effectively mandate the court's use of a specific private contractor. (CAP-SF is a nonprofit corporation, not a governmental entity. The Judicial Council, on behalf of the Supreme Court, at present enters into an annual contract with CAP-SF to provide services in connection with the review of capital cases.) Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity contractor. This is doubly true where it remains unclear who will fund these services—the counties or the state. For that reason, the proposed rule does not name a specific entity.

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

Regional committees

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

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

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

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

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

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

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

Governance and Management of the Regional Committees.[35] The working group also received many comments on the portions of the proposed rules related to the management and governance

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

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of the regional committees, many of which resulted in the working group revising the proposed rules, including as follows:

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

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

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

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

Duties of the regional committees.[36] Some commenters thought it was sufficient that the regional committees take on the duties of assisting superior courts in recruiting, vetting, and matching counsel. Other commenters, however, suggested that the committees should take on additional duties. The proposed duties included offering training and education for appointed attorneys, evaluating appointed counsel on an ongoing basis rather than just when an attorney applies for a renewed term, and vetting and compiling a list of assisting counsel. Given that the committees are only beginning to take on this work, and because the currently proposed duties would pose challenges enough with the limited resources available, the working group did not make any of the proposed revisions. The working group did, however, add a comment *encouraging* courts and committees to support activities to expand the pool of attorneys that are qualified to represent

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

petitioners in death penalty–related habeas corpus proceedings, including by providing mentoring and training programs and encouraging the use of supervised counsel.

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

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

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

One commenter asserted that requiring a superior court to adopt a local rule of court before it could appoint an attorney from a local panel (as would be required by proposed rules 4.561(e)(2) and 4.562(g)) "violates Government Code section 68662. The statute vests the appointment discretion in the superior court, and a court cannot be required to adopt a rule to maintain a discretion already vested in it by statute. The Judicial Council is constitutionally forbidden to

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

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adopt rules 'inconsistent with statute,' (Cal. Const., art. VI, § 6), and this proposal is inconsistent, as well as being bad policy."

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

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

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

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

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

(*Id.* at p. 1101.)

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

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

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

> The superior court that imposed the sentence shall offer to appoint counsel to represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

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

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

Statewide panels of qualified counsel.[40] Two commenters objected to the regional committees' compiling a statewide panel of qualified counsel on the ground that such a list would be inconsistent with the roster of qualified counsel identified in Government Code section 68661. That section had previously authorized HCRC to establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings, but was amended by Proposition 66 to require that HCRC "recommend attorneys to the Supreme Court for inclusion in a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases, provided that the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center."[41]

> (a) The appointment of one or more counsel to represent the prisoner in proceedings pursuant to Section 1509 of the Penal Code upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

[39] Government Code section 68665 provides:

> (a) The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings, and they shall reevaluate the standards as needed to ensure that they meet the criteria in subdivision (b).
>
> (b) In establishing and reevaluating the standards, the Judicial Council and the Supreme Court shall consider the qualifications needed to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code. Experience requirements shall not be limited to defense experience.

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

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

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

Requiring the Supreme Court to review the counsel recommended by HCRC is consistent with another change Proposition 66 made to give the Supreme Court greater control over HCRC, e.g., the amendment to Government Code section 68664(b) that shifts from a five member board to the Supreme Court responsibility for selecting the executive director of HCRC.[43] Requiring the Supreme Court to approve all attorneys before they can be added to a single statewide list of counsel would be inconsistent with Proposition 66, which has removed death penalty–related proceedings from the Supreme Court and insisted that the appointment procedure be localized in an effort to increase the pool of available attorneys. In contrast, allowing multiple statewide, regional, or local lists is more likely to result in expansion of the pool of available counsel than having one list controlled by the same entity, the Supreme Court, that has been responsible for making these appointments over the past 20 years.

Alternatives considered

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

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

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

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

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

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

Fiscal and Operational Impacts

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

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 28
2. Roster of Proposition 66 Rules Working Group, at pages 29–30
3. Cal. Rules of Court, rules 4.550, 4.550.5, 4.560, 4.561, and 4.562, at pages 31–38
4. Forms HC-100, and HC-101, at pages 39–41
5. Chart of comments, at pages 42–162
6. Copies of comments received, at pages 163–256
7. Link A: Ballot description and arguments for and against Prop. 66, and text of Prop. 66, *November 2016 Official Voter Information Guide* (pp. 104–109 and 212–218 of the linked document, respectively)

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

Charge to Proposition 66 Rules Working Group

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

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

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

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

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

Proposition 66 Rules Working Group

As of February 5, 2018

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

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

Hon. Richard T. Fields
Associate Justice of the Court of Appeal
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Mr. Clifford Gardner
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Mr. Michael J. Hersek
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Habeas Corpus Resource Center
San Francisco

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Court of Appeal
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California Department of Justice
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Ms. Mary K. McComb
State Public Defender
Office of State Public Defender
Sacramento

Mr. Jorge Navarrete
Clerk/Executive Officer
California Supreme Court

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County of Contra Costa

Ms. Beth Robbins
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Court of Appeal
First Appellate District
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Chief of Capital Habeas Unit
Federal Public Defender's Office
Los Angeles

Proposition 66 Rules Working Group

As of February 5, 2018

Ms. Anabel Romero
Deputy Court Executive Officer
Superior Court of California,
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Rancho Cucamonga

Mr. Steven Rosenberg, JD
Director, Capital Central Staff
California Supreme Court
San Francisco

Hon. William C. Ryan
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Mr. Joseph Schlesinger
Executive Director
California Appellate Project
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Hon. John S. Somers
Judge of the Superior Court of California,
County of Kern

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

Mr. Michael Giden
Supervising Attorney
Criminal Justice Services
Judicial Council of California

Rules 4.550.5, 4.560, 4.561, and 4.562 of the California Rules of Court are adopted and rule 4.550 is amended, effective April 25, 2019, to read:

4. Criminal Rules

Division 6. Postconviction, Postrelease, and Writs

Chapter 3. Habeas Corpus

Article 1. General Provisions

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

~~(a) Application~~

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

~~(b) Definitions~~

In this chapter, the following definitions apply:

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

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

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

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

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

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

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

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Article 2. Noncapital Habeas Corpus Proceedings in the Superior Court

Rule 4.550.5. Application of article

This article applies to habeas corpus proceedings in the superior court under Penal Code section 1473 et seq. or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement, except for death penalty–related habeas corpus proceedings, which are governed by rule 4.560 et seq.

* * *

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

Rule 4.560. Application of article

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

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

(a) Purpose

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

(b) Prioritization of oldest judgments

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

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

The Habeas Corpus Resource Center must maintain a list of persons subject to a judgment of death, organized by the date the judgment was entered by the sentencing court. The list must indicate whether death penalty–related habeas

corpus counsel has been appointed for each person and, if so, the date of the appointment. The list must also indicate for each person whether a petition is pending in the Supreme Court.

(d) Notice of oldest judgments without counsel

(1) Within 30 days of the effective date of this rule, the Habeas Corpus Resource Center must identify the persons on the list required by (c) with the 25 oldest judgments of death for whom death penalty–related habeas corpus counsel have not been appointed.

(2) The Habeas Corpus Resource Center must notify the presiding judges of the superior courts in which these 25 judgments of death were entered that these are the oldest cases in which habeas corpus counsel have not been appointed. The Habeas Corpus Resource Center will send a copy of the notice to the administrative presiding justice of the appellate district in which the superior court is located.

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

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

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

(6) When a copy of an appointment order, or information indicating that an appointment is for any reason not required, has been received by the Habeas Corpus Resource Center for 20 judgments, the center will identify the next 20 oldest judgments of death in cases in which death penalty–related habeas corpus counsel have not been appointed and send out a notice identifying these 20 judgments, and the procedures required by paragraphs (3) through (6) of this subdivision must be repeated.

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

(e) Appointment of counsel

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

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

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

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

(a) Purpose

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

(b) Regional habeas corpus panel committees

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

(c) Composition of regional habeas corpus panel committees

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

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

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

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

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

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

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

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

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

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

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

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

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

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(d) Regional habeas corpus panel committee responsibilities

The committee has the following responsibilities:

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

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

(2) *Accept applications*

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

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

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

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

(3) *Review qualifications*

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

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

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

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

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

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

(5) *Match qualified attorneys to cases*

Each committee must assist a participating superior court in matching one or more qualified attorneys from the statewide panel to a person for whom counsel must be appointed under Government Code section 68662, if the court requests such assistance.

(6) *Remove attorneys from panel*

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

(e) Consolidated habeas corpus panel committees

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

(f) Recruitment of qualified attorneys

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

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1 **(g) Local rule**
2
3 A superior court may, by adopting a local rule, authorize appointment of qualified
4 attorneys who are not members of the statewide panel. The local rule must establish
5 procedures for submission and review of a *Declaration of Counsel re Minimum*
6 *Qualifications for Appointment in Death Penalty–Related Habeas Corpus*
7 *Proceedings* (form HC-100) and require attorneys to meet the minimum
8 qualifications under rule 8.652(c).
9
10 **Advisory Committee Comment**
11
12 **Subdivisions (d) and (f).** In addition to the responsibilities identified in subdivisions (d) and (f),
13 courts and regional committees are encouraged to support activities to expand the pool of
14 attorneys that are qualified to represent petitioners in death penalty–related habeas corpus
15 proceedings. Examples of such activities include providing mentoring and training programs and
16 encouraging the use of supervised counsel.

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

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

1. I request that *(check one)*

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

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

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

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

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

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

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

   (b) ☐ supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed *and* counsel of record in a combination of at least five completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. Attached are the attestations and recommendations of lead or associate counsel in the two cases in which I was supervised counsel.

   (c) ☐ counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed.

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

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

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

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

NAME:	STATE BAR NUMBER:

2. b. ☐ I have at least five years of experience substantially equivalent to that of an attorney qualified under rule 8.652(c)(1)–(2). Attached is a description of my experience. In the last two years, I have completed at least 18 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which involved death penalty habeas corpus proceedings. Attached are the dates and descriptions of my trainings. I understand that this experience does not qualify me for appointment under rule 4.562(g) by a superior court under local rule.

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

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

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

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

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

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

	Name of Attorney	Address	Phone	Email
a.				
b.				

6. Trial experience *(please check one)*

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

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

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

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

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

8. Previous application, if applicable

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

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

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

9. Attached is a copy of my current resume.

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

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

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

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **10-04-2018** **Not approved by the Judicial Council**
In re ______________________ on Habeas Corpus (NAME OF PETITIONER)	
ORDER APPOINTING COUNSEL IN DEATH PENALTY–RELATED HABEAS CORPUS PROCEEDING	CASE NUMBER:

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

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

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

Date:

JUDGE OF THE SUPERIOR COURT

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

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

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

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
1.	Robert D. Bacon, Attorney at Law Oakland, California	NI	Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful. To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. * * * I also commend to the Council the comments submitted by California Attorneys for Criminal Justice (CACJ). I am a member of that organization but I did not personally participate in the writing of their comments. See comments on specific provisions below.	See responses to specific comments below.
2.	California Appellate Defense Counsel, Inc. (CADC) By Kyle Gee, Chair CADC Government Relations Committee	NI	These comments are being submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals.	

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

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

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
	Oakland, California		CADC has one observation relevant to the proposed rules regarding "Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings." See comments on specific provision below.	See response to specific comment below.
3.	California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	NI	Due to the extensive changes Prop 66 will bring, it is difficult to comment on the appointment and qualification rules in a piecemeal fashion. Most significantly, it is difficult to meaningfully assess the proposed rules without knowing what resources appointed counsel will have at their disposal (e.g. how much money for investigation, paralegal assistance, co-counsel, etc.) and what form habeas corpus petitions will take under the new process. Additionally, the time offered to comment on the proposed rule changes was inadequate to allow for a thorough consideration of the changes and the likely ramifications of the suggested changes. The lack of a meaningful comment period, coupled with the piecemeal consideration of the newly proposed rules, strongly favors a final comment period once all the rules are drafted and can be considered in total. * * *	Penal Code section 190.6(d), as enacted by Proposition 66 (the act), requires the Judicial Council to adopt "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review" within 18 months of the effective date of the act. The act took effect on October 25, 2017, when the Supreme Court issued its decision in *Briggs v. Brown et al.* (2017) 3 Cal.5th 808. The Judicial Council must therefore adopt *initial* rules of court on or before April 25, 2019. The working group concluded that some rules, including rules governing the superior court appointment of habeas corpus counsel should be adopted before April 25, 2019, so that courts and attorneys handling death penalty–related habeas corpus proceedings in the superior courts would have guidance at the earliest date possible to allow them to begin preparing for the new responsibilities and procedures imposed by

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			The piecemeal issuance of rules by the working group and the lack of information about funding mechanisms make it particularly difficult to respond constructively to these rules. It is nonetheless clear that in light of the accelerated timeline for litigation contemplated by Proposition 66, enhanced staffing of cases is critical to competent representation.	Proposition 66. Under these circumstances the working group provided the greatest opportunity possible for public review and comment on this proposal. The working group recognizes that Proposition 66 did not address the issue of how the new responsibilities and procedures would be funded. Although the lack of this information does present challenges, it does not relieve the Judicial Council of its statutory responsibility to adopt initial rules of court. The working group emphasizes that these rules of court represent an *initial* set of rules. As a matter of the policy, any person or organization may at any time submit to the Judicial Council a request for a new or amended rule of court, form, or standard of judicial administration. With respect to this particular set of rules, Proposition 66 specifically imposed on the Judicial Council a continuing obligation to "monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceeding . . . ." Although the working group recommends that the Judicial Council adopt these rules at its November 2018 meeting to become effective April 25, 2019, it anticipates

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			See comments on specific provisions below.	there will be opportunities in the future to revisit and amend these rules as the Judicial Council finds necessary or appropriate. See responses to specific comments below.
4.	California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	NI	These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for qualification and appointment of habeas corpus counsel in capital cases. CACJ's comments would be more thorough and reflective but for the abbreviated comment period and complexity of the matters at issue. * * * CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the appointment of competent post-conviction counsel. * * * CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In	

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			addition, since Proposition 66 allows for the reopening on appeal of issues handled by first habeas counsel based on their ineffective assistance, failure to insure the appointment of competent and experienced counsel in the Superior Court will only require extensive re-litigation in the Court of Appeal with different counsel under new Penal Code Section 1509.1(b). See comments on specific provisions below.	See responses to specific comments below.
5.	California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	NI	The Committee on Appellate Courts appreciates the working group's efforts to balance the mandates of Proposition 66 with the need to ensure qualified representation for death penalty appeals and habeas proceedings. See comments on specific provisions below.	See responses to specific comments below.
6.	California Public Defenders Association by Robin Lipetzky, President Sacramento, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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7.	Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	NI	The Second Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty-related habeas corpus proceedings. In response to the working group's request for informal feedback from the Administrative Presiding Justices Advisory Committee, the Second District offers the following responses to the working group's specific questions. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
8.	Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	NI	The Fourth Appellate District supports the Proposition 66 Rules Working Group's efforts to propose rules concerning appointment of counsel in death penalty–related habeas corpus proceedings. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
9.	Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	NI	The Criminal Justice Legal Foundation, a nonprofit organization formed to protect and advance the rights of victims of crime, submits these comments on the above proposals. The Judicial Council is tasked by statute, enacted in Proposition 66, to "adopt rules and standards of administration designed to expedite	

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			the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6, subd. (d).) It would be difficult to overstate the extent to which Proposal 18-13 fails in that goal. Instead of obeying the mandate of the voters to fix what is wrong with the present system and expedite the cases, the proposal doubles down on the current failures. It is contrary to Proposition 66 in spirit, in purpose, and in letter. * * * Because the proposal proceeds from a misunderstanding of the background and the problem, it goes off in a very wrong direction. Far from obeying the statutory mandate to expedite, it appears to be crafted to obstruct. See comments on specific provisions below. [The commenter provided extensive comments, not all of which addressed specific provisions of the proposal and those portions of the comment therefore are not included in this chart. A complete copy of the commenter's letter is attached for the Judicial Council's and the public's reference.]	See responses to specific comments below.

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

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10.	Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	NI	On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for superior court appointment of counsel in death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter. The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad. There are currently 39 Mexican nationals on death row in California. Twenty-two of those do	

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			not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply. Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death.	
			As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex. Mexico cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.	With respect to the August 24, 2018 deadline for comments, please refer to the response to CAP-SF above.

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			[1] See, e.g., Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261. * * * Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States. See comments on specific provisions below.	See responses to specific comments below.
11.	Hon. Mary J. Greenwood, Administrative Presiding Justice, Court of Appeal, Sixth Appellate District	NI	I thank the Proposition 66 Rules Working Group for their work on the proposed rules concerning appointment of counsel in death penalty-related habeas corpus proceedings. I join in the comments made by my colleague Justice McConnell on behalf of the Fourth District with the following additional comments. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.

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

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12.	Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	NI	The below comments to SP 18-13 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 13-15 of the Invitation to Comment. See comments on specific provisions below.	See responses to specific comments below.
13.	Marylou Hillberg, Attorney at Law Sebastopol, California	N	[From Ms. Hillberg,'s comments on Proposal SP18-12:] My remaining concern is that the local appointment and oversight of habeas counsel will be inadequate to ensure competence, given discoveries I have made during investigations in state and federal cases of poor oversight and even, claims of corruption. It has shocked me even though I had "seen it all". I am not sure that these rules are intended to address adequate oversight on a state-wide level as my experience is that the adequacy of trial counsel varies greatly by locale. I hope this does not become true in death penalty cases. See comment on a specific provision below.	See response to specific comments below.

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14.	Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee) by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	NI	Thanks for all your hard work on this very onerous and complicated process. See comments on specific provisions below.	The working group notes the commenter's general support for its efforts. See responses to specific comments below.
15.	Office of the Federal Defender, Eastern District of California by Heather E. Williams, Federal Defender Sacramento, California	NI	My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates. Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and vital to the clients we represent that California appoint qualified counsel to represent these persons. See comments on specific provisions below.	See responses to specific comments below.

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

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16.	Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	NI	The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience See comments on specific provisions below.	See responses to specific comments below.
17.	Kristin Traicoff, Law Offices of Kristin Traicoff Sacramento, California	AM	After reading these proposed rules, I remain confused as to how, if at all, they are intended to intersect with the current SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH (hereafter, "Policies"). In some regards, the proposed rules appear to supplant the Policies but in some respects (notably in describing the funding mechanisms), the proposed rules appear to imply (though I may be incorrect in this interpretation) that the Policies will remain in effect even when the Superior Court has assumed responsibility of appointment of counsel. As a solo practitioner who is currently appointed on a capital appeal and who contemplates requesting appointment on a capital habeas, I rely greatly on the detail provided in the Policies concerning numerous practical aspects of my appointment. Foremost	*The Supreme Court Polices Regarding Cases Arising from Judgments of Death* apply when the Supreme Court appoints counsel and pays counsel in capital cases. The polices therefore would not apply to counsel appointed by a superior court in death penalty–related habeas corpus proceedings, which are the proceedings governed by the rules in this proposal. The working group notes that this is only one of five proposals it is recommending to the Judicial Council. The working group anticipates recommending a proposal on the procedures for death penalty–related habeas corpus proceedings in the superior courts that may address some of the areas addressed in the Supreme Court's policies (e.g., filing deadlines.) However, as discussed more fully in the body of the report, it is not clear whether it will be the judicial branch or counties that have responsibility for the costs

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

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

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

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Commenter	**Comment**	**Proposed Working Group Response**
		In addition, briefing has been completed on the automatic appeal for a substantial number of the oldest cases, so the concern raised by the commenter is unlikely to occur within the next several years and possibly not for many years.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes.	The working group notes the commenter's support for this provision in the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes.	The working group notes the commenter's support for this provision in the rule.
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Proposed Rule [4.561], subdivisions (a)-(d) would construct an elaborate process to constrict the superior courts from appointing counsel on the theory that appointing counsel for a newer case causes increased delay in appointing counsel for an older case. The premise of the theory is that the pool of lawyers is statewide, and that the venue is irrelevant to a lawyer's ability and willingness to take the case. The text says that the principle is not meant to be applied rigidly and that the working group recognizes that "availability of counsel may vary regionally." Yet the rule proposed is rigid, and it appears to restrict the superior court of a county from appointing counsel	Given the existing shortage of qualified counsel willing and able to serve as habeas corpus counsel, not every person subject to a judgment of death will have counsel appointed immediately following adoption of the rules. The intent underlying this proposal is to put in place a structure that allows for the orderly appointment of counsel, as they become available. The working group concluded that the least inequitable solution would be to appoint counsel first for those individuals who are subject to the oldest judgments of death. The reasoning underlying this principle is that those individuals who

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
Commenter	**Comment**	**Proposed Working Group Response**
	(or at least give it "cover" for not doing so) when it might appoint a local lawyer who would not be able or willing to take a case in another county. Certainly it is true that the ability of courts to recruit counsel may vary by county, and that newer cases in some counties might receive appointments. The proposal implies that this situation would be inequitable "to the families of the crime victims who have been waiting for a resolution to these cases." I have represented some of these families, and I very much doubt that any would be offended by the appointment of a local lawyer in another county to a newer case when that lawyer would not be available in their county. I also find it curious that the only mention of these families in the entire proposal is in the context of justifying a mechanism for increasing the delay overall. The absence of victim advocates from the Working Group may be a factor in this lack of understanding. The principle of appointing lawyers for the oldest cases first should operate only by county, at least for appointment of local lawyers. A mechanism for rationing the appointment of lawyers from outside the area could conceivably be appropriate, but the result of such unavailability should be that the court recruits and appoints from the local bar. Having no statewide rule would be better than the proposed rule. This proposal should be scrapped. If a prioritization rule is desired, the Working Group should start over and draft a much more limited and advisory rule.	have only recently been sentenced to death should not obtain counsel while those who have waited decades are required to wait even longer. This reasoning applies equally to the families of the crime victims who have been waiting for a resolution to these cases. The proposed rule is intended to provide a principle under which the limited pool of counsel can be appointed in an equitable way across the state. The rule provides a mechanism that prioritizes judgments, but does not prevent a superior court that has counsel available from appointing that counsel. Under the proposal, all superior courts that have entered a judgment of death are required to develop and implement a plan to identify and recruit qualified counsel. (Proposed rule 4.562(f).)

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

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

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

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Commenter	**Comment**	**Proposed Working Group Response**
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	1. We have deep concerns about the current length of time between the imposition of the judgment of death and the appointment of habeas counsel. Some of the appellants we represent have been waiting over a decade for habeas counsel. In the meantime, evidence is lost, memories fade, witnesses disappear or pass away. Thus, we note the rule provision that prioritizes the older cases, proposed rule [4.561](b), is a step in the right direction. However, we wonder whether this rule and its "whenever possible" language will assure that the oldest cases get counsel first. We favor a more mandatory, direct rule. The language of [4.561](b) should read "shall", not "should." 2. While delay remains a significant problem, there is also a danger in appointing counsel too soon. New Government Code § 1509 subdivision (b) states that habeas counsel should be offered to defendants "[a]fter the entry of a judgment of death." This suggests that counsel might be appointed soon after entry of judgment. Of course, the prioritization of the older cases should prevent such an occurrence, but, in any event, no habeas counsel appointment should be made until after the record is certified. Habeas counsel, who will presumably – subject perhaps to equitable tolling – be expected to file a petition	The working group appreciates this input. Based on the other comments received, the working group declined to make this suggested change. The working group recognizes that making appointments can be more difficult in some cases than in others. There is a risk that if there are serious impediments to making appointments in one or two cases, a rigid prioritization of older judgments could prevent appointments from being made when qualified counsel are available and willing to accept appointments. The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council

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Rule 4.561(b) (circulated as rule 8.654(b)) – Prioritization of Oldest Judgments		
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	within a year of appointment, must have access to a complete and accurate record immediately. We favor a rule that specifically states that: "Regardless of any other provision, no appointment of habeas counsel in a death-penalty related case shall be made until after the record has been certified for completeness and accuracy pursuant to California Rules of Court, rule 8.622(b)(2)." This might be added to proposed rule [4.561] as subdivision (f).	for the working group to consider, develop, and circulate another proposal. Therefore the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Superior Court of Los Angeles County	***Should courts prioritize the appointment of counsel for the oldest judgments of death?*** Yes, the courts should prioritize appointment of counsel for the oldest judgments of death.	The working group notes the commenter's support for this provision in the rule.

Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	The initial appointment of counsel to the oldest twenty-five cases, and thereafter to the next oldest twenty cases, is overly ambitious and does not take into account the complexity of these cases. It will be difficult to assess and find appropriate counsel for twenty-five, or even twenty, of these cases in any predictable timeframe. A review of just the first group of twenty-five oldest judgements reveals several defendants who were pro se at trial; have documented severe mental and/or physical illnesses or both; and/or, have a case that poses	The working group declined to make this suggested change. The working group recognizes there will be challenges in making these appointments. There appears to be little risk, however, in starting with a larger number of judgments than with a smaller number. In the event that the effort to make 25 appointments initially, and 20 appointments in each batch thereafter, does create an impediment to making appointments, the Judicial Council may consider whether making fewer

Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	significant investigative and/or forensic challenges. In addition, within this group of cases, there are two defendants in their 70's and five defendants that pose conflicts for CAP-SF. For the oldest twenty-five cases, as well as several of the other cases waiting for habeas counsel, finding qualified counsel with the necessary knowledge and experience will be a time consuming and involved process. The process is further complicated for those cases in which CAP-SF has a conflict and a qualified assisting entity or counsel will need to be found. CAP-SF, therefore, recommends limiting the first group of cases to 15, and subsequent groups to ten to twelve cases.	appointments at a time would improve the process and may amend the rule accordingly. The working group notes that many other commenters support an initial effort to make 25 appointments.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Proposed Rule [4.561](c)-(d) requires that HCRC compile and maintain a statewide list of condemned inmates, ordered by date of judgment. HCRC should devise and manage the process of distributing the cases to superior courts. While it is the obligation of the Judicial Council to "continuously monitor the timeliness of review of capital cases" (Pen. Code § 190.6(d)), there is no statutory requirement that the Judicial Council dictate the distribution of cases to the presiding judge of a jurisdiction.	Penal Code section 190.6(d) requires the Judicial Council to "adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." This proposal is intended to partially satisfy that mandate. The proposed rules do not "dictate the distribution of cases," but introduce a mechanism by which superior courts will have the information they need to know where the judgments pending in their courts fit among the approximately 360 judgments awaiting appointment of counsel. The mechanism is overseen by HCRC and allows courts to appoint counsel first for those judgments of death in the state that have been awaiting counsel for the longest period of time.

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

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Rule 4.561(d)(1)–(3), (5), (6) (circulated as rule 8.654(d)(1)–(3), (5), (6)) – Notice of Oldest Judgments without Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	[I]t may be preferable to leave it to the superior courts to decide prioritization for themselves. Doing so would allow the courts flexibility in deciding which case to assign to available counsel, taking into consideration the nature of the case, size of the record, and any complicating factors, along with counsel's experience. At the same time, superior courts could be encouraged to prioritize the oldest cases first. Along the lines suggested by the working group, the Habeas Corpus Resource Center (HCRC) could provide each superior court with periodic updates on the persons subject to a judgment of death for whom habeas corpus counsel has not been appointed, listed with the oldest judgments first. If the working group instead implements the proposed system of sending rolling lists of the oldest judgments to the courts, the Committee agrees with the specifics of the proposed system.	The working group believes its proposal is consistent with the commenter's suggestion. The proposal does not infringe on the superior courts' statutory authority to make appointments as and when they deem appropriate. The proposed process is designed to encourage superior courts to prioritize the oldest judgments first, but it is necessary to give superior courts the information on where the judgments entered in their respective courts fit into the statewide caseload. The notices sent out as batches of 20 appointments are made would provide the updates the commenter proposes. The working group appreciates this input.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the first group of judgments for which HCRC sends out notice include 25 judgments or a different number?*** The question appears to assume that HCRC is the only current statewide body that can perform statewide functions regarding capital cases. That is not true. The California Appellate Project—San Francisco (CAP-SF) also has the capability to perform statewide functions in capital litigation. It is suggested below that the management of the panel, and the function of matching counsel to cases, be recognized as a statewide function to be performed by CAP-SF.	The working group declined to make this suggested change. HCRC is part of the judicial branch of the State of California and the duties described in proposed rule 4.561(d) are consistent with HCRC's statutory duties. (Gov. Code, § 68661.) The working group agrees that CAP-SF is qualified to serve the functions described in proposed rule 4.561(d). CAP-SF is a non-profit corporation that provides services to the Supreme Court in connection with capital cases pursuant to an annual contract. The function described in proposed rule

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

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

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

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

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

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

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

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

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

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

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
		balance, the working group thought it best to leave to the discretion of the individual superior court judge who will be familiar with the needs in the specific proceeding to determine how many attorneys should be appointed. In addition, because the rule will require designation of an assisting entity or counsel, the appointed attorney will not be working in isolation, but will have an experienced attorney or attorneys providing support and assistance.
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	Although the proposed rules acknowledge the possibility of the appointment of more than one attorney in capital state habeas cases, the rules should contain a more robust endorsement of the appointment of associate counsel. The rules should provide that where HCRC is not able to be appointed to a complex case,[1] two attorneys must be appointed. Further, the rule should expressly state that, where the appointment of two attorneys is deemed necessary, those attorneys are each entitled to separate and reasonable fees. [1] Complex cases are generally those with multiple defendants, multiple victims, multiple crime scenes, extensive expert testimony or significant forensic or mental health issues. * * * A modification is necessary to harmonize [rule 4.561(e)(3)] with proposed Rule [4.562](d)(5), which states that the regional committee "must assist a participating superior court in matching one or more qualified attorneys from the statewide panel to a person for whom counsel must be appointed under	Please see the response to the comment of Robert D. Bacon above. The working group declined to make this suggested change. The intent underlying proposed rule 4.562(d)(5) is that a regional committee will obligated to provide a superior court assistance with matching counsel to a case only if the court requested such assistance. The working

Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
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	Government Code section 68662." CAP-SF recommends this rule be modified to clarify that the superior court will request the regional committee's assistance in identifying appropriate panel attorneys to appoint. The rule should be modified as follows: "If the Habeas Corpus Resource Center declined to represent the person, the court must *request that the regional committee identify an appropriate attorney or attorneys for the case and then* appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule [4.562](d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel." [See also comment under "Funding," below.]	group modified rule 4.562(d)(5) to clarify that assistance must be provided if requested by a superior court.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The rules for appointment of counsel should follow the "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) (Guidelines), and accordingly authorize the judge to appoint two habeas corpus attorneys at a minimum. The appointment of two qualified counsel is particularly crucial because of Proposition 66's shortened timeframes.	Please see the response to the comment of Robert D. Bacon above.

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

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*** The Fourth District does not take a position on this question.	No response required.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Proposed Rule [4.561](e)(2) would mandate that the superior court offer the appointment to HCRC first. Not a single shred of justification for this astonishing proposal can be found in the background material. First, use of local counsel is particularly appropriate in habeas corpus proceedings. State habeas corpus is primarily concerned with claims arising on facts outside the record; claims that appear on the record generally can and must be made on direct appeal. (See *In re Dixon* (1953) 41 Cal.2d 756.) Proximity is both valuable and economical for fact-finding legwork and court appearances, and the local knowledge that comes with having practiced law for years in a community is a significant asset. HCRC is in San Francisco. Only 14.8% of California capital judgments come from the nine Bay Area counties, while 68.5% come from the nine counties south of the line that forms the northern boundary of San Bernardino, Kern, and San Luis Obispo Counties. For most cases, HCRC is a long way from where the action is. The superior court could very well conclude that a local attorney is better positioned to take on a fact-intense case, and that decision ought not be precluded by rule.	The working group modified the proposal to allow superior courts to appoint counsel from any entity that employs qualified attorneys, including HCRC, a local public defender, or alternate public defender. The proposal was also revised to be silent on whether superior courts must first attempt to appoint such an entity before it turns to private counsel.

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	Second, though it is rarely stated in public, it is well known among courts, prosecutors, and victim advocates that the institutional defense organizations are often more of the problem than the solution in capital litigation. Pennsylvania Chief Justice Castille's concurrence in *Commonwealth v. Spotz*, *supra*, cited by the California Supreme Court in *Reno*, is one of the few public statements, but his opinion is widely shared. Within California, HCRC is widely regarded on the prosecution side as a failed institution with a deep culture of obstruction. If HCRC wants priority in appointments it can earn it by demonstrating that it has the ability and the will to handle capital habeas corpus cases expeditiously. Superior courts should have the authority to deal with obstructive lawyers, both individuals and institutions, by not appointing them. Giving HCRC a "right of first refusal" by statewide court rule is a needless restriction on the courts. It is certainly a violation of the spirit and probably a violation of the letter of Government Code section 68662, which now localizes the appointment decision and vests it in the superior court.	
	Proposed Rule [4.561](e)(2) is unjustified, unwise, and probably illegal. It should be removed from the proposal. * * * Proposed Rule [4.561](e)(3) would forbid the superior court to appoint an attorney not on the statewide list unless that court has adopted a local rule. This proposal also violates	Proposed rules 4.561(e)(3) and 4.562(g) do not interfere in any way with the statutory power of a superior court to appoint counsel. Government Code section 68665(a) requires the Supreme Court and the Judicial Council to adopt "binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Government

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
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	Government Code section 68662. The statute vests the appointment discretion in the superior court, and a court cannot be required to adopt a rule to maintain a discretion already vested in it by statute. The Judicial Council is constitutionally forbidden to adopt rules "inconsistent with statute," (Cal. Const., art. VI, § 6), and this proposal is inconsistent, as well as being bad policy. One of the reasons that Proposition 66 vests the appointment decision in the superior court is that the judges of that court are familiar with the local lawyers. To put it candidly, they know who the stars are and who the turkeys are. The formal roster-making process is all well and good as an advisory matter, but it should not prevent a superior court judge from appointing a lawyer whom the judge knows is fully capable of the task.	Code section 68662 does not authorize a superior court judge to appoint counsel who do not meet these qualifications. No statute provides, however, who is responsible for determining whether an individual attorney meets these qualifications. Proposed rules 4.561(e)(3) and 4.562(g) provide two processes (one regional, one local) for determining whether an attorney meets these qualifications before a superior court can appoint such an attorney to represent an individual in a death penalty–related habeas corpus proceeding. Because statute does not dictate any process, the Judicial Council has the authority to adopt these rules. Although the superior courts may be familiar with the qualifications of individual attorneys to try cases, the superior courts have no experience at this time with an attorney's ability to represent an individual on a death penalty–related habeas corpus petition. These rules are intended to assure that the superior courts appoint those attorneys who meet the minimum qualifications provided by the California Rules of Court adopted by the Supreme Court and the Judicial Council under Government Code section 68665

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	Proposed Rule [4.561](e)(3) should either be deleted or, if retained, amended to make unmistakably clear that the court has discretion to appoint an attorney not on the statewide roster if the court finds the attorney qualified, and no local rule to that effect is necessary.	The working group declined to make this suggested change for the reasons stated above.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Mexico's primary concern about the appointment of counsel is that, as currently drafted, the proposal does not account for the fact that certain cases-specifically, the cases of foreign nationals-will have specialized needs requiring the appointment of counsel with additional qualifications, as discussed in Mexico's comments on SP 18-12. To ensure that qualified counsel is appointed for each defendant, the roster of attorneys should be structured to include a sub-category of attorneys who are qualified by additional required training and experience to accept foreign national cases. Counsel should only be appointed to represent a foreign national if he or she has been determined to possess these additional qualifications. Including this specialized designation in the records of available attorneys would greatly assist in locating and appointing counsel who are qualified to represent particular defendants, especially because such attorneys are comparatively rare and are likely spread around the state. The proposed rules, while appearing to recognize that certain cases will have specific needs apart from simply meeting the minimum qualifications,[2] create a much less formal system, whereby regional committees could, if asked, help superior courts match available counsel to particular cases, without any	The working group appreciates this comment and acknowledges that representing a foreign national may require certain skills, experience, or training that may not be necessary or beneficial when representing a U.S. citizen. The working group declined to add specific additional qualifications for counsel eligible to represent foreign nationals for the reasons explained in the working group's concurrently submitted report to the Judicial Council regarding the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings.

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

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

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Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	facts will vary widely. An attorney could request additional help if he/she thinks it necessary.	
Office of the Federal Defender, Eastern District of California, by Heather E. Williams, Federal Defender Sacramento, California	This proposed rule directs the sentencing court to appoint "a qualified attorney or attorneys to represent the person in death penalty-related habeas corpus proceedings." This Proposed Rule envisions there will be cases for assigning only one attorney. We recommend the rule provide for appointing two attorneys in all death penalty-related habeas corpus proceedings. Penal Code Section 1509(c), enacted as part of Proposition 66, creates a one-year statute of limitations for filing death penalty-related habeas corpus petitions. Prior to Proposition 66, no statute of limitations existed. A death penalty-related habeas corpus petition was considered timely filed when it was filed within three years of habeas corpus counsel appointment. *Supreme Court of Cal., Supreme Court Policies Regarding Cases Arising from Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1. This means an attorney accepting a death penalty-related habeas corpus petition appointment must complete three years' work now in one year. To compensate for the two-year loss, the Rule must appoint to every death-sentenced person two lawyers for death penalty-related habeas corpus proceedings to try to complete three year's work into one year.	Please see the response to the comment of Robert D. Bacon above.

Rule 4.561(e) (circulated as rule 8.654(e)) – Appointment of Counsel: Generally

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

Rule 4.561(e) (circulated as 8.654(e)) – Appointment of Counsel: Appointment of Public Defender

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

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

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

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

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

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

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

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

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

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

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

Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	More than thirty-five years ago, the California Supreme Court voiced concern about the quality of representation in death penalty cases by reaching out to the State Bar for assistance. In response, to advance the quality of lawyering in death judgment cases, the State Bar established the California Appellate Project – San Francisco (CAP-SF). CAP-SF's mission was, and still is, to facilitate competent representation in indigent capital appeal and habeas cases. Proposition 66's mandate to significantly shorten the time in which to file a capital habeas petition - while simultaneously imposing new restrictions on the availability of second or successive applications for relief -- heightens rather than diminishes the concern for quality representation in death judgment cases. The new rules will create many changes and challenges to be met by experienced capital litigators as well as attorneys with no capital experience. Now more than ever, capital habeas attorneys will need assistance by experienced capital attorneys in order to meet the inherent challenges of capital representation coupled with the additional hurdles imposed by Proposition 66. CAP-SF is the entity best able to provide that assistance. [From CAP-SF's comments on Proposal SP18-12:] Throughout the proposed rules addressing the appointment of counsel, the need for assistance is mentioned, but proposed rules never expressly state that assistance is required. Assistance should be required in all capital appointments for all	Please see the response to the comment of Robert D. Bacon above. Proposed rule 4.561(e)(3) (circulated as proposed rule 8.654(e)(3)) requires a superior court to designate an assisting entity or counsel when appointing counsel other than HCRC.

Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	of the reasons it was necessary thirty-five years ago and for the additional concerns raised by Proposition 66 (new rules, inexperienced lawyers, and significantly shortened filing deadlines).	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Superior courts should be required to designate CAP-SF as the "assisting entity." CAP-SF, and its staff, have decades of professional and institutional experience with litigating capital habeas corpus cases and assisting and monitoring private counsel in those cases. The expertise within CAP-SF is found in no other organization in California. CAP-SF provides education, training, training materials, a capital case databank, and an experienced lawyer who is personally assigned to assist appointed counsel in their capital habeas corpus proceedings. Regional appellate projects are not qualified, as their sole focus is assisting private counsel in providing quality indigent representation in non-capital criminal, juvenile, dependency and mental health appeals. As a result, these nonprofit entities should not be appointed to assist appointed capital habeas corpus attorneys. If adequate CAP-SF resources are not available, or a conflict of interest exists preventing CAP-SF from assisting a particular capital habeas counsel, the court should appoint the most experienced counsel from the Supreme Court roster of qualified capital habeas corpus attorneys.	Please see the response to the comment of Robert D. Bacon above.

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

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

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Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The proposals show no awareness of the reality that the "assisting entities" can be as much of a hindrance as a help. We have been told that the difficulty of dealing with CAP-SF is one of the reasons that some appointed counsel say "never again," thus exacerbating an already critical shortage of attorneys. * * * A rule governing the relationship between appointed counsel and the assisting entity is in order, though, and it requires balance and a recognition of counsel's role as the decision- maker. Such a rule might read like this: "Appointed counsel and the assisting counsel or entity shall cooperate with each other. The role of the assisting counsel or entity is to advise and not to control. Appointed counsel remains responsible for case and shall make the	A majority of the working group took the position that courts must designate an assisting entity or counsel, and the comments show strong support for a rule that requires designation of an assisting entity or counsel. The presumption underlying the qualification of counsel rules that the working group proposes in the accompanying report to the Judicial Council is premised on the assumption that appointed private attorneys will receive assistance and support from an assisting entity or counsel. Were the rules not to require the use of assisting entities or counsel, the minimum qualifications for counsel would have to be raised. Raising the qualifications for counsel would reduce the number of attorneys who meet the qualifications and would be inconsistent with Proposition 66 to the extent the proposition is intended to increase the pool of available, qualified attorneys. The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	decisions regarding representation in the best of his or her professional judgment after considering the advice offered. In the event that conflict between appointed counsel and the assisting counsel or entity becomes detrimental to representation, the court may (1) relieve the assisting counsel or entity if the court determines that appointed counsel can proceed without further assistance; or (2) designate a different counsel or entity to assist. Withdrawal or dismissal of appointed counsel on the ground of such conflict shall not be employed unless the court determines it is necessary to ensure effective representation." Although it may be beyond the scope of the present rulemaking proceeding, the Judicial Council's monitoring of capital cases (see Pen. Code, § 190.6, subd. (d)) should include a review of how well or how poorly the assisting entities are actually assisting, including collection and review of evaluations of the entities by the appointed counsel. If the dissatisfaction in the reports we have received is widespread (and we have no way of knowing if it is), a change would be in order.	proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Therefore the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Yes, superior courts should be required to designate an assisting entity or counsel for private appointed counsel. Historically, the assistance provided by an assisting entity or counsel has been vital to ensuring that private counsel have access to appropriate training, resources, and expert advice	 The working group appreciates this input.

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Rule 4.561(e)(3) (circulated as rule 8.654(e)(3)) – Designation of Assisting Entity or Counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	throughout their representation of death-sentenced persons. ***Should the proposal designate a specific assisting entity (e.g., CAP-SF)?*** Yes, the proposed rules should designate the California Appellate Project – San Francisco (CAP-SF) as the default assisting entity because of its decades-long experience providing assistance to private counsel in habeas cases. Designating HCRC as the default assisting entity would be problematic for at least three reasons: First, HCRC enabling legislation (Gov't Code § 68661) makes it unclear as to whether HCRC may perform the full breadth of duties expected of an assisting entity; second, in contrast to CAP-SF, HCRC provides direct representation to condemned inmates and adding this responsibility to HCRC attorneys would reduce the number of cases in which HCRC would be able to provide direct representation; third, unlike CAP-SF, HCRC has only very minimal experience providing such assistance to private counsel.	Please see the response to the comment of Robert D. Bacon above.
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (Joint Rules Subcommittee), by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*** Superior Courts should be designating an entity to assist and support private counsel. The obvious problem, as with every part of this proposal, is what agency is going to pay for such an entity. ***Should the proposal designate a specific assisting entity (e.g., CAP-SF)?***	The working group appreciates this input.

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

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

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

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

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

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

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

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	68661, subd. (d))[2] and the superior court's duty to appoint counsel (§ 68662). That said, some revisions to the proposed rules would strengthen the process and provide greater protection for the independence of habeas counsel. [2]Unexplained section references are to the Government Code.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	As amended by Proposition 66, Govt. Code Section 68661(d) provides that the Habeas Corpus Resource Center (HCRC) may recommend attorneys to the Supreme Court for inclusion in a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases, provided that the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center. The voters specifically voted on the amended language in this subsection. Hence, by statute, the Supreme Court is responsible for the roster, and, makes "the final determination of whether to include an attorney in the roster" whether the Court previously maintained a roster or not. * * * Considering the foregoing and commenting specifically on the proposals numbered SP 18-12 and 18-13, we are aware of the proposal to create regional committees to assist in evaluating candidates for appointment to capital habeas cases. We respectfully submit that such regional committees could accept	Government Code section 68661(d) governs a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases that is maintained by HCRC with the approval of the Supreme Court. The statute does not preclude other judicial branch entities from maintaining their own lists of qualified attorneys for use by the superior courts and there is no provision in Proposition 66 that requires a superior court to draw counsel from the Government Code section 68661(d) roster. Under the proposal, the regional committees would provide support for determining whether attorneys meet the minimum qualifications to serve as counsel in a death penalty–related habeas corpus proceeding. This does not represent a delegation of the Supreme Court's

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Rule 4.562(a),(b) (circulated as Rule 8.655(a),(b)) – Regional Committees: Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	applications and forward appropriate nominees to HCRC and the Supreme Court for inclusion, upon the Supreme Court's "final determination," on the roster. Unless the statute is amended by three fourths vote or approval of the voters, the statute clearly states that the Supreme Court's duties cannot be delegated and certainly cannot be delegated to individual superior courts or its judges. * * * Regional committees should be encouraged to recommend attorneys to HCRC for qualification. However, neither a regional committee nor a superior court have authority to qualify an attorney or unilaterally include an attorney on the Supreme Court roster.	responsibilities to approve HCRC recommendations to a Government Code section 68661(d) roster. The proposal does not provide for any superior court or regional committee to include attorneys on the Supreme Court's roster and does not govern attorneys appointed by the Supreme Court in capital cases. The proposal provides a method for determining the minimum qualifications of attorneys to be appointed by superior courts to serve as counsel in death penalty–related habeas corpus proceedings in the superior courts.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee agrees with the proposal to form regional vetting committees	The working group appreciates this input.

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

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

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

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

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	on the committee by attorneys from six possible categories seems to suggest that only one attorney per category will be selected to the committee, but the language is not definitive. The subsection language should expressly state that only one attorney per category will be selected to the committee. If subsection (c)(l)(C) allows only one attorney per category, CAP-SF's primary concerns are that the rule as written could lead to a scenario where the three selected attorney members on a regional committee would have little to no capital habeas experience/knowledge. For example, it is possible a regional committee could be comprised of one DCA project attorney, one attorney from the public defender's office, and one attorney "designated by another entity" (subsection (vi) see below discussion). There is nothing written in the rule that would require the DCA project attorney to have capital habeas knowledge/experience. This is important because most DCA project attorneys practice in non-capital appeals. There is nothing written in the rule that would require the attorney from the public defender's office to have capital habeas knowledge/experience. This is important because there is a wide range of skill levels at a public defender's office and the rule would allow for an attorney who practices solely in misdemeanor cases as well as an attorney who practices in serious felony cases. The third attorney as noted above from category (vi), one "designated by another entity," could be anyone the chair authorizes and there is nothing in this rule that would require that person have any capital habeas	change. Several categories may involve multiple nominations (e.g., the Federal and local public defenders) and rather than adding further details to the rule, it may be more effective to allow the administrative presiding justices the discretion to exercise their judgment in the particular local circumstances. Based on this comment and suggestions received from other commenters, the working group has revised the proposal to require that at least two of the three attorney members of the committee have experience representing petitioners in death penalty–related habeas corpus proceedings.

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Rule 4.562(c)(1), (2) (circulated as 8.655(c)(1), (2)) – Regional Committees: Composition & Appointments		
Commenter	**Comment**	**Proposed Working Group Response**
	experience/knowledge. To avoid this scenario and to ensure that the regional committee is staffed with experienced/knowledgeable capital habeas attorneys, the rule must indicate that at least two of the three attorneys chosen from categories (i)-(vi) are representatives of capital post-conviction agencies (HCRC, CAP-SF, or a federal public defender capital habeas unit). These agencies are in the best position to vet and assess the skills of applicants and the volume and type of work necessary to litigate the case.	
	Further, to avoid subsection (c)(l)(C)(vi) being interpreted as allowing for an unqualified attorney to be named as regional committee member as illustrated above, section (vi) should be restated with clarity. Currently, subsection (c)(l)(C) (vi) states, "An attorney designated by another entity, as authorized by the chair." If the intent of this subsection is that one of the entities identified in subsection (i)-(v) may designate an attorney, it should clearly state as much. If that is not the intent the subsection should be further defined so the intent is clear.	Based on the commenter's suggestion, the working group has revised proposed rule 4.562(c)(1)(C)(vi) to clarify that the administrative presiding justice may invite an entity other than the five identified in the subparagraph to nominate an attorney.
	CAP-SF objects to the vagueness of [rule 4.562(c)(2)]. If the intent is for the committee to be able to seek out someone with specialized knowledge, for example DNA, that could assist in pairing cases, it appears there would be no need that this person be designated as a "member." Instead, the rule could be revised to allow the committee to consult with someone who has specialized knowledge. As written, there is no definition of	The working group declined to make this suggested change. An advisory member is one that does not have a vote. The purpose of the provision was to expand the membership of the committee at the discretion of the administrative presiding justice without changing the voting composition of the committees provided in proposed rule 4.562(c)(1). As noted in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Rule 4.562(c), (d) (circulated as rule 8.655(c), (d) – Regional Committees: Management and Governance		
Commenter	**Comment**	**Proposed Working Group Response**
		would vote as a block against the recommendation and expertise of the attorney members of the committee.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We believe the rule should specify who is responsible for appointing members of the committee, and that person should either be the Chief Justice or the Presiding Justice of the court of appeal for that region. Consequently, the Rule should be amended to provide that the superior courts may nominate judges to be appointed to the three positions for superior court judges, rather than "agreed upon" by the presiding judges of the superior courts. There should also be a process for taking applications to join the regional committees. Further, we agree that the term for each committee member should be set at three years, and the terms of the various committee members should be staggered.	The working group appreciates this input. Based on this comment and suggestions received from other commenters the working group has revised the rule to provide that the administrative presiding justice of the appellate district would be responsible for making appointments to the regional committee and that the administrative presiding justice would appoint three superior court judges from among those nominated by the superior courts in the district. The working group defers to the administrative presiding justices and the respective committees as to the process for obtaining nominations for membership on the regional committees.
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	Section (c)(3) states "When a member is unable to complete a term, a replacement will serve out the existing term." Similar to [4.562](c)(2), this proposed provision is vague. Who selects the replacement member, and a requirement that the new member meet all of the panel committee qualifications, should be stated.	Under the revised proposal, the administrative presiding justices would be responsible for selecting members of the regional committee, and this would include any replacement members.

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

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

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

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

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

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

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

Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	This proposed rule should provide a mechanism for evaluating appointed counsel's work on an ongoing basis as opposed to waiting six years. This could be accomplished by requiring the assisting entity to provide the committee with a confidential evaluation of appointed counsel's work on all appointed death penalty-related habeas corpus pleadings filed. A comprehensive confidential evaluation could be submitted to the committee within thirty days of the habeas matter being fully briefed. The committee could then consider the confidential evaluation in its assessment of future appointments to appointed counsel. A mechanism such as this, would provide a way to monitor counsel's work and ensure that those who produced valuable work would continue to receive appointments and those whose work was inadequate would be precluded from future appointments or deemed qualified as supervised and not lead counsel. It would provide an incentive to counsel to provide competent representation and be a step towards the effort of appointing quality representation in capital cases.	The working group appreciates both of these suggestions. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested changes would not be minor substantive changes and therefore would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.

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

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

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	The rule should expressly forbid rejecting an application on the basis of the applicant's views on capital punishment or on prior experience as a prosecutor. An applicant who is not approved should have the right to a specific statement as to why he was not. There must be a mechanism for review. Consistently with the statute, that mechanism should be a final decision by the California Supreme Court. The court would no doubt routinely approve uncontested decisions and only be called upon to review the dubious and disputed ones.	suggestion that an applicant who is rejected should have a mechanism for review, but declined to revise the rules on this point. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. The working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Marylou Hillberg, Attorney at Law Sebastopol, California	[From Ms. Hillberg,'s comments on Proposal SP18-12:] I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council

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Rule 4.562(d) (circulated as rule 8.655(d)) – Regional Committees: Responsibilities and Duties, Generally		
Commenter	**Comment**	**Proposed Working Group Response**
	I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.	for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time. The working group did, however, revise the proposal to include an advisory committee comment *encouraging* courts and regional committees to "to support activities to expand the pool of attorneys that are qualified to represent petitioners in death penalty–related habeas corpus proceedings. Examples of such activities include providing mentoring and training programs, and encouraging the use of supervised counsel."
Joint Rules Subcommittee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Should regional committees take on duties different from those specified in the proposal?*** They should not take on additional duties different than the ones specified, except maybe to assist in offering trainings, mentor attorneys, etc., to expand the pool.	The working group notes the commenter's support for these provisions in the rule.
Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	[P]roposed rule [4.562](d)(2)(B) provides that "each committee must accept applications only from attorneys whose principal place of business is within the appellate district." We suggest the language be modified so that it is clear whether this means that the committee may only accept applications from local attorneys, or whether it means that while the committee is only required to accept applications from local attorneys, it may choose to accept applications from non-local attorneys as well. While we suspect it is intended to mean the former in order to serve the goals of dividing the process equitably (after all,	The working group appreciates this input and has revised rule 4.562(d)(2)(B) to clarify that "each committee must accept applications from attorneys whose principal place of business is within the appellate district and from only those attorneys."

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

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

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

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

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

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

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

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Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	In conjunction with the comments made to [4.562](d)(4)(C), an assessment should be made based on the assisting entity's confidential evaluation. Where counsel's performance has been determined to be inadequate, this should be considered as a basis for removal.	See response to that comment above.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee agrees with proposed Rule [4.562](d)(6), which allows each committee to decide whether to reevaluate and remove an attorney following a finding in any proceeding that the attorney provided ineffective assistance of counsel. Given the wide range of conduct that could constitute ineffective assistance of counsel, and the fact that ineffective assistance in a different case may or may not reflect on counsel's fitness for appointment, automatic removal from the panel does not seem warranted.	The working group notes the commenter's support for this provision of the rule.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	Finally, removal of an attorney should be required from the statewide panel if there has been a judicial ruling finding that the attorney rendered ineffective assistance of counsel. Given the decisions by the United States Supreme Court requiring state habeas proceedings to begin anew in a capital case where initial habeas counsel was ineffective (*Trevino*, *supra*, 133 S.Ct. 1911; *Martinez*, *supra*, 566 U.S. 1), and the need to prevent both victims and-defendants from enduring the additional delays that would result if habeas counsel was ineffective yet again, counsel should not be appointed if he or she was previously found ineffective. * * *	Based on the other comments received, the working group declined to make this suggested change. A rule that required removal of an attorney who was found to have provided ineffective assistance of counsel would provide no flexibility for the extenuating circumstances that might warrant allowing an attorney to remain on the statewide panel.

Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
	An attorney should not be allowed to continue to be on the list unless he or she maintains current training in capital habeas litigation. Thus, [proposed rule 4.562(d)(4)(C)] should be modified to read: "Unless removed from the panel under (d)(6), an attorney included on the panel may remain on the panel for up.to six years without submitting a renewed application on condition that the attorney completes 20 hours of habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty habeas corpus proceedings, every 2 years." For the reasons explained above, delete the second sentence and replace it with the following: "An attorney shall also be removed from the panel if there has been a final judicial ruling reversing a judgment based on a finding that the attorney has rendered the ineffective assistance of counsel."	The working group appreciates this suggestion. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?*** No.	The working group notes the commenter's support for this provision of the rule.
Court of Appeal, Fourth Appellate District by Hon. Judith McConnell, Administrative Presiding Justice	***Should the proposal provide broader, narrower or more specific circumstances or language regarding when an attorney would be removed from a panel?*** No.	The working group notes the commenter's support for this provision of the rule.

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Rule 4.562(d)(6) (circulated as 8.655(d)(6)) – Statewide Panel of Attorneys: Attorney Retention and Removal		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation, by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The proposal provides in Rule [4.562](d)(6) that a finding of ineffective assistance does not automatically result in removal of an attorney from the panel. We believe that is correct. Given the propensity of some courts to stretch for any reason to overturn a capital sentence, a finding of ineffective assistance may simply be wrong. This is particularly true where a claim of ineffective assistance was considered and rejected by the state courts and subsequently accepted by the federal courts. However, the rule implies that a committee can unilaterally decide to remove an attorney from the panel. It cannot. The statutory vesting of the decision to include in the Supreme Court implies a similar assignment of the decision to remove. Along with ineffective assistance, abusive tactics such as those denounced in *In re Reno*, *supra*, and *Gomez v. U.S. District Court*, *supra*, should also be expressly mentioned as grounds for removal.	The working group notes the commenter's support for this provision of the rule.

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

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

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

Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	For these reasons, CADC respectfully suggests that the Working Group should consider further description or definition of the local entity that would undertake this alternative means of appointing counsel, which description might mirror the provisions of Rule 4.562(c) in regard to "regional habeas corpus panel committees."	
California Appellate Project – San Francisco by Joseph Schlesinger, Executive Director	As set forth in [rule 4.562(e)(3)] and proposed Rule [4.562](g), CAP-SF objects to allowing superior courts to adopt local rules regarding the appointment of counsel. The process set forth in proposed Rule [4.562](d)(2)-(4) is not burdensome and should be followed by all appointed counsel. Giving superior courts the authority to deem an applicant qualified, without approval by the regional committee, permits the superior courts - whether intentional or not - to take a more lenient view of the qualification standards than the regional committee. Allowing a superior court to adopt local rules for the appointment of counsel unnecessarily introduces the possibility of unqualified counsel appointed to represent capital habeas petitioners. Requiring that appointments be made only to counsel approved by the regional committees will assist in guaranteeing uniformity in the assessment of counsel's qualifications For these reasons, CADC respectfully suggests that the Working Group should consider further description or definition of the local entity that would undertake this alternative means of appointing counsel, which description might mirror the provisions of Rule [4.562](c) in regard to	See response to Robert D. Bacon above.

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Rule 8.655(g) – Local Panels of Qualified Attorneys		
Commenter	**Comment**	**Proposed Working Group Response**
	"regional habeas corpus panel committees."	
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	With the goal of expanding the pool of available counsel in mind, the Committee agrees that a superior court should be authorized to appoint qualified attorneys who are not members of the statewide panel. No approval from the regional committee should be required. As well, attorneys who are on the statewide panel should be allowed to seek inclusion on a local panel.	The working group notes the commenter's support for this provision in the rule and appreciates the input.
California Public Defenders Association by Robin Lipetzky, President Sacramento, California	We recognize there are concerns over whether anyone but the State Supreme Court has or should have the authority to identify counsel qualified to represent the defendant/petitioner in capital habeas corpus proceedings. We are not taking a position on that issue. However, to the extent that anyone other than the Supreme Court should be permitted to identify qualified counsel, that authority should be limited to regional committees, not local superior courts. Application of the death penalty is a matter of statewide importance, governed by statewide initiatives and statutes, and the state and federal constitution. Standards governing its application must be uniformly applied throughout the state. An attorney deemed unqualified by the State Supreme Court or even a regional committee cannot be allowed to represent a condemned individual by the same superior court that condemned that individual. Whereas the State Supreme Court or even a regional committee would apply uniform qualification standards throughout its jurisdiction, thereby resulting in consistent standards of representation, different superior courts	See response to Robert D. Bacon above.

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

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

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

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

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

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

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

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Rule 8.655(d)(2)(A), (g) – Form Declaration of Counsel re Minimum Qualifications (HC-100)		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The Judicial Council should create a form for attorneys to submit to HCRC with their applications for qualification. HCRC may develop forms to document that counsel is qualified to be included on the Supreme Court roster.	The Judicial Council adopts forms for use in and by the courts. Attorneys interested in being on the roster established under Government Code section 68661 should contact HCRC.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	The Committee supports the mandatory use of Judicial Council Form HC-100 for all applications to the statewide panel. This requirement will help ensure that the necessary information is provided and will streamline the review of applicants. The Committee provides the following suggestions with regard to the proposed Judicial Council Form HC-100: • For section 2.a.(2).(b), consider allowing the applicant to provide the contact information for lead counsel, rather than requiring attestations and recommendations. • Consider omitting section 3, which states: "I am familiar with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings." The qualification requirements are meant to ensure familiarity, and this stand-alone statement is vague about what it means to be "familiar" with the practices and procedures.	The working group appreciates this input on form HC-100. The working group declined to make the suggested change. Providing written attestations and recommendations will be of more assistance to the committee, and will represent better documentation, than would contact information. The working group declined to make the suggested change. This language is modeled after language in the relevant rule of court.

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

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

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

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

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

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

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

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

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

Time for Implementation		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The rules for qualification and appointment of habeas corpus counsel cannot be implemented within a month of promulgation. Before the rules can be implemented considerable infrastructure is required. The tasks include: 1. Defining agency responsibility for creation and management of the financial arrangements between appointed counsel and the court before implementation of the rules. a. No qualified attorney should be expected to accept appointment without a contract. The judicial branch must develop a contract between the funding agency and appointed contractor habeas corpus counsel. b. The judicial branch must create a budget for timely payment of appointed habeas corpus counsel at competitive rates. c. The judicial branch must allocate or appropriate funds for attorneys, mitigation specialists[1], investigators, experts and others prior to implementation of the rules. d. The agency must define the mechanism for invoice submission, review, and payment. e. The agency must create a mechanism for resolution of payment disputes prior to implementation of the rules. 2. Funding HCRC and CAP-SF in advance of appointment of counsel to adequately meet the demands of Proposition 66 while adequately serving existing appointed counsel clients and the court. Funding additional staff as required by the demands of Proposition 66.	Based on this and other comments, the working group is recommending that the Judicial Council adopt these rules at its November 2018 meeting, with an effective date about five months later, on the April 25, 2019. The working group recognizes there are many practical and organizational impediments to implementation of these rules and Proposition 66. As discussed more fully in the body of the report, the working group notes that it is not clear whether it will be the judicial branch or counties that have responsibility for the costs of appointed private counsel.

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Time for Implementation		
Commenter	**Comment**	**Proposed Working Group Response**
	3. Funding attorney participation in mandatory training programs. 4. Funding and implementation of trial court training. 5. Instituting a process for trial court training and feedback. [1] Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L.R. 677 (2008)	
Court of Appeal, Second Appellate District by Hon. Elwood Lui, Administrative Presiding Justice	***Would 1 1/2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** That is probably insufficient time to implement the new proceedings in superior court.	Based on this and other comments, the working group is recommending that the Judicial Council adopt these rules at its November 2018 meeting, with an effective date about five months later, on the April 25, 2019, which is the date by which Proposition 66 requires the Judicial Council to adopt an initial set of rules of court. (Pen. Code, § 190.6(d).)
Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee by Hon. Becky Lynn Dugan Presiding Judge, Superior Court of Riverside County	***Would 1 1/2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** 45 days WOULD NOT provide adequate time for courts to prepare. This is an enormous undertaking. 90 days would be a minimum to begin implementation.	See response above to the comment of the Court of Appeal, Second Appellate District.

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

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

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

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

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

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

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Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	supervised counsel. Given that the proposed rules create a path to qualification as lead or associate counsel by serving as supervised counsel,[2] the rules should provide a separate stream of funding for supervised counsel as well. Adopting rules which encourage experienced counsel to collaborate with less experienced counsel serves one of the core purposes of Proposition 66, which is to expand the pool of attorneys willing and qualified to accept appointments to capital habeas cases. Additionally, under an accelerated litigation process, the need to provide counsel with more robust funding to hire support staff such as paralegals, consulting experts, or other assistance must be addressed. [2] Rule 8.652(c)(2)(B)(i.)	adopt rules governing the payment of appointed counsel until there is greater certainty about the source and amount of funding available.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	There is a gaping hole in the proposed rules: the lack of any discussion of funding. Habeas counsel must be compensated. The reasonable expenses of habeas counsel must be funded. The rules do not make any provision for the payment of the attorneys who are supposedly going to receive appointments. It is simply unrealistic to expect any attorney to apply to be on the state-wide panel for habeas appointments without any provisions for when and how payment will be made for services and expenses. Under current procedures, the California Supreme Court grants habeas counsel up to $ 50,000 in expenses for the preparation of habeas petitions. (See Supreme Court Policies Regarding	Please see the responses to Robert D. Bacon and CAP-SF above.

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Other Comments -- Funding		
Commenter	**Comment**	**Proposed Working Group Response**
	Cases Arising From Judgments of Death, Policy 3, 2-2.1.) This policy has served to assure counsel taking an appointment that the Court anticipates that counsel will incur necessary expenses for investigation, forensic testing, experts, and other tasks. To have no similar provision in these rules creates uncertainty, confusion, and unfairness. Further, the amended statute (Gov. Code § 68650.5) notes that one of the purposes of the law is to "qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154 of Title 28 of the United States Code." The Chapter 154 regulations specifically require a state system to provide for reasonable compensation for counsel and payment of litigation expenses, including investigators, mitigation specialists, mental health and forensic science experts, and support personnel. (See 28 C.F.R. § 26.22(c), (d).) Yet the proposed rules are, again, completely silent on the question of funding, compensation, and expenses. This is a glaring omission. At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid. Additionally, and related, is the question of funding and staff for the committees created by this rule. There is no provision for the funding of the operation of the committees, nor funding for staff and resources. The rule is silent and the omission also glaring.	

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STATE BAR NO. 73297

August 24, 2018

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

Re: No. SP18-13: Appointment of Capital Habeas Counsel

Ladies and Gentlemen:

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

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

1. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded

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

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

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

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

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

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

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

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

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

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

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

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

[3] "The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice – for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice." (*Ibid.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

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

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

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

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

August 24, 2018

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

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

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

General Comments on All Proposed Rules

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

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

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

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

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

Proposed Rule 8.601(5): Definitions

8.601(5): Definition of "Assisting Counsel or Entity"

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

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

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

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

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

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

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

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

8.652(b) General qualifications

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

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

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

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

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

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

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

Subsection 2(A):

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

Subsection (B)(i)

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

Section 2(C) states:

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

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

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

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

> "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases. In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed.*
>
> *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification; and familiarity with death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.*"

8.652(c)(4) (A): Training

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

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

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

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

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

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

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

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

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

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

Proposed Rules 8.654 – 8.655: Appointment of Counsel

General comment

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

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

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

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

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

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

<u>8.654(d): Notice of Oldest Judgement without Counsel</u>

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

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

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

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

8.654(e)(3): Appointment of counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.655(d)(6): Removal from panel

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

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

Thank you for this opportunity to comment.

Very truly yours,

Joseph Schlesinger
Executive Director

Fighting for justice since 1973

California Attorneys for Criminal Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments Specific to SP18-13

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

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

- **Mechanics of Attorney Appointment**

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

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

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

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

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

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

- **Regional Committees and Vetting**

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

- **Appointment Orders and Forms**

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

- **Timing of Implementation of Proposition 66**

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

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

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

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

habeas corpus counsel at competitive rates.

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

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

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

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

3. Funding attorney participation in mandatory training programs.

4. Funding and implementation of trial court training.

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

Comments specific to SP18-12

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

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

ABA GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

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

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

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

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

all available fora.

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

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

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

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

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

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

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

<u>Attorney Qualifications Considering Proposition 66's Expedited Timeframes</u>

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

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

<u>Experience Necessary for Appointment as Habeas Corpus Counsel</u>

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

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

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

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

Training Requirements for Appointed Habeas Corpus Counsel

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

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

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

Removal of Appointed Counsel

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

Expanding Pool of Counsel

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

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

These comments are respectfully submitted.

Sincerely,

STEVE REASE
President of California Attorneys for Criminal Justice

CALIFORNIA APPELLATE DEFENSE COUNSEL

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

BY E-MAIL

Re: Proposition 66 Working Group Proposed Rules
Request for Comments
Superior Court Appointment of Habeas Counsel

Introduction

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

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

The Potential Problem

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

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

Thank you for your time and consideration.

Very truly yours,

KYLE GEE
Chair, CADC Government Relations Committee

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

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

FROM: Committee on Appellate Courts, Litigation Section

DATE: August 24, 2018

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

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

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

Proposal as a Whole:

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

Specific Comments:

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

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

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

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

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

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

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

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

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

Prioritization and Appointment:

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

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

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

Regional Committees and Vetting of Attorney Qualifications

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

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

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

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

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

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

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

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

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

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

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

CONTACTS:

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CPDA

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August 24, 2018

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

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

Dear Judicial Council of California:

I am pleased to submit the following comments on behalf of the California Public Defenders Association (hereinafter, "CPDA") in regards to the proposed changes to the Rules of Court concerning **Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings**, Item Number SP18-13.

Statement of Interest

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

Position

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

Comments

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

Prioritization and Appointment

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

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

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

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

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

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

Regional Committees and Vetting of Attorney Qualifications

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

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

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

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

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

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

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

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

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

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

Our additional comments to specific Rules are as follows:

Rule 8.654 (d)(4):

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

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

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

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

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

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

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

should be modified to read: "Unless removed from the panel under (d)(6), an attorney included on the panel may remain on the panel for up to six years without submitting a renewed application on condition that the attorney completes 20 hours of habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty habeas corpus proceedings, every 2 years."

Rule 8.655(d)(6):

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

Rule 8.655(g) Local Rule:

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

Thank you for your consideration,

Robin Lipetzky
President, California Public Defenders Association

Court of Appeal

STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

TO: Heather Anderson
Michael Giden

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

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

DATE: July 20, 2018

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

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

Prioritization and Appointment

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

  Response: Yes.

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

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

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

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

Response: 20 judgments is acceptable.

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

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

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

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

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

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

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

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

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

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

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

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

Response: Yes.

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

Response: Yes.

Regional Committees and Vetting of Attorney Qualifications

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

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

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

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

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

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

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

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

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

Response: Yes to both questions.

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

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

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

Response: No.

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

    Response: No.

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

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

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

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

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

    Response: Yes.

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

    Response: Yes.

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

    Response: The form is adequate.

Cost and Implementation Matters

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

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

- What would the implementation requirements be for courts?

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

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

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

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

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

General Comment

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

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

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

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COURT OF APPEAL
FOURTH APPELLATE DISTRICT

TO: Heather Anderson
Michael Giden

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

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

DATE: July 19, 2018

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

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

<u>Responses to the Working Group's Requests for Specific Comments</u>

Prioritization and Appointment

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

Response: Yes.

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

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

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

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

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

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

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

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

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

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

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

> Response: Yes.

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

> Response: Yes.

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

Response: Yes.

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

Response: Yes.

Regional Committees and Vetting of Attorney Qualifications

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

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

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

Response: No.

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

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

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

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

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

Response: Yes, three-year terms are appropriate.

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

Response: Yes.

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

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

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

Response: No.

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

Response: Yes.

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

Response: Yes.

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

Response: Yes.

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

Response: Yes.

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

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

Additional Comments Concerning Proposed Rule 8.655

- Subdivision (c):

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

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

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

- Subdivision(d)(1)(C)(i) – (v):

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

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

- Subdivision (d)(4):

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

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

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

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

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

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

<u>CONTACT</u>:

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Criminal Justice Legal Foundation

August 24, 2018

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Proposition 66 Rules Working Group
Judicial Council of California
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Re: SP 18-12, Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, and

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

Proposition 66 Rules Working Group:

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

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

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

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The Status Quo Ante

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

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

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

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

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

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

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

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

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

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

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

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

Proposition 66

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

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

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

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

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

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

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

The Habeas Corpus Appointment Proposal

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

Central Control of Appointment Priority

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

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

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

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

Priority and Source of Appointment

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

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

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

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

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

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

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

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

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

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

The Statewide Roster

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

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

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

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

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

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

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

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

Assisting Entities

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

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

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

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

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

The Qualification Proposal

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

1. Achieving competent representation;
2. Avoiding unduly restricting the available pool of attorneys;
3. Qualifying for Chapter 154 of Title 28 of the U.S. Code; and
4. Not limiting experience requirements to the defense side.

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

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

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

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

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

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

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

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

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

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

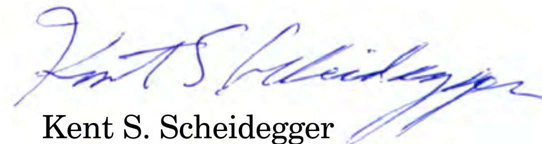
Training

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

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

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

Very truly yours,



Kent S. Scheidegger

KSS:iha

Presiding Justice Greenwood
Sixth District Appellate Court
333 W. Santa Clara St., Suite 1060
San Jose, CA 95113

MEMO

TO: Heather Anderson
Michael Giden

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

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

DATE : 7/31/2018

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

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I thank the Proposition 66 Rules Working Group for their work on the proposed rules concerning appointment of counsel in death penalty-related habeas corpus proceedings.

I join in the comments made by my colleague Justice McConnel on behalf of the Fourth District, with the following additional comments.

- Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?

Response: No. I agree with the majority of the working group that the rule should not impose such a requirement.

As Administrative Presiding Justice of the Sixth District Court of Appeal, I take no position on the lawful interpretation of Government Code section 27706 or *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858. I do offer the following based on my experience as the Chief Defender of the Santa Clara County Public Defender Office from 2005 to 2012, where I administered both the Public Defender and Alternate Defender Office.

In practice, capital defendants at the trial level are almost invariably represented by the Public Defender or, if the Public Defender declares a conflict, its ethically walled ancillary office, such as the

Alternate Defender. Competent post trial habeas and appellate review requires an evaluation of the performance of trial counsel. As a result, the Public Defender and its ancillary offices would be required to declare a conflict in all but the very exceptional case.

The only potential mechanism for appointment of the Public Defender in capital habeas cases would be through the establishment of a separate, ethically walled office for habeas appointments under the Public Defender's administration. Even under these circumstances, the likelihood of conflicts discovered *after* appointment would be high – evidence related to capital defendants often includes the use of informants and other jail house witnesses whose testimony cross pollinates in multiple cases. Such delayed discovery of conflicts within the institutional office would disqualify all the attorneys in the organization, and would occasion significant delays inconsistent with the underlying intent of Proposition 66.

Additionally, an institutional office would be far more expensive than the appointment of private counsel. Public defender offices provide high quality defense at a low cost, but the fiscal benefit is dependent on a high case volume. Ancillary ethically walled institutional offices that provide salary and benefits to attorneys become less cost effective when the lawyers represent very few clients, as would be the case in capital habeas representation. Public Defender Offices in major urban areas often have one cost effective ancillary Alternate Defender Office, but default to private attorney panel appointments if neither office can legally accept representation of a defendant.

Because of the likelihood of delay inherent in identifying legal conflicts, and because of the high cost associated with the appointment of the Public Defender, the appointment of private attorneys, less burdened by the issues of legal conflicts, is the more appropriate mechanism in these habeas proceedings.

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: August 24, 2018

Re: SP 18-13 - Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings

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The below comments to SP 18-13 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 13-15 of the Invitation to Comment.

Responses to Selected Requests for Specific Comments:

Prioritization and Appointment

- *Should courts prioritize the appointment of counsel for the oldest judgments of death?*

Yes, the rules should require that courts prioritize appointment of habeas corpus counsel for the oldest death judgments. Currently, thirty-nine persons sentenced to death have waited over twenty years for appointment of habeas counsel and the necessary funding to pursue post-conviction relief. Thirteen different California counties entered the death judgments against these persons, including Los Angeles County (nine judgments), Orange County (five judgments), Riverside (five judgments), and San Bernardino (four judgments). In light of the large number of individuals waiting many years for the appointment of habeas counsel, fairness and equity – for both the persons sentenced to death and the families of crime victims waiting for resolution of these cases – demand that California courts prioritize the oldest death judgments for appointment of counsel. The appointment of habeas counsel to newly death-sentenced persons may result in legal challenges to the appointment process and cause further delays in the appointment of counsel and progress of habeas corpus cases.

- *For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a petition is pending before the Supreme Court from those that do not have a petition pending before the Supreme Court?*

The rule should not distinguish or exclude cases in which a habeas corpus petition is pending before the California Supreme Court for the purpose of appointment prioritization. Priority for appointment should be given to the oldest judgments regardless of whether there is a petition pending. The Supreme Court and the superior courts should work in concert to ensure that qualified counsel is appointed to the oldest cases first. Although amended Government Code section 68662 provides that the superior courts shall offer and appoint habeas counsel, that provision provides no express timeframe for making appointments. Nor does it preclude the fair and just prioritization of all existing cases in which defendants have waited decades for the promised appointment of habeas corpus counsel. The amended statute contemplates such a coordinated approach by the Supreme Court and superior courts; amended section 68661(d) requires that the Supreme Court continue to be involved in the qualification and appointment of habeas counsel in that it requires the Court to make a final determination of attorneys to be included on the state-wide roster of counsel qualified to accept an appointment in a state habeas corpus proceeding.

In addition, the superior court should not be permitted to appoint habeas counsel to a habeas case that has already been initiated in the Supreme Court without the assent of that Court. The Supreme Court retains the inherent judicial power to appoint counsel in habeas corpus cases before it. *See In re Anderson*, 69 Cal. 2d 613, 632-34 (1968); *see also Briggs v. Brown*, 3 Cal. 5th 808, 848-54 (2017) (discussing the inherent power of a court to administer its proceedings). Given the longstanding shortage of qualified habeas counsel, and the fact that the automatic appeals of death-sentenced persons who have not been provided habeas counsel will continue to progress (and be rejected), persons whose appeals conclude before their habeas petition has been filed will continue to file initial petitions in the California Supreme Court under *In re Morgan*, 50 Cal. 4th 932 (2010). With the assistance of HCRC, the Supreme Court and the superior courts should track the persons in need of habeas counsel and appoint counsel to the oldest judgments whenever possible.

- *For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a Morgan petition is pending before the Supreme Court (as opposed to a petition filed by counsel, but for which there is not currently an attorney as a result of, for example, death or withdrawal of the attorney)?*

No, priority should be given to cases based on the oldest judgment regardless of whether

a full-counseled habeas petition is pending, a *Morgan* petition is pending, or no habeas petition has been filed.

- *Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long? Would 60 days be appropriate?*

No. As noted above, a superior court should not appoint counsel to a habeas case initiated in the California Supreme Court. The Supreme Court must affirmatively relinquish its jurisdiction and inherent judicial power to appoint counsel in habeas cases initiated in the Supreme Court before a superior court judge can appoint habeas counsel.

- *Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?*

Yes, the proposed rules should require the appointment of no fewer than two qualified habeas counsel to each death-sentenced person, in accordance with the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1 – except when a qualified entity (e.g., the Habeas Corpus Resource Center or the California Appellate Project) is appointed as habeas counsel. In addition, the shortened one-year timeframe for the filing of an initial habeas petition under Penal Code section 1509(c) demands the appointment of at least two habeas counsel. A single attorney will not be able to complete the extensive work required to file a professionally adequate habeas petition in one year and effectively represent his or her client in the habeas proceeding.

- *Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?*

No. In cases where the public defender represented the defendant at trial, the public defender must not accept the habeas corpus appointment. Similarly, where the public defender declared a conflict prior to the trial, neither the public defender nor alternative defender will be normally available. It makes little sense to include a rule that requires a court to routinely conduct an act that will rarely, if ever, lead to the appointment of unconflicted counsel.

- *Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?*

Yes, superior courts should be required to designate an assisting entity or counsel for private appointed counsel. Historically, the assistance provided by an assisting entity or

counsel has been vital to ensuring that private counsel have access to appropriate training, resources, and expert advice throughout their representation of death-sentenced persons.

- S*hould the proposal designate a specific assisting entity (e.g., CAP-SF)?*

Yes, the proposed rules should designate the California Appellate Project-San Francisco (CAP-SF) as the default assisting entity because of its decades-long experience providing assistance to private counsel in habeas cases. Designating HCRC as the default assisting entity would be problematic for at least three reasons: First, HCRC enabling legislation (Gov't Code § 68661) makes it unclear as to whether HCRC may perform the full breadth of duties expected of an assisting entity; second, in contrast to CAP-SF, HCRC provides direct representation to condemned inmates and adding this responsibility to HCRC attorneys would reduce the number of cases in which HCRC would be able to provide direct representation; third, unlike CAP-SF, HCRC has only very minimal experience providing such assistance to private counsel.

Regional Committees and Vetting of Attorney Qualifications

- *Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty-related habeas corpus counsel?*

Yes, regional panel committees should be formed to vet attorneys for inclusion on a statewide panel of qualified attorneys from which superior courts may appoint habeas counsel. Similar panel committees of subject-matter experts are used successfully by federal courts in California to recruit and vet counsel for appointment in federal capital habeas cases. The regional panel committees should be able to more effectively recruit counsel from their geographic areas than a centralized statewide vetting authority. The regional panel committees also will distribute the burden for vetting potential habeas counsel.

- *Should it be mandatory that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience? If yes, how many of the three?*

Yes, it is necessary that the attorneys on the regional panel committees have subject-matter expertise in order to properly vet and evaluate the panel applicants. The federal court committees include such attorneys. All of the required attorney members of the committees should have experience representing death-sentenced persons in habeas corpus proceedings. If the chair of a regional committee deems it necessary that the panel include a member without subject-matter expertise, the chair may appoint that individual as an advisory member.

- *Should the proposed rule specify who is responsible for appointing members of the committee? If yes, should it be the chair of the committee?*

Yes. Given Government Code section 68661(d)'s requirement that the Supreme Court be the final arbiter of who may be included on a roster of attorneys qualified to accept capital habeas corpus appointments, it makes sense that the Chief Justice or her designee work in concert with each committee chair to appoint the committee members.

- *Should the proposed rule require that the attorney members be selected from among those nominated by the attorney groups? Or should the proposed rule require the chair to select the attorney groups from which it wants to draw members and let the groups designate an attorney?*

The chair of the regional committee should select the attorney groups from which it will draw members and let the groups designate an attorney for membership on the committee.

- *Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? If yes, is a three-year term appropriate?*

Yes. Given that the Chief Justice and Chair should work in concert to determine the members of the committee (see above), it makes sense to include in the rule a three-year term as a default, along with language that makes it clear that members serve at the pleasure of the Chief Justice and the committee Chair.

- *Should the regional habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees' duties?*

No. The regional panel committees should not be authorized by rule to divest themselves of their responsibility to recruit and vet qualified counsel.

- *Should the rule require committees to provide for procedures for the removal and replacement of its own members?*

A rule seems unnecessary. Just as the Chief Justice and Chair should work in concert to determine the members of the committee (see above), in the event that a committee member is unwilling or unable to fulfill their responsibility, the Chief Justice and Chair can simply remove the nonfunctioning member.

- *Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?*

No. In the event that a local superior court judge wishes to appoint a particular attorney who is not on the statewide panel, the judge need simply refer the attorney to the panel for vetting. We would support a rule requiring expedited consideration of any such referral by a superior court judge.

- *If a court determines that an attorney is qualified pursuant to a local rule, should that qualification be provisional, pending approval of a regional committee?*

Yes. The ultimate determination of qualification rests with the Supreme Court (Gov't Code § 68661(d)). The committee panels will be comprised of designees of the Chief Justices. No final qualification determination should occur at the superior court level.

Cost and Implementation Matters

- *Would the proposal provide cost savings? If so, please quantify.*

No. The process for recruiting, qualifying, and appointing counsel requires time and the expenditure of resources. Over the past few years, very few habeas appointments have been made. Any effort to recruit, qualify and appoint more habeas attorney necessarily will increase the amount of time and money spent on this endeavor.

Downs, Benita

From: Invitations
Sent: Friday, August 17, 2018 9:29 AM
To: Invitations
Subject: Invitation to Comment: SP18-12

Proposal: SP18-12
Position: Disagree
Name: Marylou Hillberg
Title: Attorney at Law
Organization:
Comment on Behalf of Org.: No
Address: PO Box 1879
City, State, Zip: Sebastopol CA, 95473
Telephone: 707-575-0393
Email: hillberg@sonic.net
COMMENT:
Comments on Proposed Rule for New Qualifications for Appointment in Capital Habeas Petitions, California Rules of Court, Rule 8.652(c)

As counsel of record on two capital habeas appointments (S221802 & S211187), as well as un-appointed associate counsel for nearly ten years in another, (S168103), my evaluation of the proposed qualifications is that they will lead to grossly under-qualified counsel. Moreover, given the one year time line to file under Prop 66, there simply won't be enough time to climb the steep learning curve required to adequately investigate and prepare a constitutionally adequate habeas petition.

One of the most glaring omissions is that these rules do not even require prior experience in a murder case. That is extremely perplexing to me as most of the habeas work I have done, and what I have read in other cases, involves the impact of mental states and defenses on criminal behaviors. As a criminal defense attorney, one does not really begin to comprehend how the various forms of mental illness and disabilities affect the behaviors of our clients until we must apply them to defense in the varied degrees of homicide. I've handled more than seventy-five murder cases and can count on one hand (probably with fingers left over) how many of these cases were "who dun it"[s]. The issues I've encountered generally involved varied mental states as defenses to the crimes. Most other types of serious crimes, do not require this kind of analysis.

The other comment I have is that I greatly benefited from the assistance of an experienced, and extremely capable lawyer when I was an unappointed associate counsel with him in a case for nearly a decade. Then when I accepted my own capital habeas appointments, I learned just how overwhelming and difficult this work is for a sole practioner. I could not have done an adequate job in these petitions, within the three years of my appointments, without the assistance of CAP.

I think your MCLE requirements are grossly understated; since I started working on capital cases about 15 years ago, I've taken more 500 hours of MCLE, mostly in mental health areas. I do not believe that any attorney, without extensive prior training and experience, can adequately learn these areas AND file a petition within one year.

I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.

I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a

younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.

My remaining concern is that the local appointment and oversight of habeas counsel will be inadequate to ensure competence, given discoveries I have made during investigations in state and federal cases of poor oversight and even, claims of corruption. It has shocked me even though I had "seen it all". I am not sure that these rules are intended to address adequate oversight on a state-wide level as my experience is that the adequacy of trial counsel varies greatly by locale. I hope this does not become true in death penalty cases.

Thank you very much for considering my thoughts.

Sincerely,
Marylou Hillberg,
Attorney at Law

Comments on Appointment of Counsel - Death Penalty Habeas Corpus Proceedings

Submitted by Becky Dugan, Chair of PJ Committee- Rules and Forms

1) Yes, courts should prioritize appointments of counsel for the oldest judgments. Allowing flexibility makes sense, but there does not seem to be another equitable way todo it.
2) 25 judgments is an arbitrary number, but as good as any, especially since another 20 will be right behind it. Most judgments will come out of just a few counties anyway.
3) Yes, the superior court judge should be authorized to appoint counsel if the Supreme Court has not acted. 60 days should be enough time for the Supreme Court to respond to the Superior Court. The point of the proposition is to speed up the processing of the appeals and the Supreme Court should not have an indeterminate time to respond.
4) No- the rules should not include a proposal as to how many attorneys should be appointed to initiate a petition. Each set of facts will vary widely. An attorney could request additional help if he/she thinks it necessary.
5) Judges should be required to request the Public Defender if it makes sense to do so. In other words, they would not be appointed if they represented the defendant at trial because of the likelihood of "incompetent counsel" claims. However, there may be times where a private counsel represented the defendant at trial. If so, appointing the PD would make sense. The court should screen the case to see if appointing the PD would be appropriate.
6) Superior Courts should be designating an entity to assist and support private counsel. The obvious problem, as with every part of this proposal, is what agency is going to pay for such an entity. The proposal should not designate a specific assisting entity unless the State intends to fund such an entity. It would then make sense not to re-invent the wheel and use CAP-SF, which already has the experience.
7) Yes, there should be a mandatory form for appointment. That way, counsel will know what to supply to the committee and multiple requests for further information will not have to be sent. The form looks good and seems to have the required fields.
8) Regional committees could assist or slow the process down. Many courts, such as San Bernardino and Riverside, will be fighting for the same limited set of attorneys. However, a regional committee may be able to assist in widening the pool of available counsel. As log as the Superior Court is not limited to the counsel approved by the committee, having a committee should do more good than harm. They should not take on additional duties different than the ones specified, except maybe to assist in offering trainings, mentor attorneys, etc., to expand the pool.
9) The Proposed rule should NOT specify three year term. The community of judges and attorneys competent and interested in being on such a committee is quite small. Each committee should make its own rules based on the culture and availability in a particular region.
10) It should not be mandatory that attorneys on the committee have death penalty related experience. In some areas, you would probably have no qualified attorneys. However, they should have felony experience in appellate work. Again, different regions should be able to tailor their rules. The proposed membership makes sense.

11) Courts should MOST DEFINITELY be authorized to appoint attorneys who are not part of the State-wide panels. Each court generally knows its attorneys and their qualifications. If a court approves an appointment, there should not be a delay awaiting approval from the regional committee. Attorneys should be allowed to seek inclusion on any and all panels-local, regional and State. The form is adequate and should be mandatory for the reasons stated regarding the other form.
12) 45 days WOULD NOT provide adequate time for courts to prepare. This is an enormous undertaking. 90 days would be a minimum to begin implementation.

Thanks for all your hard work on this very onerous and complicated process.

Becky L. Dugan 7-19-18

Embajada de México

Washington, DC
August 23, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: SP 18-13, Comment from the Government of the United Mexican States

Dear members of the Judicial Council of California,

On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for superior court appointment of counsel in death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.

The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad.

There are currently 39 Mexican nationals on death row in California. Twenty-two of those do not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply.

[1] *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261.

Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death.

As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex. Mexico cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.

The proposal, SP 18-13, requests specific comments on two categories of questions: prioritization and appointment, and regional committees and vetting of attorney qualifications. Regarding prioritization and appointment, Mexico generally agrees that courts should prioritize appointment of counsel for the oldest judgments of death. Problems that occur with the passage of time, such as the inability to locate witnesses and the loss or destruction of records, can be especially challenging in the cases of Mexican nationals. In these cases, significant evidence is always located in Mexico, where record-keeping is much less consistent and standardized than in the United States and where the location of witnesses can be significantly more challenging. Especially in poor rural areas, where many of the defendants are from, witnesses cannot be located via property ownership records, cell phones, credit cards, vehicle registration, and other common methods used in the United States; investigators must rely instead on local residents' knowledge and memory, which inevitably deteriorates over time.

Mexicans under sentence of death in California without habeas counsel include individuals with death judgments more than 20 years old. These cases where the risk of lost evidence is greatest should be prioritized over newer cases. These risks exist regardless of whether a petition is pending before the Supreme Court.

As detailed in Mexico's comments on the companion proposal, SP 18-12, the representation of foreign nationals is a specialized type of representation, requiring specific skills and experience not necessary for capital habeas cases generally. A rule requiring the attempted appointment of a public defender could result in the required appointment of a public defender without the necessary specialized skills and experience over an available private attorney who would be much better qualified to handle the particular case.

Mexico's primary concern about the appointment of counsel is that, as currently drafted, the proposal does not account for the fact that certain cases—specifically, the cases of foreign nationals—will have specialized needs requiring the appointment of counsel with additional qualifications, as discussed in Mexico's comments on SP 18-12. To ensure that qualified counsel is appointed for each defendant, the roster of attorneys should be structured to include a sub-category of attorneys who are qualified by additional required training and experience to accept foreign national cases. Counsel should only be appointed to represent a foreign national if he or she has been determined to possess these additional qualifications. Including this specialized designation in the records of available attorneys would greatly assist in locating and appointing counsel who are qualified to represent particular defendants, especially because such attorneys are comparatively rare and are likely spread around the state.

The proposed rules, while appearing to recognize that certain cases will have specific needs apart from simply meeting the minimum qualifications,[2] create a much less formal system, whereby regional committees could, if asked, help superior courts match available counsel to particular cases, without any guidelines or requirements for this process. This proposal is not sufficient to ensure effective representation for all defendants. It neither requires that superior courts solicit such input nor guarantees that counsel so "matched" will actually be qualified to undertake the representation. Mexico fears that under the current proposal, counsel could be "matched" to a Mexican national case because he or she speaks some Spanish, even if he or she lacks fluency, knows nothing about Mexican culture, and has no experience whatsoever in representing foreign nationals. Or a local attorney could be appointed who meets the bare minimum qualifications for a death penalty habeas appointment, without even attempting to identify an attorney who could actually provide effective representation in that particular specialized case.

Importantly, the rules must not rely on the optional provision of informal advice, rendered without articulated standards, to ensure that counsel appointed to represent a foreign national is qualified to provide effective representation. They must do more than simply hope or assume appointments will be made only when an attorney fully qualified for a particular case is located; they must provide for the assessment of the specific necessary qualifications, and limit appointments in foreign national cases to attorneys so qualified.

This necessity informs Mexico's answers to several of the specific questions put forth in the proposal. For instance, Mexico does not support authorizing the appointment of attorneys who are not members of the statewide panel, as it is through their inclusion on this panel that qualified specialists may be identified and vetted; allowing appointments from outside of this panel could circumvent the requirement that counsel have the

[2] For instance, the proposal recognizes that "making appointments may be more difficult in some cases than in others," p. 6, and explains that a committee may "assist in identifying an attorney on the panel who is suitable for the appointment," pp. 7-8.

necessary additional qualifications. Moreover, the proposed forms are not sufficient because they do not solicit the information necessary to determine if an attorney is qualified to represent foreign nationals or require, for appointment in such cases, that a court find counsel is qualified to represent a foreign national.

Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States.

I avail myself of this opportunity to convey to you the assurances of my esteem and consideration.

Sincerely,

Gerónimo Gutiérrez Fernández
Ambassador

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Eastern District of California

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BENJAMIN D. GALLOWAY
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KELLY S. CULSHAW
CHU Supervisor

CHARLES J. LEE
Fresno Branch Supervisor

August 24, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688
invitations@jud.ca.gov

RE: Comments of Federal Defender Heather E. Williams, Eastern District of California regarding *Invitation to Comment SP18-13, Rules and Forms: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings.*

Dear Judicial Council members:

I write to comment on the proposed *Rules and Forms: Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings, SP18-13.*

Introduction:

My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates.

Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and vital to the clients we represent that California appoint qualified counsel to represent these persons.

Proposed Rule 8.654(b):

We agree with the recommendation to prioritize appointing death penalty-related habeas corpus counsel first for those persons subject to the oldest death judgments.

According to the Executive Summary, 360 persons await capital habeas counsel appointments. Of these, about half have been waiting over ten years since sentenced to death. *Briggs v. Brown*, 3 Cal. 5th 808, 864 (2017) (Liu, J., concurring). Twenty-five persons whose cases originated in Eastern District counties have been waiting over ten

years for habeas corpus counsel appointments. Of those, two have been waiting for habeas corpus counsel appointment since 1996 – 22 years.

I cannot overstate how difficult it is to investigate and prepare a federal habeas petition in a case over a decade old. Witnesses are lost to death or faded memory. Documents are lost or destroyed. *See People v. Morales*, 2 Cal. 5th 523, 531 (2017) (delay in appointing death penalty-related habeas corpus counsel may result in loss of documents or evidence). The client's memory fades so he is unable to relate facts about the trial, the circumstances surrounding his charges, or his family, friends and childhood. Because the risk that critical evidence and information will be lost in the passage of time, we agree the rule should prioritize appointing death penalty-related habeas corpus counsel to those individuals who have waited the longest.

Proposed Rule 8.654(e)(1):

This proposed rule directs the sentencing court to appoint "a qualified attorney or attorneys to represent the person in death penalty-related habeas corpus proceedings."

This Proposed Rule envisions there will be cases for assigning only one attorney. We recommend the rule provide for appointing two attorneys in all death penalty-related habeas corpus proceedings.

Penal Code Section 1509(c), enacted as part of Proposition 66, creates a one-year statute of limitations for filing death penalty-related habeas corpus petitions. Prior to Proposition 66, no statute of limitations existed. A death penalty-related habeas corpus petition was considered timely filed when it was filed within three years of habeas corpus counsel appointment. Supreme Court of Cal., *Supreme Court Policies Regarding Cases Arising from Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1. This means an attorney accepting a death penalty-related habeas corpus petition appointment must complete three years' work now in one year. To compensate for the two-year loss, the Rule must appoint to every death-sentenced person two lawyers for death penalty-related habeas corpus proceedings to try to complete three year's work into one year.

The second reason to require superior courts to appoint two attorneys for each death penalty-related habeas corpus proceeding is to expand the eligible attorney pool. There will be attorneys who apply for the panel who are not qualified to serve as lead counsel yet can serve as associate counsel. *See* Proposed Rule 8.601(2), (3). By appointing less experienced lawyers as associate counsel, the Panel will provide those lawyers experience, so they may eventually accept lead counsel appointments.

Proposed Rule 8.654(e)(3):

A sentencing court must designate an assisting entity or counsel when that court appoints death penalty-related habeas corpus proceeding counsel. We recommend the

rule direct superior courts to appoint the California Appellate Project – San Francisco (CAP-SF) in the first instance, then, only if CAP-SF has a conflict of interest, look to appoint other entities.

Currently, no entity exists able and qualified to serve as an assisting entity other than CAP-SF. If the rule does not specify CAP-SF, it must state the assisting entity has statewide capital habeas corpus procedure experience and knowledge.

The Habeas Corpus Resource Center (HCRC) conceivably could provide such assisting entity support. However, Proposed Rule 8.654(e)(2) requires superior courts first determine whether HCRC can accept **counsel** appointment before considering other counsel. This Rule makes HCRC the default choice as **counsel** in death penalty-related habeas corpus proceedings. HCRC is limited by statute to 34 attorneys. Gov. Code § 68661(a). Implementing Proposed Rule 8.654(e)(2) will result in HCRC's appointment in many death penalty-related habeas corpus proceedings. Those 34 attorneys should not also be tasked with serving as the **assisting entity** to private counsel except in extraordinary circumstances, such as a CAP-SF conflict of interest.

The Office of the State Public Defender (OSPD) likewise should not be appointed as assisting entity absent extraordinary circumstances. OSPD's mission is to represent death-sentenced persons in their automatic appeals. Gov. Code § 15421(a). Its expertise is in appeals, not death penalty-related habeas corpus proceedings.

<u>Proposed Rule 8.655(c):</u>

This Rule should specify that one or more of the attorney members of the regional habeas corpus panel committees have death penalty-related habeas corpus experience.

My duties as Federal Defender include serving or designating someone form my Office to serve on the Eastern District Selection Board, which vets attorneys for federal capital habeas corpus case appointment. E.D. Local Rule 191(c). The Selection Board consists of five attorneys experienced in capital trial, appellate and/or habeas representation. From my experience with the Selection Board, I know how important it is that the people vetting attorneys for capital habeas cases themselves have capital habeas experience.

First, capital cases are different from other felony cases. *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) ("[D]eath is a punishment different from all other sanctions . . . ."). Unlike in a felony case, in a capital case, the attorney must investigate and present a defense against the charges and a guilty verdict while simultaneously must investigate and present a case in mitigation in case there is a guilty verdict. *See Florida v. Nixon*, 543 U.S. 175, 190-191 (2004) (a capital trial's two-phase structure must inform counsel's strategic calculus). Moreover, the attorney must present a coordinated defense, so the trial defense is consistent with the penalty phase

life sentence evidence and arguments. An attorney presenting a death penalty-related habeas corpus petition must understand how capital cases are different and be able to devise strategies maximizing the chance of vacating the judgment.

Second, habeas corpus is different from both trial and appellate proceedings:

> First, work on a capital habeas corpus petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both.

In re Morgan, 50 Cal. 4th 932, 938 (2010).

In addition to the specialized skill set needed, death penalty-related habeas corpus proceedings counsel must master the labyrinthine habeas corpus rules, which are designed to make it difficult for a petitioner to prevail. *See In re Gallego*, 18 Cal. 4th 825, 842 (1998) (Brown, J., concurring and dissenting) (describing procedural rules governing habeas corpus as "a Byzantine system of procedural hurdles, each riddled with exceptions and fact-intensive qualifications").

"'Habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.'" *In re Reno*, 55 Cal. 4th 428, 450 (2012), quoting *People v. Gonzalez*, 51 Cal. 3d 1179, 1260 (1990). "If a criminal defendant has unsuccessfully tested the state's evidence at trial and appeal and wishes to mount a further, collateral attack, 'all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.'" *Reno*, 55 Cal. 4th at 451, quoting *People v. Duvall*, 9 Cal.4th 464, 474 (1995), quoting *Gonzalez*, 51 Cal. 3d at 1260. An attorney representing a petitioner in death penalty-related habeas corpus proceedings must understand the law governing capital cases and the procedural rules governing the habeas corpus remedy.

Attorneys representing persons in death penalty-related habeas corpus proceedings in California state courts must also be familiar with the rules governing federal habeas corpus proceedings, lest an error made in state court prevents the petitioner from obtaining federal review of her death judgment. *See Martinez v. Ryan*, 566 U.S. 1 (2012) (recognizing that state habeas counsel's error could preclude federal review of petitioner's claims); *Coleman v. Thomspon*, 501 U.S. 722, 753-754 (1991) (same).

> [Q]uality legal representation is necessary in capital habeas corpus proceedings in light of "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." [citation]. An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because "the complexity of our jurisprudence in this area . . .

> makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Murray v. Giarratano*, 492 U.S. 1, 14, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (Kennedy, J., joined by O'Connor, J., concurring in judgment); *see also id.*, at 28 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) ("This Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").

McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (citation omitted).

The state court is the "principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). If petitioner's counsel does not conduct a thorough investigation and raise claims in accordance with state procedural rules, the petitioner will lose any chance of vindicating her constitutional rights in state or federal court. Because the stakes are so high, the committees must be staffed with attorneys experienced in state and federal capital habeas corpus litigation.

Finally, the committees are charged with assisting superior courts in matching qualified counsel with persons who need death penalty-related habeas corpus counsel. *See* Proposed Rule 8.655(d)(5). To be effective in that role, committee membership must include attorneys familiar with the cases, the clients, **and** the attorney applicants. Requiring committee members to also have capital habeas experience will help ensure the committee can recommend counsel appropriate for a particular case.

Thank you for this opportunity.

Very truly yours,

HEATHER E. WILLIAMS
Federal Defender, Eastern District of California

/hew

Office of the State Public Defender
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Telephone: (510) 267-3300
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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
Sent via email to: invitations@jud.ca.gov

Re: Comments on Item SP18-13, proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings

Comments on Item SP18-12, proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

Dear Members of the Judicial Council:

The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience

We submit the following comments on the proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings, SP18-13.

1. We have deep concerns about the current length of time between the imposition of the judgment of death and the appointment of habeas counsel. Some of the appellants we represent have been waiting over a decade for habeas counsel. In the meantime, evidence is lost, memories fade, witnesses disappear or pass away. Thus, we note the rule provision that prioritizes the older cases, proposed rule 8.654(b), is a step in the right direction.

However, we wonder whether this rule and its "whenever possible" language will assure that the oldest cases get counsel first. We favor a more mandatory, direct rule. The language of 8.654(b) should read "shall", not "should."

2. While delay remains a significant problem, there is also a danger in appointing counsel too soon. New Government Code § 1509 subdivision (b) states that habeas counsel should be offered to defendants "[a]fter the entry of a judgment of death." This suggests that counsel might be appointed soon after entry of judgment. Of course, the prioritization of the older cases should prevent such an occurrence, but, in any event, no habeas counsel appointment should be made until after the record is certified. Habeas counsel, who will presumably – subject perhaps to equitable tolling – be expected to file a petition within a year of appointment, must have access to a complete and accurate record immediately. We favor a rule that specifically states that: "Regardless of any other provision, no appointment of habeas counsel in a death-penalty related case shall be made until after the record has been certified for completeness and accuracy pursuant to California Rules of Court, rule 8.622(b)(2)." This might be added to proposed rule 8.654 as subdivision (f).

3. There is a gaping hole in the proposed rules: the lack of any discussion of funding. Habeas counsel must be compensated. The reasonable expenses of habeas counsel must be funded. The rules do not make any provision for the payment of the attorneys who are supposedly going to receive appointments. It is simply unrealistic to expect any attorney to apply to be on the state-wide panel for habeas appointments without any provisions for when and how payment will be made for services and expenses.

Under current procedures, the California Supreme Court grants habeas counsel up to $ 50,000 in expenses for the preparation of habeas petitions. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, 2-2.1.) This policy has served to assure counsel taking an appointment that the Court anticipates that counsel will incur necessary expenses for investigation, forensic testing, experts, and other tasks. To have no similar provision in these rules creates uncertainty, confusion, and unfairness.

Further, the amended statute (Gov. Code § 68650.5) notes that one of the purposes of the law is to "qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154 of Title 28 of the United States Code." The Chapter 154 regulations specifically require a state system to provide for reasonable compensation for counsel and payment of litigation expenses, including investigators, mitigation specialists, mental health and forensic science experts, and support personnel. (See 28 C.F.R. § 26.22(c), (d).) Yet the proposed rules are, again, completely silent on the question of funding, compensation, and expenses. This is a glaring omission.

At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid.

Additionally, and related, is the question of funding and staff for the committees created by this rule. There is no provision for the funding of the operation of the committees, nor funding for staff and resources. The rule is silent and the omission also glaring.

4. We object to the "local rule" provision of rule 8.654(e)(3) and rule 8.655(e). The local rule provision is a mistake for a number of reasons. First, a local rule will invite inconsistency in the evaluation and selection of counsel. Second, a local rule will subvert the oldest case first proviso, since the local entity might not have cases within the 8.654(d) list of 25. Third, a local rule invites insular, separate decision making that will undercut the quality and consistency of the counsel appointments.

5. The "assisting entity" language of rule 8.654(e)0(3) does not mention any entities. The rule should designate CAP and HCRC as potential assisting entities.

We submit the following comments on the proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, SP18-12.

1. As mentioned in our comments with regard to SP18-13, there is a significant and debilitating omission in these rules: the lack of provisions for the compensation of counsel and the funding of expenses.

2, Proposed rule 8.605(f) seems to be outdated and unnecessary. It appears to contemplate a joint appellate and habeas appointment in the California Supreme Court. Under the new procedures, it is unclear whether this situation would ever occur.

OSPD appreciates the Judicial Council's consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

Sincerely,

/S/

Mary K. McComb
State Public Defender

From:	Invitations
To:	Invitations
Subject:	Invitation to Comment: SP18-13
Date:	Friday, August 24, 2018 5:17:51 PM

Proposal: SP18-13
Position: Agree if modified
Name: Kristin Traicoff
Title: Attorney
Organization: Law Office of Kristin Traicoff
Comment on Behalf of Org.: No
Address:
City, State, Zip: Sacramento CA, 95820
Telephone:
Email: kristin@traicofflaw.com
COMMENT:
After reading these proposed rules, I remain confused as to how, if at all, they are intended to intersect with the current SUPREME COURT POLICIES REGARDING
CASES ARISING FROM JUDGMENTS OF DEATH (hereafter, "Policies"). In some regards, the proposed rules appear to supplant the Policies but in some respects (notably in describing the funding mechanisms), the proposed rules appear to imply (though I may be incorrect in this interpretation) that the Policies will remain in effect even when the Superior Court has assumed responsibility of appointment of counsel. As a solo practitioner who is currently appointed on a capital appeal and who contemplates requesting appointment on a capital habeas, I rely greatly on the detail provided in the Policies concerning numerous practical aspects of my appointment. Foremost among these are the funding guarantees and the detailed policies describing how funding is obtained. I simply could not operate my business without such certainty, and I have declined to represent capitally-sentenced inmates in other jurisdictions where the funding provisions are unclear. I believe the proposed rules need to make explicit to what extent, if at all, they intend to incorporate the Policies. I urge the Committee strongly to retain the Policies notwithstanding the proposed rule amendments, as the Policies provide a great deal of practical, detailed information governing counsel's appointments, which are simply wholly absent from the proposed rules and, without which, it is difficult to imagine a system of appointment functioning effectively.

Item SP18-13 Response Form

TITLE: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

X **Agree** with proposed changes
Agree with proposed changes **only if modified**
Do not agree with proposed changes

Comments:

Please see the attached document.

PLEASE NOTE:
These comments are from the Los Angeles Superior Court and not from any one person in particular.

ORGANIZATION: LOS ANGELES SUPERIOR COURT
111 N. Hill Street, Los Angeles, CA 90012

RESPONSE TO: **Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102**

DEADLINE FOR COMMENT: **Friday, August 24, 2018**

Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

SP18-13 Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Request for Specific Comments:

Prioritization and Appointment

- **Should courts prioritize the appointment of counsel for the oldest judgments of death?**

  Yes, the courts should prioritize appointment of counsel for the oldest judgments of death.

- **Should the number of judgments for which HCRC sends out subsequent notices include 20 judgments or a different number?**

  It appears, based on the number of inmates awaiting habeas counsel, that notices for 20 judgments at a time are appropriate, so as not to inundate trial courts.

- **Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?**

  No. Judges should not be required to request that a public defender or alternate public defender accept representation prior to appointing private counsel.

Regional Committees and Vetting of Attorney Qualifications

- **Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty–related habeas corpus counsel?**

  Yes. The Los Angeles Superior Court is in favor of the regional committee approach to the vetting of counsel for habeas petitions.

- **Should regional committees take on duties different from those specified in the proposal?**

  No. Regional committees should not take on duties different from those specified in the proposal.

The working group also seeks comments from *courts* on the following cost and implementation matters:

- **Would the proposal provide cost savings? If so, please quantify.**

  No.

- **What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?**

  Implementation would require approximately four hours of training on new procedure, forms and CMS for current Judicial Assistants (JAs). The JA training program would then incorporate this into their criminal training module. Some staff time would be required to develop procedures and training materials.

  Development of a new CMS docket code would require minimal resources.

- **Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?**

  No. Eighteen months will be necessary for implementation considering the formation of regional committees.

- **How well would this proposal work in courts of different sizes?**

  The volume and number of cases will impact courts differently.

From:	Invitations
To:	Invitations
Subject:	Invitation to Comment: SP18-13
Date:	Friday, August 24, 2018 2:13:07 PM

Proposal: SP18-13
Position: Agree
Name: Susan D. Ryan
Title: Chief Deputy of Legal Services
Organization: Riverside Superior Court
Comment on Behalf of Org.: Yes
Address: 4050 Main Street
City, State, Zip: Riverside CA , 92502
Telephone:
Email:
COMMENT:
It is difficult to anticipate how smoothly the appointment process will work out in practice, nevertheless, it appears the proposed rules are generally well thought out and do a good job of balancing the various concerns in play.

We have two specific comments.

We are concerned about the language of proposed rule 8.654(d)(6) regarding the Habeas Corpus Resource Center's receipt of "information indicating that an appointment is for any reason not required." Though this provision may have drafted with pro-per parties in mind, there could be other circumstances where appointment may not be required or appropriate – like with an inmate who has become incapacitated. We suggest the rule include a mechanism whereby either the HCRC or the trial court can decide that, notwithstanding the age of the case, the particular inmate should be removed from the list.

In addition, proposed rule 8.655(d)(2)(B) provides that "each committee must accept applications only from attorneys whose principal place of business is within the appellate district." We suggest the language be modified so that it is clear whether this means that the committee may only accept applications from local attorneys, or whether it means that while the committee is only required to accept applications from local attorneys, it may choose to accept applications from non-local attorneys as well. While we suspect it is intended to mean the former in order to serve the goals of dividing the process equitably (after all, successful applicants go to the same statewide panel) and recruiting local attorneys, the language could be clearer.

Response to Request for Specific Comments:
Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? Yes, and 60 days seems appropriate.

Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel? No, in light of the fact that the public defender will most often have a conflict of interest.

Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? Yes; and a three-year term appropriate so long as membership can be renewed as appropriate. Membership should be staggered so that not all members leave the panel at the same time.

Should the rule require committees to provide for procedures for the removal and replacement of its own members? Yes.

Item number: 16

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: October 19, 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; renumber rules 8.495, 8.496, 8.498, and 8.499)

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 attached and is also in the "About" tab at the following link: http://www.courts.ca.gov/prop66-working-group.htm
Project description from annual agenda: n/a

If requesting July 1 or out of cycle, explain:
The working group previously requested that this proposal be circulated for public comment on a shortened special cycle - starting on August 2 and ending on August 23—so that the proposal could be presented to the Judicial Council for adoption at its November meeting. RUPRO approved this request at its meeting on July 2.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This report is submitted concurrently with working group's report titled: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings, which is the subject of separate RAR.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 29–30, 2018

DRAFT

Title
Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 8.601 and 8.652; amend rule 8.605; amend and renumber rule 8.600 as 8.603; renumber rules 8.603, 8.495, 8.496, 8.498, and 8.499

Recommended by
Proposition 66 Rules Working Group
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

Effective Date
April 25, 2019

Date of Report
November 9, 2018

Contact
Seung Lee, 415-865-5393
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Michael Giden, 415-865-7977
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Executive Summary

To achieve competent representation without unduly restricting the pool of attorneys willing and able to accept appointment in death penalty appeals and habeas corpus proceedings, the Proposition 66 Rules Working Group recommends the adoption of two new rules and amendments to two existing rules relating to qualifications of counsel. These proposed rule changes are intended to partially fulfill the Judicial Council's obligation under Proposition 66 to reevaluate the competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. This proposal is submitted concurrently with a separate report to the Judicial Council containing the working group's proposal for related rules regarding the vetting and appointment of counsel for death penalty–related habeas corpus proceedings in the superior courts.

Recommendation

The Proposition 66 Rules Working Group recommends that the Judicial Council, effective April 25, 2019:

1. Adopt Cal. Rules of Court, rule 8.601, to provide definitions for terms used in the rules addressing qualifications of counsel for death penalty appeals and habeas corpus proceedings, and specifically to:
    a. Include the terms and definitions currently set forth in existing rules 8.600(e) and 8.605(c)(1)–(5);
    b. Amend the definition of "associate counsel" and the advisory committee comment thereto, to delete, as unnecessary, language regarding specific duties of counsel;
    c. Amend the definition of "assisting counsel or entity" to add "a Court of Appeal district appellate project" to the list of possible assisting entities;
    d. Further amend the definition of "assisting counsel" to clarify that an assisting counsel:
        - Must be an experienced capital appellate counsel or habeas corpus practitioner;
        - In an automatic appeal must meet the qualifications for appointed appellate counsel, including the nonalternative case experience requirements; and
        - In a habeas corpus proceeding must have filed a death penalty–related habeas corpus petition in a California state court.
    e. Newly define the terms "panel" and "committee," two entities that are proposed and discussed in greater detail in the separate but related council report regarding the appointment of counsel for death penalty–related habeas corpus proceedings in the superior courts; and
    f. Make minor changes to existing definitions, including to reflect changes to death penalty–related habeas corpus proceedings (e.g., statutory right to appeal) enacted by Proposition 66;
2. Amend rule 8.600 as follows and renumber as rule 8.603:
    a. Add the Habeas Corpus Resource Center to the list of individuals and entities who receive a certified copy of the judgment of death;
    b. Delete the definition for trial counsel in subdivision (e), which would be moved to proposed new rule 8.601(6); and
    c. Make a minor conforming change;
3. Amend rule 8.605 to:
    a. Limit its application to counsel appointed in automatic appeals, including by moving the qualifications standards for counsel in death penalty–related habeas corpus proceedings to a new rule;

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b. Amend the statement of “purpose” to clarify that the qualifications are designed to promote competence and assist the court in appointing counsel;

c. Delete the definitions, which have been moved to proposed rule 8.601;

d. Modify the experience requirement to provide that the appeals may be on behalf of either party, but a subset of the appeals must be as counsel of record on behalf of the defendant;

e. Modify the training requirement to add that counsel may receive training credit for instruction if approved by the Supreme Court;

f. Clarify that the recent automatic appeals experience may satisfy “some or all” of the training requirement; and

g. Make other minor clarifying and conforming changes;

4. Adopt rule 8.652 to contain the qualifications standards for counsel to be included on a panel, appointed by the Supreme Court, or appointed by a superior court for a death penalty–related habeas corpus proceeding, including those standards currently set forth in existing rule 8.605, and specifically to:

   a. Parallel the overall structure of the qualifications standards for automatic appeals in proposed rule 8.605 by describing required years of practice, case experience, knowledge, training, skills, and alternative experience;

   b. Increase the current required length of time counsel has been in the active practice of law from four years to five;

   c. Modify and streamline the existing case experience requirement by:

      - Providing that it may be satisfied by past service as counsel of record for a person in a death penalty–related habeas corpus proceeding;
      - Providing that it may be satisfied by any combination of completed appeals, jury trials, or habeas corpus proceedings (as opposed to the current requirement of a certain number of appeals or writs, and a certain number of jury trials or habeas corpus proceedings), on behalf of any party, but in at least two cases counsel must have filed habeas corpus petitions involving serious felonies;
      - Deleting the reference to “writ proceedings” so that writ proceedings other than habeas corpus proceedings no longer satisfy the case experience requirement; and
      - Deleting the requirement that at least one appeal or writ proceeding must involve a murder conviction;

   d. Modify the existing training requirement by:

      - Increasing from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, of which at least 10 (increased from 6) hours must address death penalty–related habeas corpus proceedings;

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- Providing that the State Bar of California—not the Supreme Court—must approve the training courses; and
- Mirroring the training requirement in proposed amended rule 8.605 to clarify that past capital case experience may satisfy "some or all" of the training requirement, and to provide that an instructor may receive credit for teaching a course upon approval of the entity vetting counsel's qualifications;

e. Modify the existing skills requirement by retaining the requirement that recommendations, evaluations, and writing samples must be considered in an assessment of counsel's qualifications, but clarifying that it is counsel's responsibility to submit the necessary recommendations and writing samples, and the responsibility of the entity vetting counsel—which may be a committee or a superior court, as proposed in the separate council report regarding the appointment of death penalty–related habeas corpus counsel, or the Supreme Court—to obtain and review any applicable evaluations;

f. Further modify the existing skills requirement to specify that the writing samples must include:

- At least two filed habeas petitions involving serious felonies; or
- At least one filed death penalty–related habeas corpus petition; or
- Habeas corpus petitions filed, if any, if counsel is qualifying for appointment under the alternative experience standard;

5. Renumber and reorganize several rules, chapters, and divisions in title 8 that do not relate to capital proceedings so as to permit the rules regarding posttrial capital proceedings in the Supreme Court and Courts of Appeal to be located together, for the most part, in division 2 (new rules adopted by the Judicial Council on September 21, 2018), specifically:

   a. Renumber chapters 11 and 12, in division 1, as chapters 1 and 2, respectively, and move these chapters to new division 3;

   b. Renumber rule 8.495 as 8.720, rule 8.496 as 8.724, rule 8.498 as 8.728, and rule 8.499 as 8.730, and move these renumbered rules to new chapter 3 in new division 3;

   c. Reserve for future use chapter 8 in division 1, which will have no rules under it once rules 8.495, 8.496, 8.498 and 8.499 are renumbered and moved; and

   d. Renumber existing divisions 2–5 as divisions 4–7; and

6. Refer to the appropriate Judicial Council advisory body or bodies, for their consideration, commenters' suggestions for additional substantive changes to the rules that the working group was not able to consider at this time.

The text of the amended and new rules is attached at pages 29–44.

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Relevant Previous Council Action

In 1997, the California Legislature passed former section 68655 of the Government Code (now section 68665), requiring that "[t]he Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings."[1] A committee consisting of Supreme Court and Judicial Council staff was formed to develop a proposed rule. Former rule 76.6 was adopted, effective February 27, 1998, by both the Supreme Court and the Judicial Council. The rule was amended soon thereafter, effective April 15, 1998, to provide that an attorney's recent active representation in an automatic appeal or death penalty–related habeas corpus proceeding could be found to constitute compliance with the training requirement. Effective January 1, 2007, the rule was amended with nonsubstantive technical changes and renumbered as rule 8.605.

Before Proposition 66, the Supreme Court generally was responsible for the appointment of counsel for both the direct appeal and habeas corpus proceedings in capital cases. As a result, rule 8.605 establishes the minimum qualifications for attorneys appointed by the Supreme Court, and no other courts, in these proceedings.

In January 2018, after Proposition 66 went into effect, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition.[2] The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions. Since its formation, the working group has recommended, and the Judicial Council, at its meeting on September 21, 2018, has adopted and amended rules and adopted forms governing the preparation of the record on appeal in capital cases.[3] In addition, this recommendation is being submitted to the council concurrently with the working group's separate council report and recommendation[4] addressing the amendment and adoption of related rules and forms for the appointment of counsel by the superior courts in death penalty–related habeas corpus proceedings.

[1] California's adoption of this statute appears to have been at least partly in response to federal court decisions concluding that the mechanism that California previously had in place for qualifying counsel—section 20 of the Standards of Judicial Administration—failed to meet the requirements for California to qualify for "fast-track" procedures for federal habeas corpus proceedings under chapter 154 (part of the Antiterrorism and Effective Death Penalty Act of 1996), because this Standard of Judicial Administration was not a statute or a rule of court and did not impose binding or mandatory competency standards. (*Ashmus v. Calderon* (N.D.Cal. 1996) 935 F.Supp. 1048; *Ashmus v. Calderon* (9th Cir. 1997) 123 F.3d 1199, 1207–1208, revd. (1998) 523 U.S. 740, and vacated on jurisdictional grounds (9th Cir. 1998) 148 F.3d 1179.)

[2] A copy of the working group's charge and a roster of its membership are attached at pages 26–28.

[3] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases* (Sept. 7, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938*.

[4] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Nov. 2018).

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Analysis/Rationale

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty cases in the California courts, many of which were focused on reducing the time spent on this review. Among other things, Proposition 66 modified Government Code section 68665, which addresses mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. Section 68665 now directs the Judicial Council and the Supreme Court to "reevaluate the standards as needed to ensure that they meet the [following] criteria":

- The qualifications needed to achieve competent representation;
- The need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment;
- The standards needed to qualify for chapter 154 of title 28 of the United States Code (hereafter chapter 154); and
- Experience requirements must not be limited to defense experience.

Proposition 66 also provides that the superior courts must offer and, unless the offer is rejected, appoint counsel for indigent persons in death penalty–related habeas corpus proceedings. (Gov. Code, § 68662.) Proposition 66 calls for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

The act did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown et al.* (S238309) (*Briggs*). On October 25, 2017, the Supreme Court's opinion in *Briggs* (3 Cal.5th 808) became final and the act took effect. Shortly afterward the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the act.

Existing qualifications standards and procedures

Government Code section 68665 required the Judicial Council and the Supreme Court to adopt binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings. The Judicial Council and the Supreme Court fulfilled that obligation by adopting what is now rule 8.605, which establishes the minimum qualifications for attorneys appointed by the Supreme Court in these proceedings.

Rule 8.605 requires both appellate counsel and habeas corpus counsel to have completed at least four years of practice, to have the specified criminal defense experience and the specified knowledge and training, and to have demonstrated proficiency at certain skills and the

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commitment necessary to represent a capital appellant or petitioner. Rule 8.605 also includes an "alternative qualifications" provision, which permits the Supreme Court to appoint attorneys who do not have the requisite criminal defense experience, such as prosecutors, academics, or civil practitioners, providing they complete additional training and meet other requirements.

The adoption of what is now rule 8.605 predates the criteria newly articulated in Government Code section 68665, as amended by Proposition 66. Nevertheless, all four criteria were considered in developing the rule. In addition to considering how to assure competent representation, the committee also expressly considered the effect that the standards would have on the pool of available attorneys and rejected a number of suggested qualifications as unduly restrictive.[5] The committee also sought "to set the standards high enough to have a reasonable chance of avoiding" a determination by the federal courts "that the minimum appointment standards . . . are too low to qualify for federal 'fast-track' treatment [under chapter 154]."[6] The committee recommended providing an alternative qualification provision to permit the appointment of attorneys who do not have criminal defense experience "because (1) such attorneys have competently represented defendants in capital cases in the past, and (2) deleting it would unnecessarily reduce the number of attorneys available to handle death penalty cases."[7]

The Supreme Court has applied these minimum qualifications standards for over two decades, since their adoption. (Even prior to their adoption by rule of court, the Supreme Court applied a version of the standards in place as section 20 of the Standards of Judicial Administration.) Going forward, the Supreme Court will continue to be the sole appointing entity in automatic appeals. However, in death penalty–related habeas corpus proceedings, primary responsibility for appointment will reside with the superior courts, which will be applying the death penalty–related habeas corpus qualifications standards for the first time.

Working group process and considerations

The Judicial Council charged the Proposition 66 Rules Working Group with reevaluating the mandatory competency standards and considering whether changes to the qualifications of counsel appointed in death penalty direct appeals and habeas corpus proceedings are needed to address the act's provisions.

A subgroup of working group members was formed to consider this topic and make recommendations to the full working group. In undertaking this task, the working group was guided by the criteria articulated in Government Code section 68665. In considering these criteria, the working group made two general observations:

[5] See Judicial Council of Cal., staff rep., *Rule on Qualifications of Counsel in Death Penalty Appeals and Habeas Corpus Proceedings (Cal. Rules of Court, new rule 76.6)* (Feb. 20, 1998) at pp. 6–7 (declining to require eligibility for appointment to a murder case by a district appellate panel because the pool of attorneys was too limited; also declining to require prior capital experience as "unduly restrictive").

[6] *Id*. at p. 4.

[7] *Id*. at p. 6.

- Some of these criteria may point in opposite directions in terms of qualifications requirements. For example, meeting the standards needed to assure competent representation and qualify for chapter 154 may point toward increasing some qualifications requirements while the need to avoid unduly restricting the available pool of attorneys may point toward reducing some qualifications requirements.
- Chapter 154 addresses only the appointment and qualifications of counsel for death penalty–related habeas corpus proceedings, not for the appeals in capital cases.[8]

As part of its consideration, the working group examined, among other things, the qualifications standards recommended by the American Bar Association, the qualifications standards adopted by other jurisdictions, and the final rule issued by the U.S. Department of Justice regarding how to qualify under chapter 154.[9] This examination indicated that the existing requirements in rule 8.605 are generally similar to those in other jurisdictions—sometimes slightly lower and sometimes slightly higher, but never far from the minimum qualifications required in other jurisdictions.

The working group also considered the actual qualifications of attorneys who have sought appointment by the Supreme Court in capital cases. Working group members reported that attorneys applying for appointment typically have training and experience that far exceed the existing minimum qualifications standards set out in rule 8.605. Members indicated that it is rare that an attorney who has just met the requirements in rule 8.605 would seek appointment in a capital case. Many do not apply until they have decades of criminal law experience. As a result, it was not apparent to working group members that the existing qualifications standards are restricting otherwise interested and competent counsel from seeking appointment in capital cases. Instead, members pointed to other oft-cited reasons for avoiding appointment in capital

[8] As noted above, chapter 154 establishes "fast-track" procedures for federal habeas corpus proceedings. State procedures for the appointment of counsel in death penalty–related habeas corpus proceedings must meet certain standards in order to qualify for these "fast-track" procedures. To certify a state is in compliance, the Attorney General must determine

> (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; [and]
> . . .
> (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(28 U.S.C. § 2265(a)(1); see *id*., § 2261(b).) If a state's standards of competency meet or exceed the benchmarks set by the federal government's implementing regulations, those state standards are presumptively adequate under chapter 154. However, the implementing regulations are also intended to be flexible and require only that a state reasonably assure the availability and appointment of competent counsel; there is no requirement that the benchmark criteria be met in order to be certified by the Attorney General under chapter 154.

[9] Certification Process for State Capital Counsel System, final rule (78 Fed.Reg. 58,160 et seq. (Sept. 23, 2013)) (final rule); see 28 C.F.R. § 26.20 et seq.

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cases, including the level of compensation for this work,[10] the lengthy time commitment required, and the nature of the cases.

Additionally, the working group considered how capital appointments work in practice in California. Generally, only one attorney is actually appointed to a case, whether it is an automatic appeal or a death penalty–related habeas corpus proceeding. However, once appointed, every private counsel is provided with assistance and consultation by an assisting counsel or entity designated by the Supreme Court.[11]

The Proposal

This proposal is intended to help fulfill the Judicial Council's obligation under Proposition 66 to reevaluate the competency standards for the appointment of counsel in death penalty direct appeals and related habeas corpus proceedings. This proposal also is intended to help fulfill, in part, the Judicial Council's obligation under Proposition 66 to adopt, within 18 months of the act's effective date, initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.

Currently, the qualifications standards for counsel in both death penalty appeals and habeas corpus proceedings are set forth in rule 8.605. This proposal would divide the provisions in existing rule 8.605 between three rules: new rule 8.601, which would define terms used in the qualifications rules; amended rule 8.605, which would address the qualifications for counsel in appeals; and new rule 8.652, which addresses the qualifications for counsel in habeas corpus proceedings.

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[10] The Consolidated Appropriations Act of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the California Supreme Court is $145, a rate that has not increased since at least 2008. The California Commission on the Fair Administration of Justice (Commission), tasked with conducting a review of California's justice system, including its administration of the death penalty, observed in its Final Report that "the low level of income is certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals." (Commission's Final Report (2008), p. 132; see Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 So.Cal. L.Rev. 697, 734 (2007) ("Private practitioners who can bear the financial sacrifice of accepting court-appointment at the present hourly rates are scarce").

Several commenters to the proposal (see attached comment chart, pages 114–117) also suggested that it will be difficult to expand the pool of attorneys willing to accept appointments in capital review proceedings without additional compensation.

[11] This practice is not set out in any rule of court or statute. However, it is described in materials available from the Supreme Court's website. (See, e.g., Supreme Court brochure, *Appointments in Capital Cases in the California Supreme Court* (Apr. 2009), www.courts.ca.gov/documents/supremebroch.pdf ("Assistance is available to you for the duration of the appeal and related habeas corpus/executive clemency proceedings. Shortly after your appointment, you are partnered with a "buddy" attorney at CAP who will be available for consultation on legal and procedural matters"); Supreme Court memorandum, Appendix of Appointed Counsel's Duties (2011), p. 3, www.courts.ca.gov/documents/applica9.pdf (appointed counsel "have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the Supreme Court"; "[a]ppointed counsel's cooperation and close working relationship with his or her assisting entity or counsel are important to achieving the common goal of maintaining a high level of legal representation in all capital appeals and related habeas corpus/executive clemency proceedings").)

Proposition 66 did not change the procedure for hearing death penalty appeals. Death penalty appeals continue to be within the exclusive jurisdiction of the Supreme Court, which will continue to appoint counsel for such cases. The experience of the Supreme Court has been that the existing qualifications standards strike the appropriate balance between articulating qualifications that are high enough to achieve competent representation, but not so high as to unduly restrict the eligible pool of counsel. The Supreme Court also has many decades of experience applying the qualification criteria in rule 8.605. As a result, only a few changes are being proposed to the existing standards for counsel in death penalty appeals in rule 8.605.

By contrast, Proposition 66 did effect procedural changes to death penalty–related habeas corpus proceedings. One statutory change is that counsel in habeas corpus proceedings will have much less time to investigate and file an initial petition: the time has been shortened, generally, from three years to one year from the order appointing counsel.

Another change is that, going forward, the superior courts generally will hear the initial petitions and appoint counsel for those proceedings. Previously, virtually all death penalty–related habeas corpus petitions were filed in, and heard by, the Supreme Court. Thus, the Supreme Court vetted and appointed counsel for those proceedings.[12] Though not required by statute or rule of court, the Supreme Court also designated an "assisting entity" or, where the entity had a conflict, experienced "assisting counsel" to provide private habeas corpus counsel with assistance.

Accordingly, the proposed rules on qualifications of counsel in death penalty–related habeas corpus proceedings refer not only to the Supreme Court—which will continue to vet counsel for its own appointments—but also to the committees and superior courts that, as proposed in the separate council report addressing the appointment of counsel, would apply the qualification criteria when a superior court makes the appointment.

Additionally, the separate council report recommends that courts be required to designate an assisting counsel or entity for private habeas corpus counsel. Accordingly, this qualifications proposal presumes that habeas corpus counsel appointed by a superior court will continue to be assisted by an experienced entity or attorney designated for that purpose. Different minimum qualifications standards likely would be appropriate for habeas corpus counsel if they were no longer assisted.

Below is a discussion of the specific proposed changes.

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[12] Due to a scarcity of applicants and other factors, the Supreme Court does not maintain a list of qualified counsel awaiting appointments in death penalty–related habeas corpus proceedings that would be suitable for statewide use by the superior courts in making appointments. In light of Proposition 66 making superior courts generally responsible for appointment of death penalty–related counsel, it is not anticipated that the Supreme Court will be developing such a list.

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Definitions
Proposed rule 8.601 would retain the terms and definitions set forth in existing rules 8.600(e)(2) and 8.605(c)(1)–(5), generally with little or no changes, with the exception of the definition of "assisting counsel or entity."

Based on the comments received, and recognizing that the proposal regarding the appointment of death penalty–related habeas corpus counsel (submitted to the council in a separate report) would newly require superior courts to designate an "assisting counsel or entity," the working group recommends clarifying the definition. Subdivision (5) of proposed new rule 8.601 would clarify that an assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate.[13] The proposed rule would further clarify that an assisting counsel in an automatic appeal must meet the nonalternative qualifications for appointed appellate counsel, and an assisting counsel in a habeas corpus proceeding must have served as appointed counsel of record in a filed death penalty–related habeas corpus petition and meet the other minimum qualifications for appointed habeas corpus counsel.

The proposed rule would also amend the definition of "assisting counsel or entity" to add "a Court of Appeal district appellate project" to the list of possible assisting entities. The working group recommends adding these projects to the list because Proposition 66 created a statutory right to appeal a superior court's denial of a death penalty–related habeas corpus petition. While lacking capital case experience, the projects have experience assisting counsel appointed to noncapital cases in the Courts of Appeal.

Proposed rule 8.601 would also newly define "panel" and "committee," two entities proposed and discussed in greater detail in the separate report to the council addressing the appointment of death penalty–related habeas corpus counsel in the superior courts. "Panel" would refer to the panel of attorneys eligible for appointment by a superior court in death penalty–related habeas corpus proceedings, and "committee" would refer to the entity charged with vetting attorneys for inclusion in the panel.

Qualifications of counsel for death penalty appeals
As discussed above, the proposal would make only a few changes to the qualifications standards for counsel on appeal, which are set forth in existing rule 8.605(d) and (f). Following are the two main substantive changes proposed.

Criminal appellate experience. The existing rule already permits the appointment of counsel who does not have the standard criminal defense experience. Nevertheless, in reevaluating the qualifications, the working group concluded that, consistent with Proposition 66's direction that the experience requirements for counsel not be limited to defense experience, the existing requirements should be amended to more clearly convey that experience for either party counts

[13] This language is taken from page 3 of the Supreme Court memorandum, Appendix of Appointed Counsel's Duties (2011), which provides that an assisting counsel may be "an experienced private capital appellate and/or habeas corpus practitioner, as appropriate."

toward meeting the case experience requirements. Subdivision (d)(2) of existing rule 8.605 requires past experience serving as counsel of record for a defendant. The working group recommends amending this provision to provide that service as counsel of record for *either* party be permitted to satisfy part of the requirement, but a subset of that case experience (e.g., four of seven completed felony appeals) must still be as counsel of record for a defendant. (See proposed new rule 8.605(c)(2).) The working group concluded that some defense experience was generally necessary to become reasonably proficient in issue-spotting and other defense skills on appeal. Under the proposal, counsel without such experience could continue to qualify under the "alternative qualifications" provision, which the working group recommends be retained.

Training. Recognizing that instruction should be valued, the working group recommends amending the training provision (current rule 8.605(d)(4)) to permit a qualifying course instructor to request and receive training credit for teaching a course, subject to the Supreme Court's approval. (See proposed new rule 8.605(c)(4).) Additionally, the existing provision that recent capital case experience may satisfy the training requirement (rule 8.605(d)(4), (f)(3)) would be modified simply to clarify that the experience may satisfy "some or all" of the training requirement.

Qualifications of counsel for death penalty–related habeas corpus proceedings
As discussed above, this proposal creates a new rule to state the existing provisions regarding qualifications of counsel for death penalty–related habeas corpus proceedings. Specifically, subdivisions (e) through (k) in existing rule 8.605 are either moved to or repeated in proposed new rule 8.652. Throughout, references to the Supreme Court are supplemented or replaced with references to the "committee" or the "court appointing counsel under a local rule as provided in rule 4.562," and in one instance to "the California courts."[14] The overall structure of the qualifications standards would remain the same as that in current rule 8.605, and would articulate required years of practice, case experience, knowledge, training, skills, and alternative experience. However, this proposal refines or increases several of the requirements, as described in further detail below.

General legal experience. The proposal would increase from four to five years the required length of time counsel has been in the active practice of law. (See existing rule 8.605(e)(1), (f)(1) (four years).) This recommended change is consistent with Proposition 66's direction that the Judicial Council and the Supreme Court consider the standards needed to qualify under chapter 154. Since the existing qualifications standards were first adopted, the federal government has provided new guidance on the standards needed to qualify for chapter 154. Now, standards of competence are presumptively adequate for purposes of chapter 154 if they provide for the "[a]ppointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience." (28 C.F.R. § 26.22(b)(1)(i).)

[14] For example, the existing rule requires, in part, that counsel have familiarity with the practices and procedures of the Supreme Court. The proposal would replace the reference to the Supreme Court with the California courts to reflect that counsel may be practicing in the superior courts, the Courts of Appeal, or the Supreme Court.

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Case experience. The working group recommends several changes to the current requirements relating to prior case experience:

- *Combination of cases*: Current rule 8.605 requires counsel to have past case experience consisting of a set number of appeals or writ proceedings and a set number of jury trials or habeas corpus proceedings. Proposed new rule 8.652(c)(2) would streamline the case experience requirement by providing that it may be satisfied by: (1) past service as counsel of record for a person in a death penalty–related habeas corpus proceeding in a California state court in which the petition has been filed; *or* (2) any combination of completed appeals, jury trials, or habeas corpus proceedings (either eight or five, total, depending on whether counsel has previously served as a "supervised attorney" in a death penalty–related habeas corpus proceeding), for either party, as long as at least two cases include filed habeas corpus petitions in serious felony cases. The working group concluded that prior habeas corpus experience was necessary now that counsel will have only a one-year period in which to file an initial petition. Additionally, recent federal regulations and guidance on the standards needed to qualify for chapter 154 now emphasize the importance of prior postconviction litigation experience.[15] In streamlining the case experience requirement, service as counsel of record in a murder case would no longer be required. Also, writ proceedings other than habeas corpus proceedings would no longer satisfy the past case experience requirement. The working group reasoned that the broad category of "writ proceedings" (as opposed to the more specific "habeas corpus proceedings") may include very simple writ petitions that are not particularly indicative of the level of skill and experience necessary in a death penalty–related habeas corpus proceeding.
- *Service as counsel of record for* either *party*: The proposal would permit case experience requirements to be satisfied by prosecution experience. The working group recommends that, consistent with Proposition 66's direction that the experience requirements for counsel not be limited to defense experience and avoid unduly restricting the available pool of attorneys, the existing case experience requirement be amended to provide that service as counsel of record for *either* party satisfies part of the requirement. (See proposed new rule 8.652(c)(2)(B), (C).)

Training. The proposal would increase from 9 to 15 the required number of hours of appellate criminal defense or habeas corpus defense training, and would specify that at least 10 (increased from 6) of these hours must address death penalty–related habeas corpus proceedings. (Compare current rule 8.605(e)(4) with proposed new rule 8.652(c)(4).) The working group recommends the increased hours in light of the fact that counsel will have less time to learn on the job because the time to investigate and file an initial petition has been shortened to one year from the date of

[15] See final rule, 78 Fed.Reg. 58,169 (Sept. 23, 2013) ("Prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings"); 28 C.F.R. § 26.22(b)(1)(i) (articulating benchmark for the appointment of counsel "who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience").

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the order appointing counsel. This recommended change likely would not affect the pool of eligible counsel available for appointment because, in the experience of working group members, counsel who are interested in doing this type of work generally want to attend relevant trainings and, in the view of working group members, an additional 6 hours is not overly burdensome.

Going forward, superior courts generally will have primary responsibility for appointing death penalty–related habeas counsel and, therefore, will be involved, either individually or working with a regional committee, in determining whether counsel are qualified. Accordingly, the working group recommends deleting references to the Supreme Court approving training courses. The proposal includes language borrowed from existing rule 4.117, addressing qualifications for capital trial counsel, which would require that qualifying training be approved for Minimum Continuing Legal Education credit by the State Bar of California.

The existing rule provides that the training requirements must be satisfied "within three years before appointment." The working group recommends that the training provision be modified to require completion within three years before inclusion on a panel or, where applicable, appointed by a court, to accommodate the proposal (in the separate report to the council) recommending the creation of committees that will vet counsel for inclusion on a statewide panel. (This proposed provision in the separate report is a departure from current practice in which the Supreme Court vets counsel on a case-by-case basis prior to each appointment.) As provided in the separate report, counsel would have to reapply for inclusion on a panel after a maximum six-year term.

As with the proposed new rule for counsel for automatic appeals, the working group also recommends that proposed new rule 8.652 clarify that past capital case experience may satisfy "some or all" of the training requirement, and that an instructor may request and receive credit for teaching a course, subject to the approval of the entity vetting counsel's qualifications.

Skills. In keeping with the conclusion that having prior experience filing habeas corpus petitions is critical, the working group recommends modifying the existing writing sample requirement to require submission of one or more filed habeas corpus petitions. The existing requirement in rule 8.605(e)(5)(A) is more permissive and states that the writing samples are "ordinarily two appellate briefs and one habeas corpus petition." As proposed, new rule 8.652(c)(5)(A) would require that counsel must submit at least two habeas corpus petitions involving serious felonies or one petition filed as lead counsel in a death penalty–related habeas corpus proceeding, as well as any portions of habeas corpus petitions prepared as associate or supervised counsel in a capital case.

The working group also recommends clarifying that counsel is responsible for submitting the necessary recommendations and writing samples, but that the entity vetting counsel—which may be a committee or a superior court (as proposed in separate rules regarding the appointment of habeas corpus counsel) or the Supreme Court—is responsible for obtaining and reviewing any applicable evaluations.

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Alternative experience. The working group recommends retaining the substance of the current provision, which permits counsel who have extensive alternative experience to qualify for appointment even if they do not meet the standard case experience requirement, with some minor modifications. Subdivision (d) of proposed new rule 8.652 would require at least five years of experience as an attorney (instead of four), to match the proposed increase for all death penalty–related habeas corpus counsel set forth in proposed subdivision (c)(1). Proposed subdivision (d) also would require that at least 10 (increased from 9) of the required training hours address death penalty–related habeas corpus proceedings, to match the proposed increase to 10 hours that would be required of all appointed death penalty–related habeas corpus counsel. Aside from these quantitative changes, the working group recommends clarifying that qualifying alternative experience may include experience as an attorney at the Habeas Corpus Resource Center (HCRC) or the California Appellate Project–San Francisco (CAP-SF).

The working group also recommends adopting a separate writing sample provision for attorneys with alternative experience. This would be necessary because the proposed general writing sample provision would require previously filed habeas corpus petitions, which attorneys with alternative experience may not have. Proposed subdivision (d) of rule 8.652, which would address writing samples for counsel with alternative experience, would require that the writing samples include habeas corpus petitions filed by the attorney only if any exist.

Reorganization of other rules

The Judicial Council, at its meeting on September 21, 2018, adopted rules governing the preparation of the record on appeal in capital cases, which included the creation within the Appellate Rules of a new division 2, Rules Relating to Death Penalty Appeals and Habeas Corpus Proceedings. The working group recommends renumbering and reorganizing several rules, chapters, and divisions in title 8 that do not relate to capital proceedings so as to permit the rules regarding posttrial capital proceedings in the Supreme Court and Courts of Appeal to be located together, for the most part, in new division 2. (See recommendation 5 above.)

Policy implications

Government Code section 68665, as amended by Proposition 66, directs the Judicial Council and the Supreme Court to reevaluate the qualifications standards, as needed, to ensure that they meet the articulated criteria. Proposition 66 also calls for the Judicial Council to adopt "rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

To help fulfill these statutory requirements, the working group tried to identify where qualifications standards might need to be increased to achieve competent representation or to qualify for chapter 154, and where the standards could be reduced while still assuring competent representation. Factored into this calculus was the need to avoid unduly restricting the available pool of attorneys, in part to avoid further delays to state habeas corpus review, and the need to avoid limiting the experience requirements to defense experience. In making its recommendations, the working group tried to balance these arguably competing policy interests and implications.

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As discussed further in the Comments section below, this balancing act generally cautioned against overhauling or otherwise making too many changes to the current qualifications standards, which, in the experience of working group members, have generally been successful in achieving competent representation without being so onerous as to unduly restrict most interested and capable counsel from qualifying. Circumstances may change in the future, particularly as death penalty–related habeas corpus proceedings are increasingly heard in the superior courts and the qualifications are implemented and applied to counsel appointed in the superior courts. These developments may merit revisiting some of the comments and suggestions made when the proposals were circulated. That the working group did not recommend certain suggested changes is not intended to foreclose such future consideration.

Comments

This proposal circulated for public comment in a special cycle between August 3 and August 24, 2018. It was distributed to the standard list of presiding judges and justices, court executive officers, and bar associations. Working group members also were asked to distribute it to all those they thought might be interested in commenting.

Fourteen individuals or entities submitted comments on this proposal, including one superior court, ten organizations or individuals who represent criminal defendants, one victims' rights organization, one foreign government, and one lawyers' association. One commenter indicated that it agreed with the proposal, two indicated that they agreed with the proposal if amended, one indicated that she disagreed with the proposal, and the remainder did not specify an overall position on the proposal, but provided comments. Many commenters agreed with parts of the proposal and disagreed with or suggested modifications to other parts.

The text of comments directly addressed to the proposal, along with the working group responses, are available in the comment chart attached at pages 45–117. The chart begins with a table of the 14 individuals and entities that submitted comments. That table is followed by additional tables containing the substantive comments organized by rule number, form number, or topic. Following the chart are copies of the complete set of comments received by the working group on this proposal. The name of the commenter in the first part of the comment chart links to the copy of the full text of that individual's or entity's comments.

The main substantive comments and the working group responses to those comments are discussed below.

Definitions: assisting counsel or entity

Several commenters addressed the definition of an assisting counsel or entity. In addition, several commenters to the related proposal addressing the appointment of habeas corpus counsel by the superior courts, included in the separate report, suggested that CAP-SF be identified as the default or presumptive assisting entity for death penalty–related habeas corpus counsel. Proposed new rule 8.601(5) would identify a non-exhaustive list of eligible entities, but as noted by one commenter, lacks any additional guidance as to who an appointing court may designate to "provide appointed counsel with consultation and resource assistance."

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The working group declined to identify CAP-SF as the exclusive or presumptive assisting entity. The California Rules of Court have, for the last 20 years, also identified HCRC and the Office of the State Public Defender for possible designation as assisting entities. Additionally, by statute, HCRC has the general power and duty to "provide legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law" and to "provide assistance and case progress monitoring as needed." (Gov. Code, § 68661(g), (j).) The main difference between existing rule 8.605(c)(5) and proposed new rule 8.601(5), in defining assisting entities, is that the proposed new rule would add "a Court of Appeal district appellate project" to the list of entities that may be designated. The district appellate projects have experience assisting in noncapital cases before the Courts of Appeal, which may be of value to counsel appointed in the newly authorized appeals from the denial of habeas corpus.

Furthermore, a rule of court that requires a superior court to utilize the services of CAP-SF would effectively mandate the court's use of a specific private contractor. CAP-SF is not a governmental entity; it is a nonprofit corporation that provides services to the Supreme Court in connection with capital cases pursuant to a contract. Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity. This is doubly true where it remains unclear who will fund these services—the counties or the state.

The working group also declined to limit the definition to only those entities identified in proposed new rule 8.601(5). While other entities capable of providing the necessary assistance do not currently exist, the working group concluded that the definition should allow for the possible formation of local or regional entities in the future as Proposition 66 is implemented and death penalty–related habeas corpus proceedings, including counsel appointments, are increasingly conducted in the superior courts.

With respect to assisting counsel, the working group agreed with the comment that more guidance would be helpful and modified the definition of "assisting counsel" in proposed new rule 8.601(5) to clarify that "[a]n assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate." The modified definition would further clarify that "[a]n assisting counsel in an automatic appeal must, at a minimum, meet the qualifications for appointed appellate counsel," including the criminal defense experience requirements, while "[a]n assisting counsel in a habeas corpus proceeding must, at a minimum, meet the qualifications for appointed habeas corpus counsel, including" having filed a death penalty–related habeas corpus petition in California state court.

Aside from this clarification, the working group declined to modify the proposed new rule to include additional qualifications at this time. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Therefore, the working group recommends that the question of whether additional qualifications for assisting counsel would be beneficial be referred for consideration by the appropriate Judicial Council advisory body at a later date.

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The working group appreciates that designating an assisting counsel or entity would be an entirely new responsibility for the superior courts. Additionally, as several commenters noted, capital case assistance involves different skills and responsibilities from direct representation. As such, practical guidance outside of formal rules may be particularly helpful. To that end, members of the working group have offered to prepare a list of persons who have been designated as assisting counsel in death penalty–related habeas corpus proceedings in the last 10 years that can be provided to the superior courts, as appropriate. The working group also recommends that the Center for Judicial Education and Research help make available to the superior courts education (e.g., through trainings or informational materials) on what, specifically, death penalty–related habeas corpus case assistance entails and requires.

Cooperation with an assisting counsel or entity for habeas corpus counsel
Several commenters objected to the language in proposed new rule 8.652(b) requiring that "[a]n appointed attorney must be willing to cooperate with an assisting counsel or entity that the appointing court designates." One suggested that a willingness to cooperate with assisting counsel does not belong in the qualifications rules. Another took the opposite tack and suggested that willingness was not sufficient and counsel should be "required" to cooperate. The "cooperation" provision in proposed new rule 8.652(b) is identical to the existing provision in rule 8.605(b). The separate council report addressing appointment of counsel in death penalty–related habeas corpus proceedings recommends that a superior court be required to designate an assisting counsel or entity when private counsel is appointed. Given this recommendation, the working group concluded it was important to retain the provision that counsel be "willing to cooperate" with an assisting counsel or entity. The working group declined, however, to expressly require cooperation in advance of appointment.

Combined case experience for habeas corpus counsel
The proposed new, combined case experience requirement would newly require counsel to have filed at least two habeas corpus petitions involving serious felonies or one death penalty–related habeas corpus petition, but also would streamline the other existing case experience requirements. Multiple commenters suggested modifications to this proposal.

Additional experience. Multiple commenters suggested increasing the combined case experience requirement further by requiring more habeas corpus proceedings, one or more murder cases, or additional cases involving serious or violent felonies. In particular, several commenters suggested that attorneys with no prior death penalty–related habeas corpus experience as appointed or supervised counsel should have filed at least two habeas corpus petitions involving murder convictions.

The working group does not disagree that habeas corpus experience in murder cases may, as one commenter put it, "better approximate the skills required for adequate representation in capital habeas corpus proceedings." However, the working group concluded that requiring such experience could unduly restrict an already limited pool of available and qualified attorneys. For the same reason, the working group declined at this time to modify the proposal to increase the number of habeas corpus petitions filed, to increase the number of cases required to involve

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serious or violent felonies, or to expressly require that the petitions included postconviction investigation experience.

The entitlement to counsel for purposes of noncapital habeas corpus proceedings is itself limited. A person seeking to collaterally attack a conviction generally is not entitled to counsel until he or she has filed "adequately detailed factual allegations stating a prima facie case."[16] Put another way, it is only once a petitioner has "stated facts sufficient to satisfy the court that a hearing is required . . . [that] he is entitled to have counsel appointed to represent him."[17] As a result, the pool of available and qualified counsel who have filed one or more habeas corpus petitions collaterally attacking murder convictions is likely limited—certainly more limited than those who have filed petitions challenging the broader category of serious felonies.

Additionally, while the pool of attorneys who have represented appellants in direct appeals from murder convictions or defendants charged with murder in a jury trial likely is larger, the working group remains concerned that including a murder case experience requirement—in addition to the proposed habeas corpus experience requirement of two filed petitions in cases involving serious felonies—could unduly restrict and further shrink an already limited pool of available attorneys who may be capable of providing competent representation.

Service as counsel of record for either party. One commenter questioned whether the Judicial Council has the authority to require any prior defense experience. The commenter suggested deleting the requirement that counsel have filed two habeas corpus petitions in serious felonies, because the requirement could delay former prosecutors from qualifying for appointment. Several other commenters took the opposite position, suggesting that no prosecution experience should satisfy the prior case experience, or at least no prosecution experience in habeas corpus proceedings should qualify,[18] or that prosecution experience should be limited to no more than half of the case experience requirements.

The working group did not modify the proposal in response to the above comments. In the view of the working group, the proposal, which would require filing two habeas corpus petitions in serious felonies while permitting the other combined case experience to be satisfied by representing either party, strikes the appropriate balance among the criteria articulated in Government Code section 68665. In the experience of working group members, this requirement is unlikely to unduly restrict the eligible pool of counsel because attorneys with no prior experience filing a habeas corpus petition generally do not want their first attempt to be in a

[16] *People v. Shipman* (1965) 62 Cal.2d 226, 232.

[17] *Ibid*.

[18] Another commenter noted that the proposal, as circulated for comment, would seem to permit a case to satisfy part of the combined case experience requirement even where counsel of record had not filed anything, such as where no response or return was required in a habeas corpus proceeding. The working group modified the proposal in response to specify that an appeal in which counsel did not file a brief or a habeas corpus proceeding in which counsel did not file a petition, informal response, or a return does not satisfy any part of the combined case experience requirement. (See the discussion in the accompanying comment chart.)

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capital case. Furthermore, such an attorney, who has little to no prior experience filing a habeas corpus petition in a serious felony, would still have the opportunity to qualify with alternative experience, as recommended in the proposed new and amended rules.

The working group's view is that adoption of the proposed new rule is well within the scope of the Judicial Council's authority because it is not inconsistent with Government Code section 68665.[19] Section 68665, as amended by Proposition 66, directs that "[e]xperience requirements shall not be limited to defense experience." The case experience requirements in proposed new rule 8.652(c)(2)(B) and (C) would not be limited to defense experience but instead would provide that, aside from the two habeas corpus petitions, service as counsel "for either party" would satisfy the remaining combined case experience. This would be in addition to providing an opportunity to qualify instead with alternative experience. (See proposed new rule 8.652(d).)

Attorneys without trial experience

New rule 8.652(e) would provide that, when an evidentiary hearing is ordered in a habeas corpus proceeding, an appointed attorney who lacks experience in conducting trials or evidentiary hearings "must associate with an attorney who has such experience." One commenter suggested that when this occurs, the superior court should be required to appoint associate counsel from the statewide panel proposed in the separate council report addressing appointments. The rules in this proposal and in the separately submitted appointment report, together, already would require that, *if* the superior court appoints associate counsel for any purpose, including to provide evidentiary hearing experience, then that counsel must be vetted by the regional committees or by the superior court pursuant to a local rule. However, the proposed new and amended rules leave open whether a superior court must appoint additional counsel or whether counsel lacking such experience can "associate with" a trial-experienced counsel without appointment by the court—for example, by engaging supervised counsel with such experience. Given that the situation arises so infrequently, the working group does not recommend mandating the appointment of additional counsel at this time.

Additional skills and areas of experience for habeas corpus counsel

The proposed new rule, like the existing rule, would require counsel to meet the minimum qualifications, which include having prior case experience sufficient to demonstrate proficiency in investigation, issue identification, and writing, and also demonstrate the commitment, knowledge, and skills necessary to competently represent a person in a death penalty–related habeas corpus proceeding. (Proposed new rule 8.652(b), (c)(2).)

Several commenters suggested additional skills, experience, and knowledge that counsel should be encouraged or required to obtain prior to appointment. One commenter, noting the 61 foreign

[19] See Cal. Const., art. VI, § 6(d) (giving the Judicial Council authority to "adopt rules for court administration, practice and procedure" that "shall not be inconsistent with statute"); see *In re Alonzo J.* (2014) 58 Cal.4th 924, 937 (a rule is inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent); *Butterfield v. Butterfield* (1934) 1 Cal.2d 227, 228 ("the mere fact that the rule goes beyond the statutory provision does not make it inconsistent therewith").

nationals on California's death row, suggested that representing foreign nationals requires additional skills, experience, and training beyond that necessary for death penalty–related habeas corpus representation generally. Another suggested that settlement of death penalty–related habeas corpus proceedings should be encouraged, in part by having the rules identify experience in settlement negotiations as a valuable asset. Several commenters suggested that counsel, and particularly counsel without prior death penalty–related habeas corpus experience, should have additional familiarity, experience, or demonstrated proficiency in certain specific criminal defense issues, including death qualification in jury selection, the forensic sciences or criminal forensic issues, mental health issues including intellectual disability, mitigation, use of expert witnesses, and social history investigation.

The working group does not recommend requiring or otherwise specifying the suggested additional skills, experience, and knowledge at this time. One concern is that mandating additional requirements could unduly restrict the available pool of attorneys. For example, a requirement that prior case experience be sufficient to demonstrate familiarity with death qualification in jury selection could effectively require that an attorney have prior capital experience. Another concern is that specifying optional qualifications, or adding mandatory qualifications for only certain separate types of cases or categories of persons, would make the rules too unwieldy and would detract from a central purpose of the rules, which is to set forth minimum qualifications standards that all death penalty–related habeas corpus counsel should meet. Whether a specific attorney is well-suited to a specific case is something to be considered by the recommending committee or the superior court vetting counsel pursuant to a local rule, and the judge making the appointment. The working group expects, as is true now, that matching an attorney and the attorney's specific skill set to a particular case will continue to be a key step in the recommendation and appointment process.

Training for habeas corpus counsel
The proposed training provisions would increase the overall number of required training hours, as well as the subset of hours that must be focused on death penalty–related habeas corpus proceedings. These training hours would have to be completed before inclusion on a panel, which—as proposed in the separate council report addressing appointment—requires reapplication after six years, or before appointment by the Supreme Court or a superior court pursuant to local rule.

Comments received include the following:

- One commenter objected to the proposed increase in hours, while other commenters objected that the proposed increase was still too low, and should be increased further, with one commenter suggesting a supplemental multiday training for counsel without recent capital trial or habeas corpus experience;
- Several commenters suggested that only death penalty habeas corpus defense–specific training should be required (in other words, appellate criminal defense or habeas corpus defense training, if not capital case–specific, would not satisfy the required hours);

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- Multiple commenters suggested that trainings should be more recent, with some suggesting two years before inclusion on a panel and before any appointment, and others suggesting some training should be required in the year before an appointment; and
- One commenter suggested that the training hours should come from different training providers and at least three separate sessions.

The working group agrees that many practitioners will benefit from even greater training hours, but declined to recommend mandating additional training, beyond the increase proposed, by modifying the frequency, recentness, or specific hours of training required. The suggested modifications could make the training requirement more burdensome and discourage interested counsel from seeking appointment, or otherwise shrink the pool of available counsel. At the same time, it is not clear that the suggested modifications are necessary to assure competent representation.

The working group also recommends retaining the provision that appellate criminal defense or habeas corpus defense training that is not capital case–specific may still satisfy part of the training requirement. The working group recommends that counsel be given this flexibility to participate in noncapital-specific training, which may still be relevant to death penalty–related habeas corpus work, and to have such training satisfy at least some of the training hours. Removing this flexibility could make the training hours seem more burdensome, as well as discourage counsel from participating in relevant training simply because it is not specifically tailored to death penalty–related habeas corpus issues.

In addition to the above comments, several commenters addressed the proposed provision that would permit prior death penalty–related habeas corpus work to satisfy some or all of the training requirement, at the discretion of the vetting entity. The provision would parallel the existing training qualification rules for capital appellate counsel. One commenter disapproved of the provision while another approved. Several other commenters addressed the provision that would permit instructors of qualifying courses to receive training credit for instruction. The commenters did not agree on the number of training hours that should be credited for each hour of instruction. The working group did not modify the proposed training provisions in response to these comments.

One commenter also addressed the provision that would require the State Bar to approve any qualifying training, and suggested that trainings also should be approved by the regional committees responsible for vetting attorneys. The working group concluded that having trainings approved statewide and only by the State Bar would both promote uniformity and relieve the committees of an additional duty.

Alternative experience qualification for habeas corpus counsel

Existing language in rule 8.605(f) provides that counsel satisfying the "alternative" experience qualification must also satisfy the general writing sample requirement. The proposed rules circulated with the invitation to comment retained this language and would have required

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attorneys satisfying the alternative experience provision to also satisfy the general writing sample requirement. However, that proposal failed to take into account that the working group has also proposed modifying the general writing sample requirement to require at least two filed habeas corpus petitions involving serious felonies or one filed death penalty–related habeas corpus petition. As a result, the proposal circulated with the invitation to comment inadvertently would have required counsel with alternative experience to have filed two habeas corpus petitions involving serious felonies or one death penalty–related habeas corpus petition. As noted by one commenter, such a proposal would be contrary to the purpose of the alternative experience provision, which is intended to provide an avenue for counsel who may not have the usual case experience, yet who will still provide high-quality legal representation, to qualify for appointment. The working group has corrected the error and has modified proposed rule 8.652(d) to clarify that the writing samples must present analyses of complex legal issues and must include habeas corpus petitions written by counsel only if any exist.

Another commenter suggested modifying the alternative experience provision to expressly state that no one may be found qualified based on prosecutorial experience alone. The working group does not recommend this modification, which would single out attorneys with former prosecution experience but not attorneys with other alternative experience such as complex civil litigation or academia. Additionally, prior experience—whether for the prosecution or the defense—is only one component of the proposed qualifications. All attorneys, including those with prior criminal defense experience, would still have to meet the other qualifications standards, including demonstrating the requisite commitment, knowledge, and skills, and satisfying the required training.

Automatic disqualifications from cases in certain counties for former prosecutors
One commenter expressed concerns about potential conflicts of interest, particularly those that are not readily apparent on the face of a case, when an appointed counsel has previously represented the state in felony appeals involving a capital appellant or related witnesses, or in felony trials, habeas corpus proceedings, or appeals involving a death penalty–related habeas petitioner. The commenter suggested adopting rules that would automatically preclude such attorneys from accepting categories of cases from any county in which counsel had tried criminal cases or defended criminal judgments for the State of California.

The working group agrees that an appointment in a case where counsel must later withdraw due to a conflict may delay habeas corpus proceedings. On the other hand, automatically precluding counsel from accepting cases in which there is no conflict also could unnecessarily delay death penalty–related habeas corpus appointments by limiting the pool of attorneys available to accept cases from certain counties. On balance, the working group declined to recommend such a modification at this time.

Alternatives considered
The working group considered many different alternatives to the recommended actions. While most of these have been addressed above in the Comments section, additional alternatives are discussed below.

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Organization of the qualification rules
The working group considered organizing the rules by the court hearing the proceeding. For example, the working group considered whether the proposed rule on qualifications of counsel in death penalty–related habeas corpus proceedings should be located in title 4, Criminal Rules, which currently contains rules regarding procedures in habeas corpus proceedings in the superior courts, as well as the rule addressing qualifications for capital trial counsel.[20] The working group concluded that having all the qualifications rules relating to capital review proceedings in one place would make them easier to locate for practitioners and the courts.

Qualifications of counsel for death penalty appeals
The working group considered whether, for counsel in automatic appeals, to grant additional training credit for instructors. For example, for counsel appointed to represent a child in family law proceedings, rule 5.242(e)(4) provides for "1.5 hours of course participation credit for each hour of course instruction." Similarly, the State Bar provides that an instructor may claim educational credit for actual speaking time multiplied by four for the first presentation. The working group ultimately concluded that the determination whether, and to what extent, instructors receive training credit should be left to the discretion of the Supreme Court.

Qualifications of lead and associate counsel for death penalty–related habeas corpus proceedings
The working group considered establishing different qualifications requirements for lead counsel and associate counsel in order to try to build capacity. The concept was that by setting lower experience requirements for associate counsel, who would be required to work under the supervision of lead counsel, more counsel would qualify, serve, and learn in this associate capacity. One possible model is rule 4.117, which articulates different qualifications requirements for lead and associate trial counsel in capital cases. Specifically, rule 4.117 provides that lead counsel must have at least 10 years' litigation experience in the field of criminal law, while associate counsel must have at least 3 years of such experience.

The working group concluded that establishing different standards would be unnecessarily complex. Also, it is unclear whether lower standards for associate counsel would have the intended effect of building capacity if, in practice, only one habeas corpus counsel is appointed, as has generally been the case in the past. In the experience of several working group members, when lead and associate counsel are appointed to a case, both tend to be experienced counsel who have an existing working relationship with one another. Additionally, the existing rules already provide for the use of supervised counsel who do not meet the qualifications for appointment.

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[20] The separate report to the council addressing the appointment of counsel in death penalty–related habeas corpus proceedings in the superior courts recommends rules that are located in title 4.

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Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases—in particular, those provisions generally giving to the superior courts responsibility for appointing counsel for, and hearing, initial death penalty–related habeas corpus petitions—will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. However, the specific rule changes recommended herein, with respect to qualifications of counsel, are unlikely on their own to impose any appreciable implementation requirements, costs, or operational impacts.

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 26
2. Roster of Proposition 66 Rules Working Group, at pages 27–28
3. Cal. Rules of Court, rules 8.495, 8.496, 8.498, 8.499, 8.600, 8.601, 8.605, and 8.652, at pages 29–44
4. Chart of comments, at pages 45–117
5. Copies of comments received, at pages 118–183
6. Link A: Certification Process for State Capital Counsel System, final rule (Sept. 23, 2013), *www.gpo.gov/fdsys/pkg/FR-2013-09-23/pdf/2013-22766.pdf*
7. Link B: Text of Prop. 66, pp. 212–222, and ballot description and arguments for and against Prop. 66, pp. 104–109, from Nov. 2016 *Official Voter Information Guide, vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf*

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Charge to Proposition 66 Rules Working Group

The Proposition 66 Rules Working Group is charged with reviewing California Rules of Court, Standards of Judicial Administration, Judicial Council forms, and other authorities relevant to the processing of capital appeals and state habeas corpus petitions to determine whether and what modifications should be recommended to fulfill the Judicial Council's rule-making obligations under Proposition 66, the Death Penalty Reform and Savings Act of 2016.

The working group will consider what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including those governing:

- Appointment of counsel for indigent capital inmates for both the direct appeal and habeas corpus proceedings, including the time frame for appointments and the qualifications necessary to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code (Pen. Code, § 1509 and § 1239.1 and Gov. Code, § 68665);
- The filing of habeas corpus petitions and other matters in the sentencing court and all procedures attendant thereto, including those pertaining to assignment of habeas corpus matters, briefing requirements, certificates of appealability, successive or untimely petitions, and method of execution (Pen. Code, § 1509 and § 3601.1(c));
- Appeals of the sentencing court's rulings on capital habeas corpus petitions to the Court of Appeal and all procedures attendant thereto, including those pertaining to certificates of appealability, priority of such appeals, and the possibility of California Supreme Court review (Pen. Code, § 1509.1); and
- Supreme Court procedures and time frames pertaining to record preparation and briefing in capital appeals (Pen. Code, § 190.6).

In formulating any proposed new or amended court rule, judicial administration standard, or Judicial Council form, the working group will strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness to both defendants and victims. The working group will take into account the language of the act, *Briggs v. Brown* ((2017) 3 Cal.5th 808), and constitutional standards and principles. While participating in the working group, members are expected to not act as advocates of the interests of any stakeholder group, but to contribute to this statewide endeavor by drawing on their expertise in capital litigation, court administration, or other matters relevant to the act.

The working group will propose recommendations to the Judicial Council for adoption, effective April 26, 2019.

Proposition 66 Rules Working Group

As of February 5, 2018

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Proposition 66 Rules Working Group

As of February 5, 2018

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Criminal Justice Services
Judicial Council of California

Rules 8.601 and 8.652 of the California Rules of Court are adopted, rule 8.605 is amended, rule 8.600 is amended and renumbered as 8.603, and rules 8.495, 8.496, 8.498, and 8.499 are renumbered, effective April 25, 2019, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapters 1–7 * * *

Chapter 8. ~~Miscellaneous Writs~~ [Reserved]

Rule 8.495. Renumbered effective April 25, 2019.
Rule 8.495 renumbered as rule 8.720.

Rule 8.496. Renumbered effective April 25, 2019.
Rule 8.496 renumbered as rule 8.724.

Rule 8.498. Renumbered effective April 25, 2019.
Rule 8.498 renumbered as rule 8.728.

Rule 8.499. Renumbered effective April 25, 2019.
Rule 8.499 renumbered as rule 8.730.

Chapter 9. Proceedings in the Supreme Court * * *

Division 2. Rules Relating to Death Penalty Appeals and Habeas Corpus Proceedings

Chapter 1. General Provisions

Rule 8.601. Definitions

For purposes of this division:

(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal, death penalty–related habeas corpus proceedings, or an appeal of a decision in death penalty–related habeas corpus proceedings. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project–San Francisco, or a Court of Appeal district appellate project who is responsible for the overall conduct of the case and

for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a person jointly in a death penalty appeal, in death penalty–related habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.

(3) “Associate counsel” means an appointed attorney who does not have the primary responsibility for the case but nevertheless has casewide responsibility. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) “Supervised counsel” means an attorney who works under the immediate supervision and direction of lead or associate counsel but is not appointed by the court. Supervised counsel must be an active member of the State Bar of California.

(5) “Assisting counsel or entity” means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. An assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate. An assisting counsel in an automatic appeal must, at a minimum, meet the qualifications for appointed appellate counsel, including the case experience requirements in rule 8.605(c)(2). An assisting counsel in a habeas corpus proceeding must, at a minimum, meet the qualifications for appointed habeas corpus counsel, including the case experience requirements in rule 8.652(c)(2)(A). Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project–San Francisco, and a Court of Appeal district appellate project.

(6) “Trial counsel” means both the defendant’s trial counsel and the prosecuting attorney.

(7) “Panel” means a panel of attorneys from which superior courts may appoint counsel in death penalty–related habeas corpus proceedings.

(8) “Committee” means a death penalty–related habeas corpus panel committee that accepts and reviews attorney applications to determine whether applicants are qualified for inclusion on a panel.

Advisory Committee Comment

Number (3). The definition of “associate counsel” in (3) is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility.

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Chapter ~~10~~2. Automatic Appeals From Judgments of Death

Article 1. General Provisions

Rule 8.603.~~8.600~~. In general

(a) Automatic appeal to Supreme Court

If a judgment imposes a sentence of death, an appeal by the defendant is automatically taken to the Supreme Court.

(b) Copies of judgment

When a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment to the Supreme Court, the Attorney General, the Governor, the Habeas Corpus Resource Center, and the California Appellate Project~~ in~~ San Francisco.

~~**(c) Definitions**~~

~~For purposes of this part "Trial counsel" means both the defendant's trial counsel and the prosecuting attorney.~~

Rule 8.605. Qualifications of counsel in death penalty appeals ~~and habeas corpus proceedings~~

(a) Purpose

This rule defines the minimum qualifications for attorneys appointed by the Supreme Court in death penalty appeals ~~and habeas corpus proceedings related to sentences of death~~. These minimum qualifications are designed to promote competent representation and to avoid unnecessary delay and expense by assisting the court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel. An attorney is not entitled to appointment simply because the attorney meets these minimum qualifications.

(b) General qualifications

The Supreme Court may appoint an attorney only if it has determined, after reviewing the attorney's experience, writing samples, references, and evaluations under (c) and (d)~~ through (f)~~, that the attorney has demonstrated the commitment,

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knowledge, and skills necessary to competently represent the defendant. An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate.

~~**(c) Definitions**~~

~~As used in this rule:~~

~~(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal or death penalty–related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.~~

~~(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, or the California Appellate Project in San Francisco who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a defendant jointly in a death penalty appeal, in death penalty–related habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.~~

~~(3) "Associate counsel" means an appointed attorney who does not have the primary responsibility for the case but nevertheless has casewide responsibility to perform the duties for which that attorney was appointed, whether they are appellate, habeas corpus, or appellate and habeas corpus duties. Associate counsel must meet the same minimum qualifications as lead counsel.~~

~~(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.~~

~~(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco.~~

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~~(d)~~(c) Qualifications for appointed appellate counsel

Except as provided in (d), an attorney appointed as lead or associate counsel in a death penalty appeal must ~~have at least~~ satisfy the following minimum qualifications and experience:

(1) *California legal experience*

Active practice of law in California for at least four years.

(2) *Criminal appellate experience*

Either:

(A) Service as counsel of record for ~~a defendant~~ either party in seven completed felony appeals, including as counsel of record for a defendant in at least four felony appeals, one of which was a murder case; or

(B) Service as:

(i) Counsel of record for ~~a defendant~~ either party in five completed felony appeals, including as counsel of record for a defendant in at least three of these appeals; and

(ii) ~~as~~ Supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney performed substantial work on the case and recommends the attorney for appointment.

(3) *Knowledge*

Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.

(4) *Training*

(A) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. Counsel who serves as an instructor in a

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course that satisfies the requirements of this rule may receive course participation credit for instruction, on request to and approval by the Supreme Court, in an amount to be determined by the Supreme Court.

(B) If the Supreme Court has previously appointed counsel to represent a ~~defendant~~ person in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

(5) *Skills*

Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration all of the following:

(A) Two writing samples—ordinarily appellate briefs—written by the attorney and presenting an analysis of complex legal issues;

(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

~~**(e) Qualifications for appointed habeas corpus counsel**~~

~~An attorney appointed as lead or associate counsel to represent a person in death penalty–related habeas corpus proceedings must have at least the following qualifications and experience:~~

~~(1) Active practice of law in California for at least four years.~~

~~(2) Either:~~

~~(A) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as~~

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~~counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or~~

~~(B) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment.~~

~~(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty–related habeas corpus proceedings.~~

~~(4) Within three years before appointment, completion of at least nine hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.~~

~~(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration all of the following:~~

~~(A) Three writing samples—ordinarily two appellate briefs and one habeas corpus petition—written by the attorney and presenting an analysis of complex legal issues;~~

~~(B) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;~~

~~(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and~~

~~(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.~~

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~~(f)~~(d) Alternative qualifications

The Supreme Court may appoint an attorney who does not meet the California law practice requirement~~s~~ of ~~(d)~~(c)(1) ~~and (2) or (e)(1) and~~ or the criminal appellate experience requirements of (c)(2) if the attorney has the qualifications described in ~~(d)~~(c)(3)–(5) ~~or (e)(3)–(5)~~ and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under ~~(d)~~(c) ~~or (e)~~.

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court.

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court will determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of the attorney's individual background and experience. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

~~(g) Attorneys without trial experience~~

~~If an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding and an attorney appointed under either (e) or (f) to represent a defendant in that proceeding lacks experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience.~~

~~(h)~~(e) Use of supervised counsel

An attorney who does not meet the qualifications described in (c) or (d)~~, (e), or (f)~~ may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

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~~(i)~~(f) Appellate and habeas corpus appointment

(1) An attorney appointed to represent a ~~defendant~~ person in both a death penalty appeal and death penalty–related habeas corpus proceedings must meet the minimum qualifications of both ~~(d) and (e)~~ (c) or (d) and ~~of (f)~~ rule 8.652.

(2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a ~~defendant~~ person jointly in both a death penalty appeal and death penalty–related habeas corpus proceedings if the Supreme Court finds that one attorney satisfies the minimum qualifications set forth in ~~their qualifications in the aggregate satisfy the provisions of both (d) and (e)~~ (c) or (d), and the other attorney satisfies the minimum qualifications set forth in ~~of (f)~~ rule 8.652.

~~(j)~~(g) Designated entities as appointed counsel

(1) Notwithstanding any other provision of this rule, both the State Public Defender ~~is qualified to serve as appointed counsel in death penalty appeals, the Habeas Corpus Resource Center is qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings,~~ and the California Appellate Project ~~in~~ San Francisco ~~is~~ are qualified to serve as appointed counsel in ~~both classes of proceedings~~ death penalty appeals.

(2) When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project ~~in~~ San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under ~~(d)~~(c)(1)–(5) or the Supreme Court finds the attorney qualified under ~~(f)~~(d).

~~(3) When serving as appointed counsel in a death penalty–related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (e)(1)–(5) or the Supreme Court finds the attorney qualified under (f).~~

~~(k) Attorney appointed by federal court~~

~~Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty–related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds that attorney has the commitment, proficiency, and knowledge necessary to represent the defendant competently in state proceedings.~~

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~~**Advisory Committee Comment**~~

~~**Subdivision (c).** The definition of "associate counsel" in (c)(3) is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility to perform the duties for which he or she was appointed, whether they are appellate duties, habeas corpus duties, or appellate *and* habeas corpus duties.~~

Chapter 3. Death Penalty–Related Habeas Corpus Proceedings

Rule 8.652. Qualifications of counsel in death penalty–related habeas corpus proceedings

(a) Purpose

This rule defines the minimum qualifications for attorneys to be appointed by a court to represent a person in a habeas corpus proceeding related to a sentence of death. These minimum qualifications are designed to promote competent representation in habeas corpus proceedings related to sentences of death and to avoid unnecessary delay and expense by assisting the courts in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether a person received effective assistance of counsel. An attorney is not entitled to appointment simply because the attorney meets these minimum qualifications.

(b) General qualifications

An attorney may be included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, only if it is determined, after reviewing the attorney's experience, training, writing samples, references, and evaluations, that the attorney meets the minimum qualifications in this rule and has demonstrated the commitment, knowledge, and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death. An appointed attorney must be willing to cooperate with an assisting counsel or entity that the appointing court designates.

(c) Qualifications for appointed habeas corpus counsel

An attorney included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, must satisfy the following minimum qualifications:

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(1) *California legal experience*

Active practice of law in California for at least five years.

(2) *Case experience*

The case experience identified in (A), (B), or (C).

(A) Service as counsel of record for a petitioner in a death penalty–related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court.

(B) Service as:

(i) Supervised counsel in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment; and

(ii) Counsel of record for either party in a combination of at least five completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. Service as counsel of record in an appeal where counsel did not file a brief, or in a habeas corpus proceeding where counsel did not file a petition, informal response, or a return, does not satisfy any part of this combined case experience. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing.

(C) Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. Service as counsel of record in an appeal where counsel did not file a brief, or in a habeas corpus proceeding where counsel did not file a petition, informal response, or a return, does not satisfy any part of this combined case experience. The

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combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing.

(3) *Knowledge*

Familiarity with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings.

(4) *Training*

(A) Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 4.562, completion of at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings.

(B) Counsel who serves as an instructor in a course that satisfies the requirements of this rule may receive course participation credit for instruction, on request to and approval by the committee, the Supreme Court, or a court appointing counsel under a local rule as provided in rule 4.562, in an amount to be determined by the approving entity.

(C) If the attorney has previously represented a petitioner in a death penalty–related habeas corpus proceeding, the committee, the Supreme Court, or the court appointing counsel under a local rule as provided in rule 4.562, after reviewing counsel's previous work, may find that such representation constitutes compliance with some or all of this requirement.

(5) *Skills*

Demonstrated proficiency in issue identification, research, analysis, writing, investigation, and advocacy. To enable an assessment of the attorney's skills:

(A) The attorney must submit:

(i) Three writing samples written by the attorney and presenting analyses of complex legal issues. If the attorney has previously served as lead counsel of record for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include one or more habeas corpus petitions filed by the

attorney in that capacity. If the attorney has previously served as associate or supervised counsel for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include the portion of the habeas corpus petition prepared by the attorney in that capacity. If the attorney has not served as lead counsel of record for a petitioner in a death penalty–related habeas corpus proceeding, these writing samples must include two or more habeas corpus petitions filed by the attorney as counsel of record for a petitioner in a habeas corpus proceeding involving a serious felony; and

(ii) Recommendations from two attorneys familiar with the attorney's qualifications and performance.

(B) The committee, the Supreme Court, or the court appointing counsel under a local rule as provided in rule 4.562, must obtain and review:

(i) If the attorney has previously been appointed in a death penalty appeal or death penalty–related habeas corpus proceeding, the evaluation of the assisting counsel or entity in those proceedings; and

(ii) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(d) Alternative experience

An attorney who does not meet the experience requirements of (c)(1) and (2) may be included on a panel or appointed by the Supreme Court if the attorney meets the qualifications described in (c)(3) and (5), excluding the writing samples described in (c)(5)(A)(i), and:

(1) The committee or the Supreme Court finds that the attorney has:

(A) Extensive experience as an attorney at the Habeas Corpus Resource Center or the California Appellate Project–San Francisco, or in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or as a prosecutor), for at least five years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under (c)(1) and (2); and

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1
2 (B) Demonstrated proficiency in issue identification, research, analysis,
3 writing, investigation, and advocacy. To enable an assessment of the
4 attorney's skills, the attorney must submit three writing samples written
5 by the attorney and presenting analyses of complex legal issues,
6 including habeas corpus petitions filed by the attorney, if any.
7
8 (2) Ongoing consultation is available to the attorney from an assisting counsel or
9 entity designated by the court.
10
11 (3) Within two years before being included on a panel or appointed by the
12 Supreme Court, the attorney has completed at least 18 hours of appellate
13 criminal defense or habeas corpus defense training approved for Minimum
14 Continuing Legal Education credit by the State Bar of California, at least 10
15 hours of which involve death penalty habeas corpus proceedings. The
16 committee or the Supreme Court will determine whether the training
17 completed by an attorney satisfies the requirements of this subdivision in
18 light of the attorney's individual background and experience.
19
20 **(e) Attorneys without trial experience**
21
22 If an evidentiary hearing is ordered in a death penalty–related habeas corpus
23 proceeding and an attorney appointed under (c) or (d) to represent a person in that
24 proceeding lacks experience in conducting trials or evidentiary hearings, the
25 attorney must associate with an attorney who has such experience.
26
27 **(f) Use of supervised counsel**
28
29 An attorney who does not meet the qualifications described in (c) or (d) may assist
30 lead or associate counsel, but must work under the immediate supervision and
31 direction of lead or associate counsel.
32
33 **(g) Appellate and habeas corpus appointment**
34
35 (1) An attorney appointed to represent a person in both a death penalty appeal
36 and death penalty–related habeas corpus proceedings must meet the
37 minimum qualifications of both (c) or (d) and rule 8.605.
38
39 (2) Notwithstanding (1), two attorneys together may be eligible for appointment
40 to represent a person jointly in both a death penalty appeal and death penalty–
41 related habeas corpus proceedings if it is determined that one attorney
42 satisfies the minimum qualifications stated in (c) or (d) and the other attorney
43 satisfies the minimum qualifications stated in rule 8.605.

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(h) Entities as appointed counsel

(1) Notwithstanding any other provision of this rule, the Habeas Corpus Resource Center and the California Appellate Project–San Francisco are qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings.

(2) When serving as appointed counsel in a death penalty–related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project–San Francisco must not assign any attorney as lead counsel unless it finds the attorney is qualified under (c) or (d).

(i) Attorney appointed by federal court

Notwithstanding any other provision of this rule, a court may appoint an attorney who is under appointment by a federal court in a death penalty–related habeas corpus proceeding for the purpose of exhausting state remedies in the California courts if the court finds that the attorney has the commitment, proficiency, and knowledge necessary to represent the person competently in state proceedings. Counsel under appointment by a federal court is not required to also be appointed by a state court in order to appear in a state court proceeding.

Division 3. Rules Relating to Miscellaneous Appeals and Writ Proceedings

Chapter ~~11~~1. Review of California Environmental Quality Act Cases Under Public Resources Code Sections 21168.6.6, 21178–21189.3, and 21189.50–21189.57

Chapter ~~12~~2. Appeals Under Code of Civil Procedure Section 1294.4 ~~f~~From an Order Dismissing or Denying a Petition to Compel Arbitration

Chapter 3. Miscellaneous Writs

Rule 8.720.~~8.495.~~ Review of Workers' Compensation Appeals Board cases * * *

Rule 8.724.~~8.496.~~ Review of Public Utilities Commission cases * * *

Rule 8.728.~~8.498.~~ Review of Agricultural Labor Relations Board and Public Employment Relations Board cases * * *

Rule 8.730.~~8.499.~~ Filing, modification, and finality of decision; remittitur * * *

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Division ~~2~~4. Rules Relating to the Superior Court Appellate Division

Division ~~3~~5. Rules Relating to Appeals and Writs in Small Claims Cases

Division ~~4~~6. Transfer of Appellate Division Cases to the Court of Appeal

Division ~~5~~7. Publication of Appellate Opinions

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
1.	Robert D. Bacon Attorney at Law Oakland, California	NI	Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful. To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. **1. General observations: the "cardiac surgery of legal representations"** A. Given what is at stake in any capital case, a relevant analogy that the Council might keep in mind in crafting these rules – and encourage regional committees and superior courts to keep in mind in applying and implementing them – is the procedure for board certification of a physician in a medical specialty. (See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[1] see also Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* (2008) 36 Hofstra L. Rev. 775, 777 [capital	

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Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			defense is the "cardiac surgery of legal representations"].) [1] "The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice – for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice." (*Ibid*.) * * * [3] I also commend to the Council the comments submitted by California Attorneys for Criminal Justice (CACJ). I am a member of that organization but I did not personally participate in the writing of their comments. See comments on specific provisions below.	See responses to specific comments below.
2.	California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	NI	These comments are being submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals.	

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			See comments on specific provisions below.	See responses to specific comments below.
3.	California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	NI	The piecemeal issuance of rules by the working group and the lack of information about funding mechanisms make it particularly difficult to respond constructively to these rules. It is nonetheless clear that in light of the accelerated timeline for litigation contemplated by Proposition 66, enhanced staffing of cases is critical to competent representation. See comments on specific provisions below.	See responses to specific comments below.
4.	California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	NI	These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for qualification and appointment of habeas corpus counsel in capital cases. CACJ's comments would be more thorough and reflective but for the abbreviated comment period and complexity of the matters at issue. * * * CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the appointment of competent post-conviction counsel. * * *	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In addition, since Proposition 66 allows for the reopening on appeal of issues handled by first habeas counsel based on their ineffective assistance, failure to insure the appointment of competent and experienced counsel in the Superior Court will only require extensive re-litigation in the Court of Appeal with different counsel under new Penal Code Section 1509.1(b). See comments on specific provisions below.	See responses to specific comments below.
5.	California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	NI	The Committee on Appellate Courts appreciates the working group's efforts to balance the mandates of Proposition 66 with the need to ensure qualified representation for death penalty appeals and habeas proceedings. **SP18-12: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings** *Proposal as a Whole:* The Committee agrees with the working group's concern that factors other than the current qualification standards dissuade private attorneys from seeking appointment in capital cases. As the working group identifies, these other factors include the level of compensation, the lengthy time	

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			commitment required, and the nature of the cases. The new one-year deadline for filing a habeas petition may very well exacerbate the problem. Holding this aside, the working group's proposed rules will help expand the applicant pool, but the Committee has some concerns and suggestions with regard to competency requirements. See comments on specific provisions below.	 See responses to specific comments below.
6.	California Public Defenders Association (CPDA) by Robin Lipetzky, President Sacramento, California	AM	<u>Statement of Interest</u> CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes approximately 4000 attorneys who are employed as public defenders or are in private criminal defense practice. CPDA has been a leader in continuing legal education for defense attorneys for over 34 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, CPDA is the co-sponsor of the annual Capital Case Defense Seminar, co-sponsored by California Attorneys for Criminal Justice, which is held over four days every President's Day Weekend for more than thirty-five years; and the co-publisher of the California Death Penalty Defense Manual. CPDA is also active in the California Legislature, attending key Senate and Assembly committee meetings on a weekly basis, taking positions on hundreds of bills, and sponsoring legislation in a constant effort to ensure that our	

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
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			criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In addition, CPDA has appeared as amicus curiae in well over 50 decisions published by the California Supreme Court and Courts of Appeal, and served as amicus curiae in the United States Supreme Court. Position We agree with some of the proposals if they are modified. We do not agree with others. Our position is spelled out in detail below. See comments on specific provisions below.	See responses to specific comments below.
7.	Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	NI	The Criminal Justice Legal Foundation, a nonprofit organization formed to protect and advance the rights of victims of crime, submits these comments on the above proposals. The Judicial Council is tasked by statute, enacted in Proposition 66, to “adopt rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.” (Pen. Code, § 190.6, subd. (d).) It would be difficult to overstate the extent to which Proposal 18-13 fails in that goal. Instead of obeying the mandate of the voters to fix what is wrong with the present system and expedite the cases, the proposal doubles down on the current failures. It is contrary to Proposition 66 in spirit, in purpose, and in letter. Proposal 18-12 is	

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Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
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			also deeply flawed, violating the direction of Proposition 66 to avoid needlessly constricting the supple of attorneys. * * * **The Qualification Proposal** The statutory mandate for qualifications (see Gov. Code, § 68665, subd. (b)) requires consideration of four factors: 1. Achieving competent representation; 2. Avoiding unduly restricting the available pool of attorneys; 3. Qualifying for Chapter 154 of Title 28 of the U.S. Code; and 4. Not limiting experience requirements to the defense side. Under criteria 2 and 4, changes from existing standards should all be in the direction of broadening the available pool, and particularly including attorneys who have recently left a prosecuting office, unless there is a compelling reason under criteria 1 or 3 for a more restrictive standard. * * * For an increase in restrictiveness to be justified under the more general criterion 1, a compelling showing of need should be required, not just a vague impression. It is worth noting in this regard that even the American Bar Association —certainly no friend	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
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			of capital punishment—has acknowledged that its earlier emphasis on "quantitative measures of attorney experience—such as years of litigation experience and number of jury trials"—was misguided. (See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 962 (2003).) That said, Chapter 154 does require "standards of competency" (see 28 U.S.C. § 2265(a)(1)(C)), and the implementing regulations do employ quantitative measures for presumptive adequacy, so it would not be wise to abandon the existing standards. However, we are aware of no evidence that the existing bars are not high enough, and the background discussion in Proposal SP 18-12 does not cite any. Again, we should bear in mind the ABA's conclusion that quantitative measures are really not worth much. See comments on specific provisions below.	See responses to specific comments below.
8.	Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	NI	On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for superior court appointment of counsel in death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.	

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Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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			The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad. There are currently 39 Mexican nationals on death row in California. Twenty-two of those do not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply. Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case	

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List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Proposed Working Group Response**
			circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death. [1] See, e.g., Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261. * * * Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States. See comments on specific provisions below.	See responses to specific comments below.
9.	Habeas Corpus Resource Center (HCRC) by Michael Hersek Interim Executive Director San Francisco, California	NI	The below comments to SP 18-12 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, with the exception to comments on two provisions, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments,	

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			found at pages 12-13 of the Invitation to Comment. See comments on specific provisions below.	 See responses to specific comments below.
10.	Marylou Hillberg Attorney at Law Sebastopol, California	N	As counsel of record on two capital habeas appointments (S221802 & S211187), as well as unappointed associate counsel for nearly ten years in another, (S168103), my evaluation of the proposed qualifications is that they will lead to grossly under-qualified counsel. Moreover, given the one year time line to file under Prop 66, there simply won't be enough time to climb the steep learning curve required to adequately investigate and prepare a constitutionally adequate habeas petition. See comments on specific provisions below.	See responses to specific comments below.
11.	Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	NI	My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring in the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates. Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and	

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Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

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			vital to the clients we represent that California appoint qualified counsel to represent these persons. See comments on specific provisions below.	See responses to specific comments below.
12.	Office of the State Public Defender (OSPD) by Mary McComb State Public Defender Oakland, California	NI	The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience See comments on specific provisions below.	See responses to specific comments below.
13.	Superior Court of Los Angeles County	A	The Los Angeles Superior Court supports this proposal as written. These comments are from the Los Angeles Superior Court and not from any one person in particular.	The working group notes the commenter's support for these rules.
14.	Kristin Traicoff Attorney Law Office of Kristin Traicoff Sacramento, California	AM	See comments on specific provisions below.	See responses to specific comments below.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Defense Counsel Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	An Assisting Entity or Counsel This concern may not be important in the short run, so long as the Habeas Corpus Resource Center [HCRC] continues to accept representation of the person in the Superior Court under proposed Rule 8.654(e)(2), that requires the court first to request that HCRC accept such representation. However, HCRC's resources are finite, and at some point appointments will be made under subdivision (e)(3), which states: "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel." The potential problem relates to the qualifications for "an assisting entity or counsel." Proposed Rules 8.605 and 8.652 establish qualifications for counsel in death penalty appeals and death penalty–related habeas corpus proceedings, respectively. However, no rule establishes qualifications for "an *assisting* entity or counsel." (Emphasis added.) In contrast, proposed Rule 8.601(5) merely defines "assisting counsel or entity" as "an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance," and includes only a non-exclusive list of potential assisting entities. When the time arrives that	The working group agrees that additional clarification would be helpful and has modified the definition of assisting counsel in proposed rule 8.601(5) to clarify that "[a]n assisting counsel must be an experienced capital appellate counsel or habeas corpus practitioner, as appropriate." At a minimum, assisting counsel in an automatic appeal must meet the qualifications for appointed appellate counsel, including the non-alternative case experience requirements, and in a habeas corpus proceeding must have filed a death penalty–related habeas corpus petition in a California state court. Aside from this clarification, the working group declined to modify the proposed rule to include additional qualifications for assisting counsel at this time. Under rule 10.22, non-minor substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. Courts and justice partners require time to implement these and other Proposition 66–related rules before they go into effect on April 25, 2019. Therefore, the working group recommends that the question of whether additional qualifications should be developed be

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	Superior Court judges are making appointments under proposed Rule 8.654(e)(3), the court would designate the assisting entity or counsel without further guidance or limitation as to what or who that assisting entity or counsel might be. For these reasons, CADC respectfully suggests that the Working Group should consider further definition or qualification of "an assisting entity or counsel," or should consider limiting the universe of such counsel and entities.	considered by the appropriate Judicial Council advisory body at a later time. With respect to the universe of assisting entities, the working group declined to limit the definition to only those entities currently identified in proposed rule 8.601(5). While local or regional assisting entities do not currently exist, the working group concluded that the definition should allow for the possible formation of such entities in the future, as Proposition 66 is implemented and death penalty–related habeas corpus proceedings, including counsel appointments, are increasingly conducted in the superior courts. The working group appreciates that designating an assisting entity or counsel, as required in proposed rule 4.561(e)(2), included in a separate report, will be an entirely new responsibility for the superior courts. Additionally, as several commenters noted, capital case assistance involves different skills and responsibilities from direct representation. As such, practical guidance outside of formal rules may be particularly helpful. To that end, members of the working group have offered to prepare a list of persons who have been designated as assisting counsel in death penalty–related habeas corpus proceedings in the last 10 years that can be provided to superior courts. The working group also recommends that the Center for Judicial Education and Research help make available to the superior courts education (e.g., through trainings or informational materials) on what

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		specifically death penalty–related habeas corpus case assistance entails and requires.
California Appellate Project – San Francisco (CAP-SF) By Joseph Schlesinger Executive Director	More than thirty-five years ago, the California Supreme Court voiced concern about the quality of representation in death penalty cases by reaching out to the State Bar for assistance. In response, to advance the quality of lawyering in death judgment cases, the State Bar established the California Appellate Project-San Francisco (CAP-SF). CAP-SF's mission was, and still is, to facilitate competent representation in indigent capital appeal and habeas cases. Proposition 66's mandate to significantly shorten the time in which to file a capital habeas petition - while simultaneously imposing new restrictions on the availability of second or successive applications for relief -- heightens rather than diminishes the concern for quality representation in death judgment cases. The new rules will create many changes and challenges to be met by experienced capital litigators as well as attorneys with no capital experience. Now more than ever, capital habeas attorneys will need assistance by experienced capital attorneys in order to meet the inherent challenges of capital representation coupled with the additional hurdles imposed by Proposition 66. CAP-SF is the entity best able to provide that assistance. **<u>Proposed Rule 8.601(5): Definitions</u>** **<u>8.601(5): Definition of "Assisting Counsel or Entity"</u>**	The working group agrees that CAP-SF has the greatest experience and expertise of any entity in providing assistance in capital cases in California state courts. However, the working group declined to remove all entities other than CAP-SF from the definition of potential assisting entities. The California Rules of Court have, for the last twenty years, also identified HCRC and OSPD for possible designation as assisting entities. The main difference between existing rule 8.605(c)(5) and proposed new rule 8.601(5), in defining assisting entities, is that the proposed rule would add "a Court of Appeal district appellate project" to the list of entities that may be designated. The working group recommends adding these projects to the list because Proposition 66 created a statutory right to appeal a superior court's denial of a death penalty–related habeas corpus petition. Because such appeals are newly authorized by Proposition 66, no entity has experience assisting counsel with such appeals. Additionally, a rule of court that requires a superior court to utilize the services of CAP-SF would effectively mandate the court's use of a specific private contractor. CAP-SF is not a governmental entity. It is a non-profit corporation that provides services to the Supreme Court in connection with capital cases pursuant to a contract.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	"Assisting counsel or entity" means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project in San Francisco, and a Court of Appeal district appellate project." CAP-SF objects to the definition of "Assisting counsel or entity" in the proposed rules. The definition provided fails to appreciate the difference between providing capital direct representation and capital case assistance. It suggests that the Habeas Corpus Resource Center (HCRC), a capital direct representation agency, could serve as assisting counsel. Although HCRC has considerable expertise providing direct representation of habeas petitioners and makes significant contributions to training appointed counsel, it has virtually no experience serving as an assisting entity. Assistance work is highly specialized and although the skill set overlaps with direct representation, it requires knowledge and experience all its own. Moreover, assuming HCRC developed the skills and devoted its staff to assistance work, the end result would be a reduction in the number of direct representation cases it could handle. This would not promote the goal of Proposition 66 to increase the number of state habeas appointments.	Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity. This is doubly true where it remains unclear who will fund these services – the counties or the state.

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	Similarly, the Office of the State Public Defender's expertise is in direct representation in direct appeal cases, and not serving as an assisting entity to appointed counsel. The Court of Appeal district appellate (DCA) projects are even less qualified to provide capital case assistance. Their expertise and focus is in providing assistance in non-capital cases only, and almost exclusively on direct appeals. They have very limited familiarity with capital or habeas corpus practice and are not staffed to provide assistance in capital cases. CAP-SF is the only qualified and fully staffed entity in California capable of offering full-time capital assistance to appointed counsel. CAP-SF has been assisting appointed counsel for thirty-five years and has developed contacts and resources in the capital defense community that foster its ability to do so effectively. CAP-SF should continue to be defined as the presumptive assisting entity in these cases and the rules should specifically state as much in order to avoid confusion and the risk of unqualified assistance. For example, the rule could state *"assistance from CAP-SF or, in the event of a conflict, other assisting counsel that the court may designate."* * * * **8.652(b) General qualifications** CAP-SF recommends a modification to proposed Rule	With respect to proposed rule 8.652(b), regarding cooperation with an assisting entity, the working group declined to modify this provision, which is

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	8.652(b). These proposed rules fail to require that appointed counsel cooperate with the assisting entity, on direct appeal and habeas corpus, respectively. Currently the last sentence of these rules reads "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." The last sentence should be modified to read that appointed counsel *"is required to cooperate* with an assisting counsel or entity that the court designates." The modification is necessary because an experienced assisting entity or counsel helps appointed counsel provide quality representation to indigent appellants/petitioners. An assisting counsel or entity cannot adequately assist appointed counsel who will not fully cooperate with it. The California Supreme Court addresses this issue by expressly requiring appointed counsel in capital cases to cooperate with the assisting counsel or entity. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, section 5 "Progress Payments.") In the Supreme Court, appointed counsel may only receive fixed fee payments after they submit to the assisting counsel or entity the type of working documents *(e.g.* transcript notes, issues list, investigation plan) that enables the assisting counsel to offer more meaningful assistance to appointed counsel. Absent similar requirements for counsel appointed by the superior court the proposed rules should, minimally, include language that requires appointed counsel to work with the assisting entity.	identical to the existing provision in current rule 8.605(b). The working group concluded that a willingness to cooperate is sufficient for purposes of determining whether an attorney meets the minimum qualifications for appointment, and declined to expressly require cooperation in advance of appointment. This does not foreclose individual courts, the regional committees, or the relevant governmental funding source from adopting policies requiring appointed counsel to submit certain working documents to the assisting entity.

Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The qualifications rule retains the language of present Rule 8.605(b): “An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate.” This is not a qualification and does not belong in this rule. A rule governing the relationship between appointed counsel and the assisting entity is in order, though, and it requires balance and a recognition of counsel’s role as the decision- maker.	The working group declined to delete this provision requiring a willingness to cooperate with a designated assisting counsel or entity from the proposed qualification rules. Proposed rule 4.561(e)(2), in the companion report regarding appointment of counsel in death penalty–related habeas corpus proceedings in the superior courts, generally requires that a court designate an assisting entity or counsel. Given this recommendation, the working group concluded it was important to retain the provision requiring counsel to be “willing to cooperate” with an assisting entity or counsel.
Habeas Corpus Resource Center By Michael Hersek Interim Executive Director San Francisco, California	Proposed Rule 8.601(5) suggests that HCRC may be designated by an appointing court as the “assisting counsel or entity” to “provide appointed counsel with consultation and resource assistance.” HCRC’s ability to serve as an assisting entity, however, is limited by Government Code section 68661. Specifically, Proposition 66 amended subdivision (g) of section 68661 to limit HCRC to providing “legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law.” Proposition 66 struck language from the original statute that permitted HCRC to provide “any other assistance” to appointed counsel “to the extent [the assistance was] not otherwise available.” By limiting HCRC’s functional mandate in subdivision (g), Proposition 66 has created uncertainty about the level of “consultation and resource assistance” HCRC could provide directly to appointed counsel when designated as an	To the extent the commenter suggests that HCRC should be eliminated from the definition of “assisting counsel or entity,” the working group declines to make this change. As noted by the commenter, Government Code section 68661, as modified by Proposition 66, continues to specify that HCRC has the power and duty “[t]o provide legal or other advice to appointed counsel . . . .” (*Id*., subd. (g)). Section 68661 also provides that HCRC has the power and duty “[t]o provide assistance and case progress monitoring as needed.” (*Id*., subd. (j).)

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Rules 8.601(5) and 8.652(b): Assisting entities or counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	assisting entity.	
Marylou Hillberg Attorney at Law Sebastopol, California	The other comment I have is that I greatly benefited from the assistance of an experienced, and extremely capable lawyer when I was an unappointed associate counsel with him in a case for nearly a decade. Then when I accepted my own capital habeas appointments, I learned just how overwhelming and difficult this work is for a sole practitioner. I could not have done an adequate job in these petitions, within the three years of my appointments, without the assistance of CAP.	The working group appreciates this input and notes that the separately proposed rules on appointment of habeas corpus counsel retain the requirement that an assisting counsel or entity be designated.

Rule 8.605(c)(4): Training—automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
California Public Defenders Association by Robin Lipetzky President Sacramento, California	The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case experience should not satisfy any portion of the training requirement. * * * Rule 8.605(c)(4)(B): for the reasons explained above, we urge the deletion of this subdivision.	The working group agrees that prior capital case experience should not automatically satisfy the training requirement. The working group concluded that permitting the Supreme Court, which has decades of experience applying the training qualifications in current rule 8.605, to continue exercising its discretion in this area strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. The working group therefore declined to delete this provision.

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Rule 8.605(c)(4): Training—automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**

Rules 8.605(c)(2), (c)(5) and 8.652(c)(2), (c)(5): Separate requirements for skills and experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**3. Quantitative measures of attorney experience are of limited value** While experience with a particular number of cases has a place in measuring an attorney's qualifications, the Council should insure that those implementing these rules not rely too heavily on this factor. A raw count of cases makes a lawyer who churns cases, and works them up only superficially, appear to be better qualified than a lawyer who better serves her clients by litigating cases more intensely and as a result can take fewer of them. The first lawyer will meet the numerical experience standard sooner than the second, but the second one is better qualified. (See Stetler & Wendel, *supra*, 41 Hofstra L. Rev. at pp. 682-684.) The Council can take a lesson from the drafters of the ABA Guidelines: "In the original [1989] edition, [Guideline 5.1] emphasized quantitative measures of attorney experience – such as years of litigation experience and number of jury trials – as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised [2003] edition, the inquiry focuses on counsel's ability to provide high quality legal representation. … [¶] [Q]uantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with	The working group appreciates this input and agrees that having experience is not synonymous with having skills. As the commenter notes, the case experience requirements, which specify types and numbers of cases, are different and articulated separately from the skills requirements, which require review of writing samples, recommendations, and evaluations. The working group concluded that additional clarifying language was not necessary.

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Rules 8.605(c)(2), (c)(5) and 8.652(c)(2), (c)(5): Separate requirements for skills and experience		
Commenter	**Comment**	**Proposed Working Group Response**
	substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster." (ABA Guidelines, Commentary to § 5.1, 31 Hofstra L. Rev. at pp. 962, 964.) Making perhaps the same point a different way, the Rules of Professional Conduct define "competence in any legal service" to include both "learning and skill" and, separately, the "mental, emotional, and physical ability reasonably necessary." (Rule 1.1(b) [effective November 1, 2018]; accord, Rule 3-110(B) [effective until November 1, 2018] [also including "diligence" within the definition of competence].) The mental and emotional ability required for post-conviction capital litigation is extraordinary. Sadly, experience does not always insure that an attorney will have that ability. I would suggest an explicit statement in the text of the rules (or, at an absolute minimum, in the commentary and in whatever training materials are sent to regional committees and superior courts) that having the experience set forth in Rules 8.605(c)(2) and 8.652(c)(2) is ***not*** prima facie evidence that the individual attorney possesses the skills required by Rules 8.605(c)(5) and 8.652(c)(5). The experience and skills requirements should each be addressed separately by those implementing the rules, just as they are set out separately in the rules.	

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Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience *alone*.	The working group concluded that the suggested amendment could unduly discourage persons with prosecutorial experience from applying for appointment under the alternative qualifications provision. The proposed rule, which is substantially identical to the existing language in current rule 8.605(f), maintains the Supreme Court's ability to exercise its discretion, based on its lengthy experience making appointments in capital appeals, to determine whether past prosecutorial, civil, or academic experience, may satisfy the alternative experience qualifications for any given case. The comment regarding proposed rule 8.652(d)(1), is addressed in the chart below at pages 105–106.
California Public Defenders Association by Robin Lipetzky President Sacramento, California	Rule 8.605(d)(3): as explained above, we recommend increasing the required training hours from 18 to 20, and death-penalty specific habeas training from nine to ten hours, so that the first sentence reads, "Within two years before appointment, the attorney has completed at least 20 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty appellate or habeas corpus proceedings."	The working group concluded that these current requirements of 18 and 9 hours, which have been in place since 1998, are not too low, and strike the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. The working group declined to increase the required training hours in this provision.
Kristin Traicoff Attorney Law Office of Kristin Traicoff Sacramento, California	1) Proposed rules 8.605(d) and 8.652(d)(1) provide for alternative qualifications for appointment as lead counsel in capital direct appeals and habeas corpus proceedings, respectively, allowing for appointment if these qualifications	The superior courts, Courts of Appeal, and the Supreme Court all share original jurisdiction over habeas corpus petitions. In contrast, direct appeals in capital cases are heard only by the Supreme Court. "The committee" in

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Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
	are found to have been met. As a preliminary matter, it appears 8.605(d) vests solely in the Supreme Court authority to make this determination and 8.652(d)(1) allows both the Supreme Court and "the committee" to make this determination. It does not appear that there is any basis to give the committee this authority with regards to habeas appointments, but not appellate appointments, and thus I suggest 8.605(d) also include language that gives the committee this authority. 2) Proposed rules 8.605(g)(2) addresses the qualifications for assignment as lead counsel among the attorneys at OSPD. I am perplexed that this rule requires that, should the attorney be qualified under alternative qualifications (proposed rule 8.605(d)), the Supreme Court must remain the entity vested with the authority to determine if the person qualifies as lead counsel. It appears sensible that OSPD could be vested with this authority, given the other statutory and other mechanisms that exist to ensure that that agency--regardless of which attorney is assigned to represent a particular client--is, as a whole, providing effective representation to all clients whom OSPD has been appointed to represent. This is particularly true since and 8.652(h)(2) grants HCRC the authority to determine if an attorney qualifies as lead counsel under 8.652(d); again, the disparate treatment of these two agencies is perplexing and does not seem to be grounded in any material difference between the management capacities of the two agencies. Moreover, as a practical matter, it seems quite unlikely that a line attorney at OSPD would feel comfortable approaching the Supreme Court (or committee, should the rule be amended to grant the committee this authority) to essentially ask for greater	proposed rule 8.652(d)(1) refers to a regional committee created to assist superior courts in recruiting and screening counsel, and thus is inapplicable to direct appeals, in which only the Supreme Court makes appointments. Proposed rule 8.605(g)(2) retains the existing language in current rule 8.605(j)(2), which provides that the Supreme Court, and not the designated entity (i.e., OSPD or CAP-SF) is to determine whether an attorney meets the alternative qualifications for lead counsel in an automatic appeal. Unlike the responsibility for vetting counsel for habeas counsel appointments, which under separately proposed rules would be shared between multiple entities, the responsibility for vetting counsel for automatic appeals remains solely with the Supreme Court. As a result, the working group concluded that it remains appropriate for the Supreme Court alone to continue to determine whether counsel—including designated entity counsel—meet alternative qualifications.

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Rule 8.605(d), (g)(2): Alternative qualifications for automatic appeals		
Commenter	**Comment**	**Proposed Working Group Response**
	work responsibilities at their job. As someone who worked at OSPD, doing so would have made me feel profoundly uncomfortable, as it would have felt as though I was essentially skipping over the internal management structure of the agency to essentially ask for a promotion form the Court. This simply seems unrealistic and I would be surprised if many OSPD attorneys chose to avail themselves of this option.	

Rule 8.605(f): Joint appellate and habeas corpus appointment		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the State Public Defender (OSPD) by Mary McComb State Public Defender Oakland, California	2. Proposed rule 8.605(f) seems to be outdated and unnecessary. It appears to contemplate a joint appellate and habeas appointment in the California Supreme Court. Under the new procedures, it is unclear whether this situation would ever occur.	The working group agrees that this provision may prove to be unnecessary, but retained it in an abundance of caution. Thus, the working group declined to delete this provision at this time.

Rule 8.652(c)(1): Years of legal experience		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The proposal contains one, and only one, defensible increase in restriction. The present California standard for capital habeas attorneys is four years admission to the bar (see present Rule 8.605(e)(1)) while the corresponding federal standard is five years. (See 18 U.S.C. § 3599, subd. (c).) An increase to meet the federal standard does improve California's chance of qualifying for Chapter 154, if only marginally, with little impact on the available pool, and it is warranted. (See Proposed	The working group notes the commenter's support for proposed rule 8.652(c)(1).

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Rule 8.652(c)(1): Years of legal experience		
Commenter	**Comment**	**Proposed Working Group Response**
	Rule 8.652(c)(1).)	

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**2. Appellate experience on behalf of the prosecution can appropriately be counted, but no credit should be given for habeas experience on behalf of the prosecution** I learned the appellate lawyer's craft representing the prosecution in responding to appeals from felony convictions. That experience, plus a small number of non-capital criminal appeals on the defense side, was an appropriate background when I began representing death-sentenced clients on appeal. I have no problem with recognizing appellate experience as a prosecutor as a permissible part of the background for a lawyer applying to represent death-sentenced clients on appeal, so long as the lawyer also has significant experience representing criminal defendants on appeal, and meets all the other qualifications. (Rule 8.605(c)(2).) However, I strongly recommend that experience responding to habeas corpus petitions on behalf of the prosecution not be given any weight in assessing a lawyer's qualifications to represent capital habeas petitioners. Rule 8.652(c)(2) should be modified accordingly. Most California habeas petitions, capital and otherwise, are resolved based on the factual showing made in the petition. Under California's informal briefing process and prima facie	The working group declined to modify the case experience provision to exclude habeas corpus case experience on behalf of respondent from satisfying any part of the combined case experience. Proposed rule 8.652(c)(2) would already require experience as counsel of record for the petitioner in one or more habeas corpus proceedings. The working group concluded that permitting additional habeas corpus experience on behalf of the prosecution to satisfy the overall case experience requirements strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	case standard, factual investigation by the prosecution in preparing to respond to a habeas petition is not only unnecessary, it is inappropriate. The prosecution's function in responding to a habeas petition is more akin to the appellate practice: briefing the law on a closed record. That experience does not meaningfully prepare a lawyer for the intensive factual investigation required to prepare a capital habeas petition on behalf of the petitioner.	
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**<u>Attorney Qualifications Considering Proposition 66's Expedited Timeframes</u>** Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial: • prior knowledge of state and federal habeas corpus procedures, including the implications of the Anti-terrorism and Effective Death Penalty Act (AEDPA); • experience conducting evidentiary hearings; • knowledge of current capital trial standards of practice; • experience employing current standards in forensics and mental health; • complex case management experience; and, • effective use of expert witnesses.	The working group appreciates this input regarding knowledge of state and federal habeas corpus procedures, and has retained the provision in proposed rule 8.652(c)(3), requiring familiarity with with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings. The working group appreciates this input regarding evidentiary hearings, and has retained the provision in proposed rule 8.652(e) requiring that, if an evidentiary hearing is ordered, counsel must have such experience or associate with an attorney who does. The bullet points regarding capital trial standards of practice, standards in forensics and mental health, complex case management, and expert witnesses are addressed in the chart below, regarding additional skills and areas of experience, at page 87.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	<u>Experience Necessary for Appointment as Habeas Corpus Counsel</u> The expedited timeframes of Proposition 66 necessitate a team approach to capital habeas corpus defense. A capital habeas corpus team must utilize at least the following: • At least one team member must have capital habeas corpus experience. • At least one team member must have substantial capital trial experience. • At least one team member must have substantial experience in forensic sciences. • At least one team member must have substantial experience with mitigation and mental health. • Prosecution experience alone is not sufficient. • Attorneys should have at least 5 years of murder trial experience with demonstrated skills in research and writing and forensics. • A petition for a writ of habeas corpus is typically hundreds of pages in length with many dozens of exhibits. Experience with other types of writs is not comparable or sufficient.	The current appointment rules, as well as those proposed in the separate report addressing death penalty–related habeas corpus appointments, do not require the court to appoint more than one attorney in a death penalty–related habeas corpus case. As a result, the draft rules propose qualifications that must be met by individual attorneys, and not a team of attorneys. The working group concluded that requiring the combined case experience to include prior death penalty–related habeas corpus experience, substantial capital trial experience, or murder trial experience, would unduly restrict the pool of attorneys eligible to accept appointments. In response to the comment that experience with writs other than habeas corpus writs is not comparable or sufficient, the working group appreciates this input and agrees that other writs should not be part of the combined case experience. Proposed rule 8.652(c)(2) would limit qualifying cases to completed appeals, habeas corpus proceedings, or jury trials in felony cases. In response to the comment that prosecution experience alone is not sufficient, the working group appreciates this input and notes that proposed rule 8.652(c)(2)(B) and (C) requires service as counsel of record for petitioner in at least two habeas corpus proceedings.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
		The bullet pointed comments that counsel must have substantial experience in forensic sciences, with mitigation, and with mental health, are addressed in the chart below, regarding additional skills and areas of experience, at page 87.
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	**Proposed Rule 8.652 (c): Qualifications for appointed habeas corpus counsel** **8.652(c)(2): Case experience** The case experience identified in (A). (B), or (C). Read in combination with the definitions in proposed Rule 8.601, the committee's intent in subsections 2(A) and 2(B) seems fairly clear, but there is nonetheless ambiguity in wording regarding who counsel must have represented that should be resolved. It is recommended that in 2(A) the word person be changed to petitioner and in 2(B)(i) that the word petitioner be added. The suggested modification results in sections 2(A) and (B)(i) reading as follows: Subsection 2(A): "Service as counsel of record for a ~~person~~ *petitioner* in a death penalty-related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court." Subsection (B)(i):	 The working group has made the suggested clarification to rule 8.652(c)(2)(A).

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	"Supervised counsel *for a* petitioner in two death penalty-related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty-related habeas corpus proceeding will apply toward this qualification only if lead or." Subsection 2(C): "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including , including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing." The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation. Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health	The working group concluded that this change to rule 8.652(c)(2)(B)(i) was not necessary. The definitions in proposed rule 8.601 already establish that "supervised counsel" is counsel for a petitioner.

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

All comments are verbatim unless indicated by an asterisk (*).

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	issues, intellectual disability and social history development. Additionally, as written this proposed rule might allow counsel to seek and attain qualification where (s)he has litigated a serious felony habeas corpus petition that was limited to a single narrow legal issue. This does not comport with the purpose of the rule.	
	Specifically, the language of Section (2)(C) requires experience in "at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed." To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows: "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases. In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed.* *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification: and familiarity with death*	The working group agrees that prior habeas corpus experience on behalf of a petitioner is critical, particularly now that counsel generally will have one year in which to file the initial death penalty–related habeas corpus petition. Accordingly, proposed rule 8.652(c)(2)(B) and (C) would require that counsel have filed at least two habeas corpus petitions involving serious felonies. This departs from current rule 8.605(e)(2)(A), which requires experience in at least three jury trials *or* habeas corpus proceedings involving serious felonies. The working group declined to also require that at least four of the eight cases involve serious felonies, and that the two habeas corpus petitions involve murder convictions. The working group concluded that further increasing the combined case experience requirement could unduly restrict an already limited pool of available and qualified attorneys, particularly with respect to the murder convictions. A person seeking to collaterally attack a conviction generally is not entitled to counsel until he or she filed detailed factual allegations stating a prima facie case and sufficient to satisfy a court that a

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Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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	qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case."	hearing is required. As a result, the pool of available and qualified counsel who have filed one or more habeas corpus petitions collaterally attacking murder convictions is likely limited. The comment's suggested modification concerning demonstrated proficiency and service as supervised counsel is addressed in the chart below, regarding additional skills and areas of experience, at page 88.
California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	• The Committee agrees that representation of either party—the prosecution or the defense—in felony appeals, habeas corpus proceedings, or jury trials should satisfy some case requirements for appointment in death penalty–related habeas corpus proceedings. However, we suggest that counsel should have experience representing the defendant/appellant/petitioner in at least half of the proceedings, including at least two qualifying habeas proceedings. • For attorneys who do not have death penalty–related experience, the requirements should be increased, either by increasing the number of felony habeas cases to 5 or more, or by requiring that qualifying habeas cases involve post-conviction investigation.	The working group declined to modify proposed rule 8.652(c)(2)(C) to require that half of the case experience be defense-side experience. (Proposed rule 8.652(c)(2)(B) already requires at least four prior cases on behalf of petitioner: two cases as supervised counsel in a capital case and two cases as counsel of record in petitions involving serious felonies.) The working group also declined to increase the number of required habeas corpus proceedings to at least five, or to require that any qualifying habeas corpus petitions involve post-conviction investigation. The working group agrees that representing a petitioner involves different skills and substantive knowledge than does representing the State. The working group also agrees that prior habeas corpus experience and investigation skills are necessary. However, the working group is mindful of the need to expand the pool of qualified attorneys, and encourage interested attorneys—including those with prosecution experience—to apply

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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		for appointment. The existing qualifications rule does not specifically require any habeas corpus experience or post-conviction investigation experience. Requiring more habeas corpus experience than the proposed two petitions could unduly restrict the pool of attorneys eligible to accept appointments. Ultimately, the working group concluded that requiring service as counsel for petitioner in at least two habeas corpus petitions involving serious felonies, but otherwise permitting the remaining case experience requirements to be on behalf of either party, strikes the appropriate balance between these competing interests. For investigation experience, rather than modify the quantitative habeas corpus experience requirement to include post-conviction investigation, the working group concluded that retaining the qualitative provisions requiring proficiency in investigation would be sufficient. Proposed rule 8.652 would require that counsel "demonstrate proficiency in investigation" and have the "knowledge[] and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death."
California Public Defenders Association by Robin Lipetzky President Sacramento, California	The Judicial Council asked, "[w]hether permitting any combination of case experience-instead of set numbers of each type of case-is appropriate, because an attorney could then qualify for appointment without having completed any felony appeals or any jury trials." (Invitation, page 8.) We agree with the concern expressed by the Judicial Council, and object to	The working group declined to require a set number of each type of case experience. The working group concluded that such category-specific requirements could discourage some capable attorneys from applying. For example, an attorney with no appellate experience may have significant habeas corpus experience sufficient

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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	permitting any combination of case experience instead of set numbers. The specific requirements for each type of case are important. Each represents an important component that is necessary for competent representation in a capital habeas corpus proceeding. With respect to "[w]hether counsel should be required to have handled a murder case and, if so, in what context (e.g., trial, appeal, habeas corpus proceeding), or whether it is sufficient that the past cases involve serious felonies" (page 8), we submit that counsel should be required to have handled a murder case as lead counsel at trial or on appeal, or as second (or lead) on a completed habeas petition. We recognize that experience in habeas corpus litigation is essential. However, previous representation on a murder case is critical because of the significant differences between murder charges and any other serious felony. Further, if counsel has not already represented an individual convicted of murder in a habeas proceeding, then they should have at least been lead counsel in a murder trial or a direct appeal from a murder conviction. The Council considers whether prior service as counsel for the prosecution should satisfy the experiential qualifications. (Page 8.) We object to allowing service as counsel for the prosecution to satisfy any part of the requirements. The rules already allow for an alternative basis for qualification that does not require any prior defense experience. Thus, in the extremely rare (if ever) circumstance where an applicant must rely on	to demonstrate the requisite proficiency in investigation, issue identification, and writing. The working group concluded that using a combined case experience requirement that includes two habeas corpus petitions affords both counsel and entities responsible for vetting and appointing counsel some flexibility while still achieving competent representation. With respect to the suggested murder requirement, as discussed in the response to the comments of CAP-SF above, the working group has concerns that the pool of attorneys who have prior experience filing habeas corpus petitions in murder cases may be quite limited. While the pool of attorneys who have represented appellants in direct appeals from murder convictions or defendants charged with murder in a jury trial likely is larger, including a murder experience requirement in addition to the proposed habeas corpus experience requirement could unduly restrict and further shrink an already limited pool of available attorneys who may be capable of providing competent representation. The working group declined to exclude prosecution experience from satisfying any part of the combined case experience. The suggested modification could discourage former prosecutors who might otherwise be interested and qualified from seeking appointment. Also, proposed rule 8.652(c)(2)(B) and (C) already would require service as counsel for petitioner in two habeas corpus proceedings involving serious felonies. The

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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	prosecutorial experience in order to meet the minimum qualifications for appointment as capital habeas counsel, the existing rules allow for consideration of a potentially exceptional applicant. We object to treating service as habeas counsel from convictions on serious felonies in two separate cases as a satisfactory substitute for having never represented a condemned prisoner on a habeas petition from a death sentence. (Page 8.) We believe that a lawyer who has never filed a habeas petition from a death sentence should have filed more than two prior habeas petitions from serious felony convictions in order to be appointed on a capital habeas case. The timeline in these cases will be so compressed that if the lawyer is not well-versed in habeas procedure, he or she will not be able to meet the deadlines. Filing two habeas petitions from robbery or residential burglary convictions pales in contrast to the demands of filing a habeas petition from a death sentence. The consequences of procedural error or failing to raise all potentially meritorious issues can be catastrophic because of limitations on successor petitions. The requirement should be five habeas petitions with a minimum of three from violent felony convictions or two from murder convictions. * * * Our additional comments to specific Rules are as follows: * * * Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C): for the reasons	working group concluded that permitting additional experience on behalf of the prosecution to satisfy the overall case experience requirements strikes the appropriate balance between achieving competent representation and not unduly restricting the eligible pool of counsel. With respect to the suggestion regarding increased habeas corpus experience, please see the responses to the comments of CAP-SF above, regarding requiring habeas corpus experience in murder cases, and of CLA above, regarding increasing the number of habeas corpus petitions.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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	explained above, replace "for either party" with "as defense counsel". In addition, change "including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed" to "including as counsel of record for a petitioner in at least three habeas corpus proceedings, each involving a violent felony in which the petition has been filed, or at least two habeas corpus proceedings involving murder convictions in which the petition has been filed."	
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	One essential element of the Proposition 66 reform for broadening the pool is to require prosecution experience to fully count. Relegating highly experienced former prosecutors to the "back of the bus" of alternative qualification was uncalled for from the very beginning. It is highly doubtful whether the Judicial Council has authority under Government Code section 68665 to require defense-side experience at all. If we assume for the sake of argument that defense-side experience can be required in some degree, the requirement that counsel's experience include two habeas corpus cases *for the petitioner* in Proposed Rule 8.652(c)(2)(B)(ii) and (C) seems designed to insure that experienced attorneys leaving prosecuting offices will not qualify for some time, directly contrary to the intent of the Proposition 66 reform. An experienced attorney can learn the ropes of a procedure from either side. This restriction must be deleted.	The working group's view is that adoption of the proposed rule is well within the scope of the Judicial Council's authority because it is not inconsistent with statute. Government Code section 68665, as amended by Proposition 66, directs that "[e]xperience requirements shall not be limited to defense experience." The proposed rule is not limited to defense experience but instead would provide that, aside from the two petitions that are required to be filed on behalf of petitioner, service as counsel "for either party" would satisfy the combined case experience. The working group declined to omit the proposed requirement that qualifying case experience include filing habeas corpus petitions. Preparing a habeas corpus petition involves not just procedural knowledge, but different skills and substantive knowledge than responding to a petition. Due in part to the newly created one-year deadline for filing an initial death penalty–related habeas corpus petition, the working group agreed

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		that death penalty–related habeas corpus counsel will have little time to learn on the job, and thus it is important for counsel to have prior experience on behalf of a habeas corpus petitioner. Some working group members are of the view that counsel ideally should have filed more than two habeas corpus petitions before accepting an appointment in a death penalty–related habeas corpus case. However, the working group is also mindful of the need to expand the pool of qualified attorneys, and encourage attorneys—including those with prosecution experience—to apply for appointment. The working group ultimately concluded that serving as counsel of record for petitioner in at least two habeas corpus petitions involving serious felonies strikes the appropriate balance. In the experience of working group members, this requirement is unlikely to unduly restrict the eligible pool of counsel because attorneys with no prior experience filing a habeas corpus petition generally do not want their first attempt to be in a capital case. Additionally, the working group retained the alternative experience provision, which would not require prior habeas corpus experience.
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	• *Should service as counsel on behalf of any party satisfy the requirement for prior case experience, or should some or all of the experience be as counsel for the defendant/appellant/habeas corpus petitioner?* The proposed rules do not and should not allow service as counsel on behalf of any party to satisfy the requirement for	 The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(2)(B)

Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
Commenter	**Comment**	**Proposed Working Group Response**
	prior case experience. Representing petitioners in capital habeas corpus proceedings is unique and requires a high degree of skill and technical proficiency, especially regarding the identification, development, and presentation of mitigation evidence. In its 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the American Bar Association emphasized that "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." 31 Hofstra L. Rev. 913, 923 (2002). Just as the defense of ordinary criminal cases is different from capital-case defense, so too is the prosecution of criminal cases – even death penalty cases. Prosecution experience alone should not satisfy the requirement of prior case experience. * * * •*What minimum combination of past case experience should counsel have before being eligible for appointment in a death penalty-related habeas corpus proceeding?* • *Should counsel be required to have experience in habeas corpus proceedings, appeals, jury trials, and/or other writ proceedings?* • *Should counsel seeking appointment in a death penalty-related habeas corpus proceeding have prior case experience relating to a murder charge or conviction?* As discussed above with respect to training requirements,	and (C), requiring service as counsel of record for petitioner in at least two habeas corpus proceedings.

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Rule 8.652(c)(2): Combined case experience for habeas corpus counsel		
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	representation of petitioners in capital habeas corpus proceedings presents unique challenges not inherent in other areas of criminal practice. Non-capital criminal cases – even murder cases – do not involve a penalty phase, and therefore experience in non-capital cases will not prepare an attorney for that critical aspect of capital habeas corpus defense representation. Moreover, representation of defendants in capital in murder trials often does not involve extensive briefing and the understanding of labyrinthine state and federal procedural rules and standards of review required by counsel representing petitioners in capital habeas proceedings. Appellate cases – even in the capital context – do not involve development of extra-record facts, and therefore experience on criminal appeals, even when capital, will not prepare an attorney to do that work in a capital habeas proceeding. Representation of the state in criminal cases – even in capital cases – does not require mitigation investigation, nor does it present issues of client relations present in the representation of criminal defendants, and specifically death row inmates.	
	To better approximate the skills required for adequate representation of petitioners in capital habeas corpus proceedings, proposed rule 8.652(c)(2)(C) should require habeas corpus case experience in *at least* four serious felony cases, including at least two habeas corpus proceedings involving a murder conviction in which the petition has been filed. In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in	Please see the response to the comments of CAP-SF above, regarding habeas corpus case experience. The suggested modification concerning demonstrated proficiency is addressed in the chart below, regarding additional skills and areas of experience, at page 92.

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	jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.	
Marylou Hillberg Attorney at Law Sebastopol, California	One of the most glaring omissions is that these rules do not even require prior experience in a murder case. That is extremely perplexing to me as most of the habeas work I have done, and what I have read in other cases, involves the impact of mental states and defenses on criminal behaviors. As a criminal defense attorney, one does not really begin to comprehend how the various forms of mental illness and disabilities affect the behaviors of our clients until we must apply them to defense in the varied degrees of homicide. I've handled more than seventy-five murder cases and can count on one hand (probably with fingers left over) how many of these cases were "who dun it"[s]. The issues I've encountered generally involved varied mental states as defenses to the crimes. Most other types of serious crimes, do not require this kind of analysis.	Please see the response to the comments of California Public Defenders Association above, regarding prior experience in a murder case.
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	We have a second concern regarding Proposed Rule 8.652(c)(2) and trial prosecutorial experience. This Rule accepts experience as prosecution trial counsel in habeas corpus appointments. Representing the State in a trial may or may not provide relevant defendant/petitioner habeas corpus experience. As the Council is aware, a trial prosecutor may have nothing to do in a habeas corpus proceeding. Once a petitioner files a petition for writ of habeas corpus in the	The working group agrees that a case in which counsel did no substantive work should not satisfy the minimum case experience requirements. The working group has revised the proposed rule to clarify that a case in which counsel did not file a brief in an appeal, or did not file a petition, informal response or return in a habeas corpus proceeding, does not satisfy any part of the combined case experience.

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	superior court, the court may rule on the petition by issuing an order to show cause, denying the petition, or requesting an informal response. *See* Rule 4.551(a)(4). If the court summarily denies the petition, then the prosecutor never files anything. We suggest the Proposed Rule be modified to state, "A former state or county prosecutor's habeas corpus case experience qualifies under this rule only if the prosecutor filed an informal response or filed a return to an order to show cause." As with habeas corpus petitions in the superior court, habeas corpus petitions filed in the Court of Appeal or the Supreme Court may be resolved summarily, without involving the prosecutor. *See* Rule 8.385. We recommend a prosecutor's qualifying experience regarding habeas corpus petitions filed in **any** court be limited to those cases where the prosecutor filed an informal response or a return to an order to show cause.	

Rule 8.652(e): Attorneys without trial experience		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	Proposed Rule 8.652(e) directs an attorney appointed as habeas counsel, who does not have experience in trials or evidentiary hearings, must "associate with an attorney who has such experience" if an evidentiary hearing is ordered. This proposal raises questions: What mechanism or process does appointed counsel use to "associate" with counsel who has trial experience? Is the superior court that appointed habeas counsel required to appoint an associate counsel once it orders	The proposed rule is substantially identical to current rule 8.605(g), which also requires that counsel lacking such experience must "associate an attorney who has such experience" if an evidentiary hearing is ordered. In the experience of members of the working group, this situation occurs infrequently. Rather than add a requirement that a superior court formally appoint "associate counsel" in all such situations, the working group retained the existing language, which is silent on

Rule 8.652(e): Attorneys without trial experience		
Commenter	**Comment**	**Proposed Working Group Response**
	an evidentiary hearing? Does associate counsel have to meet Proposed Rule 8.652(c)'s qualifications? Must associate counsel be appointed only from the panel? We recommend the rule require the superior court appoint associate counsel from the panel.	the particulars. This arguably leaves to the discretion of the court whether to appoint additional counsel, and leaves to the discretion of appointed counsel the details of exactly how to associate with more experienced counsel. Different cases may call for different decisions as to the necessity of additional appointed counsel. However, the working group agrees that where a court determines that additional counsel who has experience in trials or evidentiary hearings should be appointed, associate counsel must meet the qualifications of 8.652(c) or (d), and must be appointed from the panel or pursuant to a court's local rule. This already would be required for appointed counsel by the proposed rules in the separate report addressing the appointment of habeas corpus counsel in the superior courts.

Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	**4. The rules should identify experience in settlement negotiations as a valuable asset for capital counsel** One means of making the substantial additional capital habeas caseload more manageable for the superior court will be to encourage settlement of capital habeas cases. The percentage that settle may not be as high as for other types of complex, document- intensive civil litigation, but if the attempt is made the settlement rate is likely to be significant. This will benefit	The working group declined to modify the proposed rules to include a reference to settlement negotiation experience and skills at this time. The proposed rules are intended to set forth minimum qualification standards that all death penalty–related habeas corpus counsel must meet. Additionally, the topic of recommending that superior courts encourage settlement of death penalty–related

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	the courts, the survivors of homicide victims, and the habeas petitioners. The regional committees should be encouraged to inquire whether applicants have experience in settlement negotiations, mediation, and other forms of alternative dispute resolution in either civil or criminal cases. Even though such experience should not be a requirement, it should be weighed in an applicant's favor. Reference to this subject in the rules and by the regional committee would send an appropriate signal to all concerned that settlement should be considered in every capital habeas case.	habeas corpus proceedings was not considered by the working group in developing the proposed rules prior to circulation for comment. There is not sufficient time for this working group to consider, develop, and circulate a separate proposal on this topic. Therefore, the working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Attorney Qualifications Considering Proposition 66's Expedited Timeframes** Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial: * * * • knowledge of current capital trial standards of practice; • experience employing current standards in forensics and mental health; • complex case management experience; and, • effective use of expert witnesses. **Experience Necessary for Appointment as Habeas Corpus Counsel**	The working group declined to modify the proposed rules to require the additional experience suggested. The existing qualifications rules do not include the suggested requirements, such as substantial experience in mitigation and forensic sciences. The working group has concerns that including these additional experience requirements could unduly restrict the pool of attorneys eligible for appointment. The working group also declined to modify the proposed rules to include the specific knowledge suggested in the comment, and concluded that retaining the more general requirement that counsel demonstrate the "knowledge[] and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death" was sufficient at this time.

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Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	* * * • At least one team member must have substantial experience in forensic sciences. • At least one team member must have substantial experience with mitigation and mental health.	
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation. Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health issues, intellectual disability and social history development. * * * To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows: "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four* *serious felony cases.*	The suggested modification concerning serious felony and murder cases is addressed in the response above, regarding combined case experience, at pages 75–76. The working group declined to modify the rules to require that the combined case experience be sufficient to demonstrate the additional areas of proficiency and familiarity specified in the comment. The existing qualifications rules do not include the suggested requirements. The working group had concerns that mandating these additional requirements could unduly restrict the already limited pool of attorneys eligible and available for appointment. For example, requiring that an attorney's combined case experience be sufficient to demonstrate "familiarity with death qualification in jury selection," would seem to require the attorney to have prior capital experience. The working group agrees that encouraging less experienced attorneys to serve as supervised counsel—as well as encouraging more experienced attorneys to work with and engage supervised counsel—may be

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Commenter	**Comment**	**Proposed Working Group Response**
	In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings. each involving a murder conviction in which the petition has been filed. *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic iss ues, and issue identification: and familiarity with death qualification in jury selection. mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case."*	critical to expanding the pool of qualified available counsel. In response to this and other comments, the working group has modified proposed rule 4.562, recommended in the separate report addressing appointment of habeas corpus counsel, to include an advisory committee comment encouraging regional committees and courts to provide mentoring and training programs and opportunities to engage and serve as supervised counsel.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	The proposal, SP 18-12, requests specific comments on 12 questions. With the exception of the first two questions, they all address the sufficiency of the proposed requirements for training and experience of attorneys appointed to represent petitioners in state habeas corpus proceedings. Mexico's primary concern about these proposed requirements is that they do not account for the special needs of foreign nationals in death penalty cases. Representing foreign nationals requires additional skills, experience, and training beyond that necessary for capital habeas corpus representation generally. Indeed, the American Bar Association's widely cited *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,*	The working group declined to add specific additional qualifications for counsel eligible to represent foreign nationals. The working group appreciates this comment and acknowledges that representing a foreign national may require certain skills, experience, or training that may not be necessary or beneficial when representing a U.S. citizen. However, the same may be true for other subsets of persons sentenced to death. Additionally, individual foreign nationals will have different legal needs. For example, a legal permanent resident who has resided in the U.S. since infancy may not necessarily require counsel who has experience in coordinating investigation in a foreign country or who is familiar with immigration-related trauma. Rather than attempt to

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Commenter	**Comment**	**Proposed Working Group Response**
	(Rev. ed. 2003) include an entire guideline, Guideline 10.6, specifically addressing “Additional Obligations of Counsel Representing a Foreign National.” In addition to working with consulates, attorneys representing Mexican nationals in death penalty habeas corpus proceedings must at a minimum be familiar with relevant treaties and international law issues; have an understanding of the cultural differences that may affect the client and witnesses in their interactions with counsel and the legal system; be experienced in coordinating an extensive investigation in a foreign country; and be familiar with issues that frequently arise in these cases that are comparatively rare in U.S. citizen cases, such as problems with language barriers and interpreters, the location and evaluation of culturally knowledgeable and appropriate experts, and mitigation themes such as exposure to pesticides and immigration-related trauma. Because habeas corpus counsel must evaluate the sufficiency of trial counsel’s representation in addition to re-investigating both the guilt-innocence and penalty portions of the case, he or she must understand what competent trial-level representation of a Mexican national entails. The proposed rules fail to account for these necessary skills and experience. They require no training on cultural issues; indeed, proposed Rule 8.652(c)(4)(C) would allow an attorney who has completed just one death penalty-related habeas corpus proceeding for a U.S. citizen to be appointed on a Mexican national’s case with no required training at all. They allow for the appointment of attorneys who have never litigated or even researched an issue regarding a treaty, such as the Vienna Convention on Consular Relations, the U.S./Mexico Mutual	create separate qualifications for each type of case or category of persons, these state-wide rules are intended to set forth minimum qualification standards that all death penalty–related habeas corpus counsel should meet. Whether a specific attorney is well-suited to a specific case is something to be considered by the recommending committee or superior court vetting counsel pursuant to a local rule, and the judge making the appointment. The working group expects, as is true now, that matching an attorney and their specific skill set to a particular case will continue to be a key step in the recommendation and appointment process.

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Commenter	**Comment**	**Proposed Working Group Response**
	Legal Assistance Treaty,2 and the bilateral U.S./Mexico Consular Convention. A Mexican national defendant could find himself represented by an attorney who had never before met a person from Mexico, never left the United States, speaks no Spanish and has never worked with an interpreter, and has never attempted to gather or analyze records or interview witnesses in a foreign country. While these omissions would be of concern any time an attorney takes on representation of a foreign national, they are especially worrisome in view of Proposition 66's one-year time limit on preparing and filing the petition. Appointed attorneys will have no time to familiarize themselves with new areas of law, unfamiliar cultural issues, or logistical challenges associated with investigation abroad. An attorney with no training or experience in these areas simply cannot provide effective representation to these individuals under such limitations. At a minimum, the qualifications for counsel appointed in death penalty habeas corpus proceedings in the cases of foreign nationals must include substantial training and experience in representing such clients. The proposed rules already account for additional requirements in a subset of cases with greater needs; Rule 8.652(e) recognizes that experience conducting trials evidentiary hearings may not be necessary for adequate representation in every case, but may become necessary in certain cases, requiring the involvement of an attorney with such experience. Thus, including requirements for the requisite experience where necessary need not increase the required experience for counsel in every case. It would be quite feasible to account for the needs of this subset of specialized cases	

Additional skills and areas of experience		
Commenter	**Comment**	**Proposed Working Group Response**
	without significantly compromising the goal of increasing the pool of available counsel for death penalty habeas corpus cases generally.	
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.	Please see the response to the comments of CAP-SF above.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	The proposed rule fails to ensure that appointed counsel have adequate familiarity with, and training in, capital habeas corpus jurisprudence and practice. One of many important differences that makes death penalty cases unique from other serious felony and special circumstance murder cases is the bifurcated penalty phase. Identifying and developing mitigation issues in the penalty phase involves a knowledge and skill set that is not required in non-capital cases. Proposition 66's jurisdictional one year filing deadline makes it vital that appointed counsel have the skill and knowledge to identify and develop penalty phase mitigation issues as soon as they are appointed to a case.	The proposed case experience and training requirements are just two components of the proposed minimum qualifications standards. The proposed rules, like the existing rules, would also specifically provide that counsel must not only meet the minimum qualifications in the rules, but also must demonstrate the commitment, knowledge, and skills necessary to competently represent a person in a death penalty–related habeas corpus proceeding. Counsel lacking the necessary knowledge and skills would not qualify, even if they meet the quantitative experience and training requirements.

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	Counsel who have not represented a capital defendant or petitioner lack the necessary experience and familiarity with death-penalty specific issues. Specific habeas related training requirements, and a mandated training for counsel who have not previously represented a capital client, will help to ensure that appointed counsel has the necessary capital habeas skills and knowledge from day one of her appointment. The draft rule (8.652(c)(2)) clarifies that "experience for either party counts toward meeting the case experience requirements." (Invitation to Comment - SP18-12, at 6.) This language suggests that former prosecutors may be deemed qualified for appointment even where critical skills that can be acquired only through the experience of having represented a defendant or completed a petition are lacking. Former prosecutors may have familiarity with the case law governing the death qualification of jurors and the penalty phase of a capital trial, such knowledge, while important, does not include all the necessary skills that a capital defense litigator must possess. Attorneys who have developed death penalty skills from the prosecution side lack the fundamental defense skills of identifying and developing mitigation, key skills necessary to quality defense death penalty representation. In sum, without specific and intensive training and robust collaboration with an assisting entity, even death penalty prosecutors lack a vital skill set required to competently represent a capital habeas petitioner as lead counsel.	The working group agrees that death penalty–related habeas corpus–specific training is important and recommends increasing both the overall the hours of training and the minimum subject–specific training. The working group, however, declined to mandate that all proposed 15 hours of overall proposed training be devoted to death penalty–related habeas corpus–specific training, or that 10 hours be devoted to the more narrow topics of penalty phase issues and investigation. Individual courts and the regional committees would not be foreclosed, however, from encouraging counsel to satisfy additional or more specific trainings. Expanding the pool of qualified available attorneys will likely require attracting attorney applicants who not only may have no prior death penalty–related habeas corpus experience, but who also may have less appellate and habeas corpus experience than the pool of attorneys who have sought appointment from the Supreme Court in the past. The proposed combined case experience requirement, for example, would not specifically require that counsel have completed any felony appeals. As a result, some attorneys may find that they would benefit from training in appellate criminal defense or habeas corpus defense that is not necessarily specific to capital cases. Additionally, even attorneys experienced in death penalty–related habeas corpus proceedings may benefit from training in areas that are not capital case–specific, but still relevant, such as DNA evidence or jury

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SP18-12

Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.601 and 8.652, amend rule 8.605; amend rule 8.600 and renumber as 8.603; renumber rules 8.495, 8.496, 8.498, and 8.499)

All comments are verbatim unless indicated by an asterisk (*).

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	CAP-SF recommends two modifications to proposed Rule 8.652 (c) (4). 1. Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training ... , at least 10 hours of which address death penalty habeas corpus proceedings." The rule should be modified to require 15 hours in death penalty habeas corpus training, and 10 of those hours must address penalty phase issues and investigation. Proposed Modification: "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of ~~appellate criminal defense or~~ *death penalty* habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which ~~address death penalty habeas corpus proceedings~~ *penalty phase issues and investigation*." 2. A sub-section should be added to Proposed Rule 8.652(c)(4) requiring additional training for appointed counsel who, within the preceding three years prior to applying for placement on the panel, has not represented either 1) a defendant in a capital trial through the penalty phase, or 2) a petitioner in a death penalty-related habeas corpus proceeding through the filing of the habeas petition. After counsel has been	selection. The working group concluded that the proposed training strikes the appropriate balance between requiring increased death penalty–related habeas corpus–specific training, and also permitting appellate criminal defense or habeas corpus defense training that may not be capital case–specific, but still relevant, to satisfy part of the training requirement. While the working group appreciates that many attorneys likely would benefit from attending an additional multi-day training, this suggested

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	deemed qualified by the regional committee, but before any superior court appointment, such counsel must complete a multi-day training on death penalty specific issues such as death qualification in jury selection and identifying and developing mitigation issues. The CAP-SF currently provides such training for counsel appointed by the California Supreme Court; therefore, this training could be coordinated and provided by the assisting entity.	modification would triple or quadruple the existing training requirements for all counsel without recent capital trial or habeas corpus experience. The working group agrees that increased training is necessary, but declined to require more than the proposed 15 hours of training overall at this time. 15 hours is already 6 hours more than is required by the existing rules. Mandating a greater increase in hours at this time could discourage otherwise interested counsel from seeking appointment.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**<u>Training Requirements for Appointed Habeas Corpus Counsel</u>** Criminal defense experience is no substitute for training. Specialized capital case training is available in California and through nation-wide criminal defense organizations. Qualified training programs must be vetted by the State Bar and the committee of attorneys who qualify counsel for inclusion on the Supreme Court roster. Attorneys must participate in 18 hours of capital case training over 3 years. Attorneys must complete at least 9 hours of capital case training within the year prior to appointment. Instructors of qualified training should receive credit for twice the number of Continuing Legal Education hours	The working group appreciates this input and agrees that trainings should not qualify unless approved for MCLE credit by the State Bar. The working group, however. declined to require that the regional committees, which are described in greater detail in the separate report addressing appointment, should also be required to approve training programs. The working group concluded that having trainings approved state-wide by a single entity would both promote uniformity and relieve the committees of an additional duty. With respect to the suggestion for increased capital case training, please see the response to the comments of CAP-SF above. The working group also declined to increase the frequency of the training or otherwise require training to be completed more recently. There were concerns that mandating such additional

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	allotted for their session(s).	requirements at this time could make the training requirement seem unduly burdensome, and thereby discourage otherwise interested counsel from seeking appointment. There was no clear agreement in the comments or even among members of the working group as to what amount of training credit instructors should receive for each hour of teaching a qualified course. Ultimately, the working group declined to specify the amount of credit. Instead, the working group retained the proposed provision, which also is in the proposed qualifications for capital appellate counsel, leaving the decision to the discretion of the vetting entity, whether that is the regional committee, a superior court, or the Supreme Court.
California Lawyers Association (CLA) Committee on Appellate Courts, Litigation Section by Saul Bercovitch, Director of Governmental Affairs Leah Spero, Attorney San Francisco, California	• In terms of training, the Committee has the following suggestions: o The proposed rules require several training hours, only some of which have to be subject specific (either to "death penalty appeals" or to "death penalty habeas corpus proceedings"). The Committee questions whether the remaining hours of criminal defense training in unspecified topics is relevant and believes it is more important to focus on the subject-specific training and the recentness of the training. To this end, the Committee suggests using only the subject-specific training requirements proposed in the rule and perhaps increasing them. Additionally, the Committee	With respect to the subject specific training, the working group appreciates this input and has retained the proposed increase to such training hours. However, as discussed further in the response to the comments of CAP-SF above, the working group declined to modify the proposal to omit the more general appellate criminal defense or habeas corpus defense training, or to further increase the subject specific hours. With respect to the suggestion that some training be

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	suggests adding a requirement that (a) some number of the hours must be completed within the year prior to the application date and (b) persons placed on the habeas corpus panel must complete some number of hours of death-penalty-habeas-corpus training per year unless handling a case that year. o Prior capital case experience should be allowed to satisfy some or all of the training requirements, depending on the extent and recentness of the experience. The Committee supports the proposed rule that allows the appointing body to determine whether any additional training is required. o The Committee believes that trainings provided by other entities (such as appellate projects and state and criminal defense organizations) should qualify if they are subject-specific, in addition to any trainings approved by the State Bar and the vetting committees. o Instructors of qualifying trainings should be automatically credited with 2 hours of participation credit per hour taught.	more recent, please see the response to the comments of CACJ above. The working group appreciates the input regarding prior capital case experience and has retained the proposed provision. The working group agrees that trainings provided by other entities should qualify, as long as they are approved for MCLE credit by the State Bar. The working group concluded that having a single entity approving qualifying trainings will promote uniformity. With respect to instructional credit, please see the response to the comments of CACJ above.
California Public Defenders Association by Robin Lipetzky President Sacramento, California	We salute the proposed increase in the training requirement from 9 to 15 hours. (Pages 9, 11.) However, 15 hours is insufficient. Habeas litigation is unique in that it requires knowledge and experience in both trial and appellate skills in defending murder cases, and expertise in the complex technicalities of habeas litigation. Thus, the training requirement should be more than required to represent a capital defendant at trial. Further, it is important to receive training from different sources. Therefore, we urge a dual requirement combining a minimum of (1) three separate trainings, (2) with a	With respect to the suggestion for increased training, please see the response to the comments of CAP-SF above. The working group also declined to add a separate requirement that the training must come from different sources. There were concerns that mandating such an additional requirement could make the training requirement seem unduly burdensome, and thereby discourage otherwise interested counsel from seeking appointment.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	cumulative total of 20 hours of appellate criminal defense or habeas corpus defense training, at least 10 of which must address death penalty-related habeas corpus proceedings. With regards to whether training credit should automatically be given for teaching (pages 9, 11), we believe that such credit should be acknowledged, but should be granted in the amount of one hour credit for one hour of teaching. Regarding the recency of the trainings that have been attended (pages 9, 11), we agree that the trainings must be within two years before being included on the panel. However, because an attorney must continue to keep pace with new legal developments in capital habeas litigation, there must be a continuing training requirement, specifically requiring the same number of hours every two years in order to remain on the panel. (Again, we recommend 20 hours of training as the minimum.) In other words, no counsel should be appointed unless they have obtained the 20 hours within two years before being appointed; it is not sufficient to have had 20 hours within two years of being placed on the panel. The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case	With respect to instructional credit, please see the response to the comments of CACJ above. With respect to the suggestion regarding frequency and recentness of the training, please see the response to the comments of CACJ above. The working group declined to omit the proposed provision regarding prior capital case experience. The provision comes from the existing qualifications rule and was adopted in 1998 to avoid disqualifying very experienced counsel with recent death penalty–related habeas corpus experience who had not otherwise met the training standards. The working group agrees that all death penalty–related habeas corpus counsel must remain current with relevant legal developments, but ultimately decided to retain the provision giving the vetting entities the discretion to determine whether, in a specific case, recent death penalty–related habeas corpus experience may satisfy some or all of the training requirement. The working group concluded that this may help retain the pool of existing experienced death

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	experience should not satisfy any portion of the training requirement. Finally, concerning the providers of the requisite training (see page 12), we recommend that the trainings for habeas counsel must be approved by a state-wide entity, e.g., the State Bar, State Supreme Court, Habeas Corpus Resource Center or California Appellate Project. Our additional comments to specific Rules are as follows: * * * Rule 8.652(c)(4)(A): change "three years" to "two years." Change "15 hours" to complete at least "three separate trainings with a total of at least 20 cumulative hours". Further the Rule needs to clearly provide that the requirement applies both to (1) being included on a panel and (2) the time of appointment. For example, change "or" to "and" immediately before "appointed" in the second line; alternatively, add a new sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment." Rule 8.652(c)(4)(C): for the reasons explained above, we urge the deletion of this subdivision. Rule 8.652(d)(3): change 18 hours (second line) to 20 hours, and make clear the requirement applies both to (1) being included on a panel and (2) the time of appointment. As with Rule 8.652(c)(4)(A), this may be accomplished by changing "or" to "and" immediately before "appointed" in the first line, or by inserting a new second sentence providing: "This	penalty–related habeas corpus counsel, without compromising the goal of achieving competent representation. The working group appreciates the input regarding approval, and has retained the provision in proposed rule 8.652(c)(4)(A), requiring that trainings be approved by the State Bar of California.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	requirement applies both to the time of being included on a panel and to the time of appointment."	
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	The concerns expressed in the proposal that the one-year limit instead of three justifies higher hurdles is not well founded. Other jurisdictions have had one-year limits for many years, and their quantitative requirements are not typically higher than California's. (See, *e.g.*, 28 U.S.C. § 2255, subd. (f) (collateral review statute of limitation for federal defendants); 18 U.S.C. § 3599, subd. (c) (standards for counsel).) There is also little reason to believe that increased hours of instruction above the current requirements will produce improved quality. Former capital appellate defense attorneys tell us that the instruction offered is frequently of poor quality and often far too elementary for the experienced attorneys required to attend it. To the extent that the proposal increases quantitative measures and training requirements beyond the current rule, all such increases should be removed. * * * *Training* Training can be helpful and may be necessary when learning a new subspecialty of practice, but we cannot assume that training will always be useful. As discussed near the beginning of this comment, it is difficult to believe that the abusive and unethical practices denounced in *In re Reno* could have become widespread if the ethics of practice and the duty of effective assistance (including *Smith v. Murray*, *supra*) had been	The working group concluded that additional training is warranted in part because expanding the pool of qualified available attorneys will likely require attracting attorney applicants who have little or no prior capital experience, and these less experienced attorneys will have little time to learn on the job while trying to meet a new one-year deadline. For those more experienced attorneys, the proposed rules permit recent capital case experience to satisfy some or all of the training requirement. The working group declined to modify the proposed

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	correctly taught at the required training. The defense bar likes to be secretive about its collective strategy, but if the power of government is going to be used to mandate attendance at training, then the public interest demands openness to insure that the course is correctly teaching ethics, not "unethics." As a condition of approval, all training providers should be required to admit any member of the bar who pays the fee.	rules to limit or otherwise add conditions to the State Bar's process in making its approval determinations. The working group concluded that the details of approving trainings are best left to the discretion of the State Bar, which has a wealth of experience approving trainings for MCLE credit, including trainings for specialized professionals, such as capital defense training for trial counsel as provided in existing rule 4.117.
Habeas Corpus Resource Center by Michael Hersek Interim Executive Director San Francisco, California	Proposed Rule 8.652(c)(4) states that an attorney must complete specified training "[w]ithin three years of being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655." Proposed Rule 8.652(d)(3) requires that the training for the "alternate experience" qualification be completed by the attorney "[w]ithin two years before being included on a panel or appointed by the Supreme Court." To make these rules consistent, and to ensure currency of knowledge in the frequently changing legal and forensic landscape of capital habeas corpus proceedings, the time period in subdivision 8.652(c)(4) should be modified from three years to two years. In addition, subdivision (c)(4) should be modified to make clear that the training requirement must be met by the appointed habeas corpus counsel not only within the specified period prior to inclusion on the statewide panel, but within the specified period *prior to any actual appointment* by a court that selected the habeas counsel from the statewide panel. This suggested modification creates uniformity in the training requirement regardless of whether the appointment is	With respect to the suggestion regarding frequency and recentness of the training, please see the response to the comments of CACJ above.

Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	made by a court that selects counsel from the statewide panel, by the Supreme Court, or by a superior court under a local rule. It also ensures that appointed counsel's training is current, in the event counsel is included on the statewide panel but not immediately appointed to a habeas corpus case. Similarly, proposed Rule 8.652(d)(3) should be modified to require that the training for the "alternate experience" qualification be completed by the attorney within two years of both inclusion on the statewide panel and any appointment by a court that selects the attorney from the panel. * * * • *How many hours of training is appropriate?* Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings." Representation of petitioners in non-capital habeas corpus proceedings may bear little resemblance to such representation in capital proceedings. Non-capital habeas corpus proceedings often involve peripheral issues including parole eligibility and conditions of confinement. Even when related to the bases for the underlying criminal conviction, habeas corpus proceedings in non-capital cases do not deal with penalty phase issues. Thus, training on non-capital habeas corpus proceedings may not enhance an attorney's qualification to represent death row	With respect to the suggestion for increased subject-specific training, please see the response to the comments of CAP-SF above.

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
	inmates in capital habeas corpus proceedings. Similarly, training in "appellate criminal defense," if that training is non-capital in nature, would not include penalty phase issues, and even if such appellate criminal defense training concerned capital representation, it would not cover development of extra-record facts – the quintessential task of the capital habeas litigator. For these reasons, the rule should be modified to require "at least 15 hours of training in the representation of petitioners in death penalty habeas corpus proceedings."	
Marylou Hillberg Attorney at Law Sebastopol, California	I think your MCLE requirements are grossly understated; since I started working on capital cases about 15 years ago, I've taken more 500 hours of MCLE, mostly in mental health areas. I do not believe that any attorney, without extensive prior training and experience, can adequately learn these areas AND file a petition within one year. * * * I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.	Please see the response regarding training hours to the comments of CAP-SF above.
Kristin Traicoff Attorney	4) I believe the committee should require that the trainings discussed in the rule be recent, e.g., within the last 2 years. The	With respect to the suggestion regarding frequency and recentness of the training, please see the response to the

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Rule 8.652(c)(4), (d)(3): Training		
Commenter	**Comment**	**Proposed Working Group Response**
Law Office of Kristin Traicoff Sacramento, California	reason is simply that capital case law is very volatile, in the sense that the US Supreme Court, 9th Circuit, and California Supreme Court frequently (i.e., multiple times per year) issue opinions that alter in some material way the understanding of the procedural or substantive law relevant to capital cases. As someone who has conducted trainings for other death penalty attorneys on legal developments, staying abreast of these developments requires significantly more effort than I have found is generally true in many other areas of the law with which I am personally familiar. An attorney who has an outdated understanding of the legal rules relevant to our work cannot provide effective representation.	comments of CACJ above.

Rule 8.652(c)(5): Writing samples		
Commenter	**Comment**	**Proposed Working Group Response**
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	Attorney applicants should electronically submit a sample complex habeas corpus petition for consideration. They should have been the one of the primary authors of the petition.	The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(5)(A), requiring an attorney to submit either one death penalty–related habeas corpus petition or two habeas corpus petitions involving serious felonies, written and filed by the attorney. The working group declined to require electronic submission in the rule, to give the regional committees and courts screening applications the discretion to determine what methods of submission are preferable.
Kristin Traicoff Attorney	3) In response to the committee's question of whether filing two habeas corpus petitions in felony cases is too low or too	The working group appreciates this input and has retained the provision in proposed rule 8.652(c)(5)(A),

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Rule 8.652(c)(5): Writing samples		
Commenter	**Comment**	**Proposed Working Group Response**
Law Office of Kristin Traicoff Sacramento, California	high as an element of required experience for appointment as habeas counsel, I would suggest simply that the rules require that the writing samples the applicant submit be, at least, those two habeas petitions. The fact that someone has filed two habeas petitions does not necessarily mean that those petitions were of the quality that would ensure effective representation of a capitally-sentenced inmate in habeas corpus proceedings.	requiring two habeas corpus petitions involving serious felonies.

Rule 8.652(d)(1): Alternative experience		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience alone.	The working group declined to include the proposed modification to proposed rule 8.652(d)(1). The suggested amendment, which would single out attorneys with former prosecution experience but not attorneys with other alternative experience such as complex civil litigation or academia, could unduly discourage persons with prosecutorial experience from applying. Additionally, prior case experience is only one component of the qualifications. All attorneys, including those with prior criminal defense experience, must still meet the other qualification standard, and demonstrate the requisite commitment, knowledge, skills, and training. The response to the comment with respect to 8.605(d)(1) can be found above, on page 67, where alternative qualifications for automatic appeals is addressed.

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Rule 8.652(d)(1): Alternative experience		
Commenter	**Comment**	**Proposed Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger Legal Director & General Counsel Sacramento, California	Even worse, the "alternative experience" provision has a stealth provision to exclude recent departees from district attorney offices who could have qualified under the current "alternative" rule. Proposed Rule 8.652(d) incorporates (c)(5). That paragraph, in turn, requires submission of writing samples including "two or more habeas corpus petitions filed by the attorney *as counsel of record for the petitioner* . . . ." While the whole point of "alternative qualifications" under the current rule is to allow appointment without criminal defense experience, and the proposed rule ostensibly is for people who don't meet the (c)(2) requirements, the defense-side experience requirement is treacherously brought in through the back door of the writing sample requirement. "Dirty pool" would be an understatement.	The working group agrees that the alternative experience provision is intended to provide an avenue for counsel who may not have the usual case experience, yet who will still provide high quality legal representation, to qualify for appointment. The proposed rule, as noted by the commenter, inadvertently required counsel with alternative experience to have prior habeas corpus experience. The working group has corrected the error and modified proposed rule 8.652(d) to clarify that the writing samples must present analyses of complex legal issues, but are not required to be habeas corpus petitions.

Mentorship and "greening programs"		
Commenter	**Comment**	**Proposed Working Group Response**
Marylou Hillberg Attorney at Law Sebastopol, California	I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.	The working group agrees that mentorship is critical to expanding the pool of available qualified counsel. The working group has modified proposed rule 4.562, recommended in the separate report addressing appointments, to include an advisory committee comment encouraging committees and courts to provide mentoring and training programs and opportunities to engage and serve as supervised counsel. However, requiring the completion of a specific "greening program" as a component of the qualifications rules is premature, as no such formal mentorship program for death penalty–related habeas proceedings currently

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Mentorship and "greening programs"		
Commenter	**Comment**	**Proposed Working Group Response**
		exists in California. Instead, the proposed rules recognize that counsel who do not meet the criteria for appointment may gain capital case experience by serving as "supervised counsel." The proposed rules also recognize that in some cases the appointment of more than one counsel may be appropriate, which may provide an opportunity for mentorship between appointed counsel in a case. Additionally, the separate report addressing appointments in death penalty–related habeas corpus proceedings recommends requiring the appointment of an assisting entity or assisting counsel to provide additional advice and guidance.

Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
Office of the Federal Defender Eastern District of California by Heather E. Williams Federal Defender Sacramento, California	Proposed Rule 8.605(c)(2): Pursuant to Proposed Rule 8.605(c)(2) concerning the Panel for appointments to represent in their automatic appeal proceedings persons sentenced to death, attorney applicants must have served as counsel of record for either party (the State or a defendant) in a specified number of felony appeals. We are concerned about the potential conflicts of interest when a Panel applicant previously represented the People of the State of California in felony appeals involving a capital appellant or witnesses involved in the capital appellant's case. Sometimes those conflicts are difficult to ascertain until the lawyer deeply involved in the case and reads the voluminous records. To	 Mindful of the need to avoid unduly restricting the available pool of attorneys, the working group declined to add the suggested provisions to the qualification rules at this time. The working group acknowledges that an automatic disqualification provision could help counsel—whether due to former prosecution experience

Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
	avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate experience on behalf of the State of California are precluded from accepting automatic appeal appointments in cases from the county or counties in which they previously defended, for the State of California, criminal judgments on appeal." This requirement would affect former California Attorney General's Office employees, from the Office which is charged with defending criminal judgments on appeal. While such an attorney may have defended criminal judgments from several California counties, thus disqualifying that person from accepting appointments in those counties, it would not prevent that lawyer from accepting any automatic appeal appointments from other counties. It is unlikely a former deputy attorney general would have defended criminal judgments from each of California's 58 counties. Proposed Rule 8.652(c)(2): This Proposed Rule provides the minimum qualifications for attorneys who accept appointment in capital habeas corpus cases in California. Like Proposed Rule 8.605, this Rule allows the committee to consider prosecutorial experience. The qualifying prosecutorial experience may include appeals, habeas corpus proceedings, and felony jury trials. *See* Proposed Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C). As with Proposed Rule 8.605, we are concerned about the	or former defense experience—avoid spending time and resources on a case from which they must later withdraw due to a conflict. However, such a provision would also automatically disqualify counsel from cases in which there is no conflict. Rather than mandate such a blanket disqualification rule at this time, the working group concluded that potential conflicts may be addressed regionally and may be mitigated by the procedures and standards the regional committees and superior courts operating pursuant to local rules, as proposed in the separate report addressing appointments, establish to match counsel to cases.

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Automatic disqualifications in cases from certain counties for former prosecutors		
Commenter	**Comment**	**Proposed Working Group Response**
	potential conflicts of interest when an applicant previously represented the People of the State of California in felony trials, habeas corpus proceedings or appeals involving a capital habeas petitioner or witnesses involved in the capital habeas petitioner's case. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate, habeas corpus or felony trial experience on behalf of the State of California are precluded from accepting capital habeas cases appointments in cases from the county or counties in which they previously tried felony cases for the State of California and/or defended, for the State of California, criminal judgments on appeal or in habeas corpus proceedings." This provision would affect prosecutors in the Attorney General's office and in the 58 California County district attorney offices.	

ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	B. The working group briefly acknowledges its review of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter "ABA Guidelines").[2] (Proposal, p. 3.) The Guidelines are never referred to again. I would suggest that language be added to the commentary, and to whatever training materials are published for regional committees and superior courts, instructing them to look to the ABA Guidelines for a summary of the tasks of capital counsel. The ultimate question in certifying an applicant is whether or not	The ABA Guidelines certainly were considered in developing the proposed rules, as they were when the qualifications rules were first adopted in 1998. However, the working group declined to formally adopt or endorse the ABA Guidelines within the proposed rules and accompanying commentary. In some ways, the guidelines are not directly applicable to the counsel system in California. For example, the guidelines are predicated on a team of two or more attorneys, whereas in California generally only one attorney is appointed as

ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	that attorney is capable of performing the work laid out in the Guidelines. [2] Accessible at (2003) 31 Hofstra L. Rev 913.	capital appellate or habeas corpus counsel. Likewise, Guideline 5.1—Qualifications of Defense Counsel, ABA Guidelines (2003), is focused on the overall skillset of the state-wide pool of attorneys, rather than of each individual attorney. Such a system of qualifications is difficult to implement here where California will, post-Proposition 66, no longer have a single pool of qualified attorneys vetted by a single entity. That vetting responsibility instead will be shared by a number of regional committees and superior courts, as proposed in the separate report addressing appointments in death penalty–related habeas corpus proceedings, in addition to the Supreme Court.
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	CACJ endorses the standards established in the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The Guidelines have been cited with approval in Supreme Court, Ninth Circuit Court of Appeals and California Supreme Court cases as a starting point for determining professional standards for competent capital representation. [*Fn. 2 omitted] To put attorney qualifications in perspective, CACJ will address the duties of habeas corpus counsel. **ABA GUIDELINE 10.15.1-DUTIES OF POST-CONVICTION COUNSEL** A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's	Please see the response to the comments of Robert D. Bacon above.

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution. B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora. C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review. D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency. E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:	

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	1. maintain close contact with the client regarding litigation developments; and 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position; 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and 4. continue an aggressive investigation of all aspects of the case.	
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	In 1989, and again in 2003, the American Bar Association issued "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." These Guidelines gather decades of wisdom and experience regarding what skills a capital defense attorney needs in order to perform competently and effectively, and what procedures should be in place for ensuring that all capital defendants receive competent counsel. Of particular relevance to this committee's tasks are Guidelines 4.1 (staffing necessary to competently litigate a capital case), 5.1 (necessary qualifications for counsel), 7.1 (need for continuing supervision of appointed counsel), and 8.1 (necessary training). These Guidelines highlight the breadth of knowledge and expertise required of capital defense counsel and recognize the difficulty for an individual attorney to represent capital defendants competently without substantial	Please see the response to the comments of Robert D. Bacon above.

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ABA Guidelines		
Commenter	**Comment**	**Proposed Working Group Response**
	assistance. We strongly urge the working group to adopt rules that comport with these standards set forth by the ABA.	

Longer comment period		
Commenter	**Comment**	**Proposed Working Group Response**
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger Executive Director	Due to the extensive changes Prop 66 will bring, it is difficult to comment on the appointment and qualification rules in a piecemeal fashion. Most significantly, it is difficult to meaningfully assess the proposed rules without knowing what resources appointed counsel will have at their disposal (e.g. how much money for investigation, paralegal assistance, co-counsel, etc.) and what form habeas corpus petitions will take under the new process. Additionally, the time offered to comment on the proposed rule changes was inadequate to allow for a thorough consideration of the changes and the likely ramifications of the suggested changes. The lack of a meaningful comment period, coupled with the piecemeal consideration of the newly proposed rules, strongly favors a final comment period once all the rules are drafted and can be considered in total.	Due to the statutory time period by which the Judicial Council must adopt initial rules, and based on comments regarding the time courts and other justice partners need to implement these proposed rules, there is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to extend the comment period until all related draft rules proposals can be considered together. However, the Judicial Council welcomes suggestions for changes to the California Rules of Court at any time. Future suggestions may be considered by the appropriate Judicial Council advisory body or bodies at a later time. Rules of court are not static and may be modified in the future, particularly as actual implementation reveals changes that may be necessary or beneficial. Here, the Judicial Council has a continuing obligation to "monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceeding . . . ." As a result, the working group anticipates that

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Longer comment period		
Commenter	**Comment**	**Proposed Working Group Response**
		there will be opportunities to revisit and amend these rules as necessary or appropriate.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D. C.	As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex. Mexico cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.	Please see the response to the comments of CAP-SF above.

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
Robert D. Bacon Attorney at Law Oakland, California	C. Section 68665 of the Government Code charges the Council with considering “the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment.” What unduly restricts the available pool of capital habeas attorneys is the inadequate compensation the Supreme Court currently offers to them, both for attorney’s fees and for investigation and expert expenses. Your new rules will fail without substantially increased per-case appropriations. I discuss that point in more detail in my comments on proposal SP-18-13, and I do not repeat that discussion here, but it is relevant to this proposal also.	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding appointments in death penalty–related habeas corpus proceedings in the superior courts.
California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee	The Important Date in Footnote 4 There is an important -- yet possibly inaccurate -- observation at page four, footnote 4: “The Consolidated Appropriations Act	 The working group appreciates this input and agrees that the current hourly rate has not increased since at least

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Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
Oakland, California	of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the Supreme Court is $145, a rate that has not increased *since 2012*." (Emphasis added.) Our recollection is that the situation is more dire and that 2012 may not be accurate. Our belief is that the last hourly increase for capital counsel took effect more than a decade ago, probably in mid-2007. Although our comment does not address the Working Group's proposed rules, a correct date may become important in future as a "baseline" for consideration of capital compensation increases. The Working Group is respectfully directed to the 2008 "Final Report and Recommendation on the Administration of the Death Penalty in California," authored by the California Commission on the Fair Administration of Justice. (See http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1601) That 2008 Final Report notes on page 132: "Currently, private lawyers who accept an appointment to handle death row appeals are compensated at a rate of $145 per allowable hour." (Footnote 62 omitted.) In addition, the 2008 report states on page 135: "Like the attorneys handling appeals, appointed habeas counsel are paid $145 per hour." The omitted footnote 62 on page 132 refers to an internet link	2008.

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Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
	to the 2008 Supreme Court Brochure. Although the link is no longer functioning, the brochure is probably still available.	
California Attorneys for Criminal Justice (CACJ) by Steve Rease, President Sacramento, California	**Expanding Pool of Counsel** The proposed changes to the rules will expand the pool of qualified counsel with other systemic changes. Qualified experienced counsel earn $188 per hour in federal habeas corpus cases. State attorneys earn $145 per hour, with limitations on investigator and expert hourly rates. State habeas corpus practitioners are forced to accept deferred and denied payments, and arbitrary and inconsistent payment practices. On the other hand, the federal courts authorize ancillary funding for experts, mitigation specialists, investigators and others at reasonable rates and provide for prompt payment of these providers. The expedited timeframes of Proposition 66 diminish the already shallow pool of qualified habeas corpus practitioners. Accepting appointment under Proposition 66 deadlines would require an attorney's full-time commitment and abandonment of current clients and other legal activities. Few experienced attorneys are willing to so limit their law practices to accept appointment on these cases without the safeguards of adequate funding and the protections afforded by these proposed comments.	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding appointments in death penalty–related habeas corpus proceedings in the superior courts.
Office of the State Public Defender (OSPD) by Mary McComb	1. As mentioned in our comments with regard to SP18-13, there is a significant and debilitating omission in these rules: the lack of provisions for the compensation of	Please see the response of the working group to the comments addressing compensation and funding in the chart accompanying the separate report regarding

Compensation and funding		
Commenter	**Comment**	**Proposed Working Group Response**
State Public Defender Oakland, California	counsel and the funding of expenses.	appointments in death penalty–related habeas corpus proceedings in the superior courts.

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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, California 94102

Re: No. SP18-12: Qualifications of Capital Counsel

Ladies and Gentlemen:

Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful.

To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts.

1. General observations: the "cardiac surgery of legal representations"

A. Given what is at stake in any capital case, a relevant analogy that the Council might keep in mind in crafting these rules – and encourage regional committees and superior courts to keep in mind in applying and implementing them – is the procedure for board certification of a physician in a medical specialty. (See Stetler & Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation* (2013) 41 Hofstra L. Rev. 635, 638-639;[1] see also Fox, *Capital Guidelines and Ethical Duties: Mutually*

[1] "The standard of care for cardiac surgeons is, of course, not set by just any physician with a medical degree and a license to practice. Treatment guidelines for medical specialties are based on a combination of scientific evidence and collaboration between the professionals who have devoted their careers to the area of practice – for example, peer review by the cardiac surgeons themselves. Similarly, the standard of care in capital

Reinforcing Responsibilities (2008) 36 Hofstra L. Rev. 775, 777 [capital defense is the "cardiac surgery of legal representations"].)

B. The working group briefly acknowledges its review of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter "ABA Guidelines").[2] (Proposal, p. 3.) The Guidelines are never referred to again. I would suggest that language be added to the commentary, and to whatever training materials are published for regional committees and superior courts, instructing them to look to the ABA Guidelines for a summary of the tasks of capital counsel. The ultimate question in certifying an applicant is whether or not that attorney is capable of performing the work laid out in the Guidelines.

C. Section 68665 of the Government Code charges the Council with considering "the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment." What unduly restricts the available pool of capital habeas attorneys is the inadequate compensation the Supreme Court currently offers to them, both for attorney's fees and for investigation and expert expenses. Your new rules will fail without substantially increased per-case appropriations. I discuss that point in more detail in my comments on proposal SP-18-13, and I do not repeat that discussion here, but it is relevant to this proposal also.

2. *Appellate* experience on behalf of the prosecution can appropriately be counted, but no credit should be given for *habeas* experience on behalf of the prosecution

I learned the appellate lawyer's craft representing the prosecution in responding to appeals from felony convictions. That experience, plus a small number of non-capital criminal appeals on the defense side, was an appropriate background when I began representing death-sentenced clients on appeal. I have no problem with recognizing appellate experience as a prosecutor as a permissible part of the background for a lawyer applying to represent death-sentenced clients on appeal, so long as the lawyer also has significant experience representing criminal defendants on appeal, and meets all the other qualifications. (Rule 8.605(c)(2).)

However, I strongly recommend that experience responding to habeas corpus petitions on behalf of the prosecution ***not*** be given any weight in assessing a lawyer's qualifications to represent capital habeas petitioners. Rule 8.652(c)(2) should be modified accordingly.

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defense representation is set not by just any lawyer who happens to have a bar card but by the professionals who specialize in this complex area of practice." (*Ibid.*)

[2] Accessible at (2003) 31 Hofstra L. Rev. 913.

Most California habeas petitions, capital and otherwise, are resolved based on the factual showing made in the petition. Under California's informal briefing process and prima facie case standard, factual investigation by the prosecution in preparing to respond to a habeas petition is not only unnecessary, it is inappropriate. The prosecution's function in responding to a habeas petition is more akin to the appellate practice: briefing the law on a closed record. That experience does not meaningfully prepare a lawyer for the intensive factual investigation required to prepare a capital habeas petition on behalf of the petitioner.

In addition, the "alternative qualifications" rules, 8.605(d)(1) and 8.652(d)(1), should be amended to clarify that, while experience as a prosecutor may be part of the experience that qualifies a lawyer for appointment, no one may be found qualified based on prosecutorial experience *alone*.

3. Quantitative measures of attorney experience are of limited value

While experience with a particular number of cases has a place in measuring an attorney's qualifications, the Council should insure that those implementing these rules not rely too heavily on this factor. A raw count of cases makes a lawyer who churns cases, and works them up only superficially, appear to be better qualified than a lawyer who better serves her clients by litigating cases more intensely and as a result can take fewer of them. The first lawyer will meet the numerical experience standard sooner than the second, but the second one is better qualified. (See Stetler & Wendel, *supra*, 41 Hofstra L. Rev. at pp. 682-684.)

The Council can take a lesson from the drafters of the ABA Guidelines: "In the original [1989] edition, [Guideline 5.1] emphasized quantitative measures of attorney experience – such as years of litigation experience and number of jury trials – as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised [2003] edition, the inquiry focuses on counsel's ability to provide high quality legal representation. … [¶] [Q]uantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster." (ABA Guidelines, Commentary to § 5.1, 31 Hofstra L. Rev. at pp. 962, 964.)

Making perhaps the same point a different way, the Rules of Professional Conduct define "competence in any legal service" to include both "learning and skill" and, separately, the "mental, emotional, and physical ability reasonably necessary." (Rule 1.1(b) [effective November 1, 2018]; accord, Rule 3-110(B) [effective until November 1, 2018] [also including "diligence" within the definition of competence].) The mental and emotional

ability required for post-conviction capital litigation is extraordinary. Sadly, experience does not always insure that an attorney will have that ability.

I would suggest an explicit statement in the text of the rules (or, at an absolute minimum, in the commentary and in whatever training materials are sent to regional committees and superior courts) that having the experience set forth in Rules 8.605(c)(2) and 8.652(c)(2) is ***not*** prima facie evidence that the individual attorney possesses the skills required by Rules 8.605(c)(5) and 8.652(c)(5). The experience and skills requirements should each be addressed separately by those implementing the rules, just as they are set out separately in the rules.

4. The rules should identify experience in settlement negotiations as a valuable asset for capital counsel

One means of making the substantial additional capital habeas caseload more manageable for the superior court will be to encourage settlement of capital habeas cases. The percentage that settle may not be as high as for other types of complex, document-intensive civil litigation, but if the attempt is made the settlement rate is likely to be significant. This will benefit the courts, the survivors of homicide victims, and the habeas petitioners. The regional committees should be encouraged to inquire whether applicants have experience in settlement negotiations, mediation, and other forms of alternative dispute resolution in either civil or criminal cases. Even though such experience should not be a requirement, it should be weighed in an applicant's favor. Reference to this subject in the rules and by the regional committee would send an appropriate signal to all concerned that settlement should be considered in every capital habeas case.

Thank you again for the opportunity to comment.[3]

Sincerely,

/s/ *Robert D. Bacon*
Robert D. Bacon

[3] I also commend to the Council the comments submitted by California Attorneys for Criminal Justice (CACJ). I am a member of that organization but I did not personally participate in the writing of their comments.

Judicial Council of California **BY E-MAIL**
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Proposition 66 Working Group Proposed Rules
Request for Comments
Qualifications of Counsel

Introduction

These comments are being submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals.

CADC has two observations relevant to the proposed "Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings. " The first concerns whether there should be minimum qualifications or other limitation as to "an assisting entity or counsel." The second concerns whether a date in an important footnote is historically accurate.

An Assisting Entity or Counsel

This concern may not be important in the short run, so long as the Habeas Corpus Resource Center [HCRC] continues to accept representation of the person in the Superior Court under proposed Rule 8.654(e)(2), that requires the court first to request that HCRC accept such representation. However, HCRC's resources are finite, and at some point appointments will be made under subdivision (e)(3), which states: "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a

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local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

The potential problem relates to the qualifications for "an assisting entity or counsel." Proposed Rules 8.605 and 8.652 establish qualifications for counsel in death penalty appeals and death penalty–related habeas corpus proceedings, respectively. However, no rule establishes qualifications for "an *assisting* entity or counsel." (Emphasis added.)

In contrast, proposed Rule 8.601(5) merely defines "assisting counsel or entity" as "an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance," and includes only a non-exclusive list of potential assisting entities. When the time arrives that Superior Court judges are making appointments under proposed Rule 8.654(e)(3), the court would designate the assisting entity or counsel without further guidance or limitation as to what or who that assisting entity or counsel might be.

For these reasons, CADC respectfully suggests that the Working Group should consider further definition or qualification of "an assisting entity or counsel," or should consider limiting the universe of such counsel and entities.

The Important Date in Footnote 4

There is an important -- yet possibly inaccurate -- observation at page four, footnote 4: "The Consolidated Appropriations Act of 2018, signed in March 2018, is reported to provide attorneys appointed to capital cases in the federal courts a cost-of-living adjustment, raising their hourly rate to $188. By contrast, the hourly rate for appointed counsel in capital cases proceeding in the Supreme Court is $145, a rate that has not increased *since 2012*." (Emphasis added.)

Our recollection is that the situation is more dire and that 2012 may not be accurate. Our belief is that the last hourly increase for capital counsel took effect more than a decade ago, probably in mid-2007. Although our comment does not address the Working Group's proposed rules, a correct date may become important in future as a "baseline" for consideration of capital compensation increases.

The Working Group is respectfully directed to the 2008 "Final Report and Recommendation on the Administration of the Death Penalty in California," authored by the California Commission on the Fair Administration of Justice. (See http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1601)

That 2008 Final Report notes on page 132: "Currently, private lawyers who accept an appointment to handle death row appeals are compensated at a rate of $145 per allowable hour." (Footnote 62 omitted.) In addition, the 2008 report states on page 135: "Like the attorneys handling appeals, appointed habeas counsel are paid $145 per hour."

The omitted footnote 62 on page 132 refers to an internet link to the 2008 Supreme Court Brochure. Although the link is no longer functioning, the brochure is probably still available.

Thank you for your time and consideration.

Very truly yours,

KYLE GEE
Chair, CADC Government Relations Committee

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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, CA 94102
via email invitations@jud.ca.gov

Re: Invitations to Comment SP18-12, SP18-13

The California Appellate Project-San Francisco ("CAP-SF") submits the following comments on the proposed "Rules and Forms: Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings" (Item Number SP18-12) and the proposed rules and forms "Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-13).

General Comments on All Proposed Rules

1. Due to the extensive changes Prop 66 will bring, it is difficult to comment on the appointment and qualification rules in a piecemeal fashion. Most significantly, it is difficult to meaningfully assess the proposed rules without knowing what resources appointed counsel will have at their disposal (e.g. how much money for investigation, paralegal assistance, co-counsel, etc.) and what form habeas corpus petitions will take under the new process. Additionally, the time offered to comment on the proposed rule changes was inadequate to allow for a thorough consideration of the changes and the likely ramifications of the suggested changes. The lack of a meaningful comment period, coupled with the piecemeal consideration of the newly proposed rules, strongly favors a final comment period once all the rules are drafted and can be considered in total.

2. In 1989, and again in 2003, the American Bar Association issued "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." These Guidelines gather decades of wisdom and experience regarding what skills a capital defense attorney needs in order to perform competently and effectively, and what procedures should be in place for ensuring that all capital defendants receive competent counsel. Of particular relevance to this committee's tasks are Guidelines 4.1 (staffing necessary to competently litigate a capital case), 5.1 (necessary qualifications for counsel), 7.1 (need for continuing supervision of appointed counsel), and 8.1 (necessary training). These Guidelines highlight the breadth of knowledge and expertise required of capital defense counsel and recognize the difficulty for an individual

attorney to represent capital defendants competently without substantial assistance. We strongly urge the working group to adopt rules that comport with these standards set forth by the ABA.

3. More than thirty-five years ago, the California Supreme Court voiced concern about the quality of representation in death penalty cases by reaching out to the State Bar for assistance. In response, to advance the quality of lawyering in death judgment cases, the State Bar established the California Appellate Project-San Francisco (CAP-SF). CAP-SF's mission was, and still is, to facilitate competent representation in indigent capital appeal and habeas cases.

Proposition 66's mandate to significantly shorten the time in which to file a capital habeas petition – while simultaneously imposing new restrictions on the availability of second or successive applications for relief -- heightens rather than diminishes the concern for quality representation in death judgment cases. The new rules will create many changes and challenges to be met by experienced capital litigators as well as attorneys with no capital experience. Now more than ever, capital habeas attorneys will need assistance by experienced capital attorneys in order to meet the inherent challenges of capital representation coupled with the additional hurdles imposed by Proposition 66. CAP-SF is the entity best able to provide that assistance.

Proposed Rule 8.601(5): Definitions

8.601(5): Definition of "Assisting Counsel or Entity"

"Assisting counsel or entity" means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, the California Appellate Project in San Francisco, and a Court of Appeal district appellate project."

CAP-SF objects to the definition of "Assisting counsel or entity" in the proposed rules. The definition provided fails to appreciate the difference between providing capital direct representation and capital case assistance. It suggests that the Habeas Corpus Resource Center (HCRC), a capital direct representation agency, could serve as assisting counsel. Although HCRC has considerable expertise providing direct representation of habeas petitioners and makes significant contributions to training appointed counsel, it has virtually no experience serving as an assisting entity. Assistance work is highly specialized and although the skill set overlaps with direct representation, it requires knowledge and experience all its own. Moreover, assuming HCRC developed the skills and devoted its staff to assistance work, the end result would be a reduction in the number of direct representation cases it could handle. This would not promote the goal of Proposition 66 to increase the number of state habeas appointments. Similarly, the Office of the State Public Defender's expertise is in direct representation in direct appeal cases, and not serving as an assisting entity to appointed counsel.

The Court of Appeal district appellate (DCA) projects are even less qualified to provide capital case assistance. Their expertise and focus is in providing assistance in non-capital cases only, and almost exclusively on direct appeals. They have very limited familiarity with capital or habeas corpus practice and are not staffed to provide assistance in capital cases.

CAP-SF is the only qualified and fully staffed entity in California capable of offering full-time capital assistance to appointed counsel. CAP-SF has been assisting appointed counsel for thirty-five years and has developed contacts and resources in the capital defense community that foster its ability to do so effectively. CAP-SF should continue to be defined as the presumptive assisting entity in these cases and the rules should specifically state as much in order to avoid confusion and the risk of unqualified assistance. For example, the rule could state "*assistance from CAP-SF or, in the event of a conflict, other assisting counsel that the court may designate*."

Throughout the proposed rules addressing the appointment of counsel, the need for assistance is mentioned, but proposed rules never expressly state that assistance is required. Assistance should be required in all capital appointments for all of the reasons it was necessary thirty-five years ago and for the additional concerns raised by Proposition 66 (new rules, inexperienced lawyers, and significantly shortened filing deadlines).

Additionally, a rule should be adopted that the regional committees have the additional task of vetting qualified assisting counsel for cases in which CAP-SF has a conflict. This is necessary to safeguard against the designation of an unqualified assisting attorney.

Proposed Rule 8.605: Qualifications of counsel in death penalty appeals and habeas corpus proceedings.

Proposed Rule 8.652: Qualifications of counsel in death penalty–related habeas corpus proceedings.

8.652(b) General qualifications

CAP-SF recommends a modification to proposed Rule 8.652(b). These proposed rules fail to require that appointed counsel cooperate with the assisting entity, on direct appeal and habeas corpus, respectively.

Currently the last sentence of these rules reads "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." The last sentence should be modified to read that appointed counsel "*is required to cooperate* with an assisting counsel or entity that the court designates."

The modification is necessary because an experienced assisting entity or counsel helps appointed counsel provide quality representation to indigent appellants/petitioners. An assisting counsel or entity cannot adequately assist appointed counsel who will not fully cooperate with it. The California Supreme Court addresses this issue by expressly requiring appointed counsel in capital cases to cooperate with the assisting counsel or entity. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, section 5 "Progress Payments.") In the Supreme Court, appointed counsel may only receive fixed fee payments after they submit to the assisting counsel or entity the type of working documents (*e.g.* transcript notes, issues list, investigation plan) that enables the assisting counsel to offer more meaningful assistance to appointed counsel. Absent similar requirements for counsel appointed by the superior court the

proposed rules should, minimally, include language that requires appointed counsel to work with the assisting entity.

Proposed Rule 8.652 (c): Qualifications for appointed habeas corpus counsel

8.652(c)(2): Case experience
The case experience identified in (A), (B), or (C).

Read in combination with the definitions in proposed Rule 8.601, the committee's intent in subsections 2(A) and 2(B) seems fairly clear, but there is nonetheless ambiguity in wording regarding who counsel must have represented that should be resolved. It is recommended that in 2(A) the word person be changed to petitioner and in 2(B)(i) that the word petitioner be added. The suggested modification results in sections 2(A) and (B)(i) reading as follows:

Subsection 2(A):

"Service as counsel of record for a ~~person~~ *petitioner* in a death penalty–related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court."

Subsection (B)(i)

"Supervised counsel *for a* petitioner in two death penalty–related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty–related habeas corpus proceeding will apply toward this qualification only if lead or."

Section 2(C) states:

"Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. The combined case experience must be sufficient to demonstrate proficiency in investigation, issue identification, and writing."

The following modification suggested by CAP-SF should be interpreted in conjunction with CAP-SF's later comments made to proposed Rule 8.652(c)(4) relating to the training necessary to familiarize less experienced counsel with the complexities of capital habeas litigation.

Section 2(C) fails to recognize the variety of skills and experience needed to successfully litigate a capital case. This section should be modified to include those skills relevant to understanding the particularities of capital jury selection, and most significantly the uniqueness of capital sentencing which requires an understanding of mental health issues, intellectual disability and social history development. Additionally, as written this proposed rule might allow counsel to seek and attain qualification where (s)he has litigated a serious felony habeas corpus petition that was limited to a single narrow legal issue. This does not comport with the purpose of the rule.

Specifically, the language of Section (2)(C) requires experience in "at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed." To address the variety of skills and experience needed to successfully litigate a capital case, CAP-SF suggests Section 2(C) be specifically modified as follows:

> "Service as counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including *at least four serious felony cases. In the serious felony cases, counsel must have been counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a murder conviction in which the petition has been filed.*
>
> *The combined case experience must be sufficient to demonstrate proficiency in criminal forensic issues, and issue identification; and familiarity with death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case*."

> **8.652(c)(4) (A): Training**
> "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings."

The proposed rule fails to ensure that appointed counsel have adequate familiarity with, and training in, capital habeas corpus jurisprudence and practice.

One of many important differences that makes death penalty cases unique from other serious felony and special circumstance murder cases is the bifurcated penalty phase. Identifying and developing mitigation issues in the penalty phase involves a knowledge and skill set that is not required in non-capital cases. Proposition 66's jurisdictional one year filing deadline makes it vital that appointed counsel have the skill and knowledge to identify and develop penalty phase mitigation issues as soon as they are appointed to a case.

Counsel who have not represented a capital defendant or petitioner lack the necessary experience and familiarity with death-penalty specific issues. Specific habeas related training requirements, and a mandated training for counsel who have not previously represented a capital client, will help to ensure that appointed counsel has the necessary capital habeas skills and knowledge from day one of her appointment.

The draft rule (8.652(c)(2)) clarifies that "experience for either party counts toward meeting the case experience requirements." (Invitation to Comment - SP18-12, at 6.) This language suggests that former prosecutors may be deemed qualified for appointment even where critical skills that can be acquired only through the experience of having represented a defendant or completed a

petition are lacking. Former prosecutors may have familiarity with the case law governing the death qualification of jurors and the penalty phase of a capital trial, such knowledge, while important, does not include all the necessary skills that a capital defense litigator must possess. Attorneys who have developed death penalty skills from the prosecution side lack the fundamental defense skills of identifying and developing mitigation, key skills necessary to quality defense death penalty representation. In sum, without specific and intensive training and robust collaboration with an assisting entity, even death penalty prosecutors lack a vital skill set required to competently represent a capital habeas petitioner as lead counsel.

CAP-SF recommends two modifications to proposed Rule 8.652 (c) (4).

1. Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense training ..., at least 10 hours of which address death penalty habeas corpus proceedings." The rule should be modified to require 15 hours in death penalty habeas corpus training, and 10 of those hours must address penalty phase issues and investigation.

> Proposed Modification: "Within three years before being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655, completion of at least 15 hours of ~~appellate criminal defense or~~ *death penalty* habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address ~~death penalty habeas corpus proceedings~~ *penalty phase issues and investigation*."

2. A sub-section should be added to Proposed Rule 8.652(c)(4) requiring *additional training for appointed counsel who, within the preceding three years prior to applying for placement on the panel, has not represented either 1) a defendant in a capital trial through the penalty phase, or 2) a petitioner in a death penalty-related habeas corpus proceeding through the filing of the habeas petition. After counsel has been deemed qualified by the regional committee, but before any superior court appointment, such counsel must complete a multi-day training on death penalty specific issues such as death qualification in jury selection and identifying and developing mitigation issues*. The CAP-SF currently provides such training for counsel appointed by the California Supreme Court; therefore, this training could be coordinated and provided by the assisting entity.

Proposed Rules 8.654 – 8.655: Appointment of Counsel

General comment

The piecemeal issuance of rules by the working group and the lack of information about funding mechanisms make it particularly difficult to respond constructively to these rules. It is nonetheless clear that in light of the accelerated timeline for litigation contemplated by Proposition 66, enhanced staffing of cases is critical to competent representation.

Although the proposed rules acknowledge the possibility of the appointment of more than one attorney in capital state habeas cases, the rules should contain a more robust endorsement of the

appointment of associate counsel. The rules should provide that where HCRC is not able to be appointed to a complex case,[1] two attorneys must be appointed. Further, the rule should expressly state that, where the appointment of two attorneys is deemed necessary, those attorneys are each entitled to separate and reasonable fees.

Proposition 66's funding mechanism must allow for separate fees to individual attorneys, rather than requiring them to split a single capped fee as is currently the case under the Supreme Court rules. Our experience as an assisting agency has shown that the current fee structure deters experienced counsel from employing less experienced attorneys as associates or supervised counsel. Given that the proposed rules create a path to qualification as lead or associate counsel by serving as supervised counsel,[2] the rules should provide a separate stream of funding for supervised counsel as well. Adopting rules which encourage experienced counsel to collaborate with less experienced counsel serves one of the core purposes of Proposition 66, which is to expand the pool of attorneys willing and qualified to accept appointments to capital habeas cases.

Additionally, under an accelerated litigation process, the need to provide counsel with more robust funding to hire support staff such as paralegals, consulting experts, or other assistance must be addressed.

Proposed Rule 8.654: Superior court appointment of counsel in death penalty–related habeas corpus proceedings

8.654(d): Notice of Oldest Judgement without Counsel

Rule 8.654(d) (1)-(2), (6) state:

> "(1) Within 30 days of the effective date of this rule, the Habeas Corpus Resource Center must identify the persons on the list required by (c) with the 25 oldest judgments of death for whom death penalty–related habeas corpus counsel have not been appointed.
>
> (2) The Habeas Corpus Resource Center must notify the presiding judges of the superior courts in which these 25 judgments of death were entered that these are the oldest cases in which habeas corpus counsel have not been appointed. The Habeas Corpus Resource Center will send a copy of the notice to the administrative presiding justice of the appellate district in which the superior court is located.
>
> ....
>
> (6) When a copy of an appointment order, or information indicating that an appointment is for any reason not required, has been received by the Habeas Corpus Resource Center for 20 judgments, the center will identify the next 20 oldest judgments of death in cases in which death penalty–related habeas corpus counsel have not been appointed and send out a notice identifying these 20 judgments, and the procedures required by paragraphs (3) through (6) of this subdivision must be repeated."

[1] Complex cases are generally those with multiple defendants, multiple victims, multiple crime scenes, extensive expert testimony or significant forensic or mental health issues.
[2] Rule 8.652(c)(2)(B)(i).

The initial appointment of counsel to the oldest twenty five cases, and thereafter to the next oldest twenty cases, is overly ambitious and does not take into account the complexity of these cases. It will be difficult to assess and find appropriate counsel for twenty-five, or even twenty, of these cases in any predictable timeframe. A review of just the first group of twenty-five oldest judgements reveals several defendants who were pro se at trial; have documented severe mental and/or physical illnesses or both; and/or, have a case that poses significant investigative and/or forensic challenges. In addition, within this group of cases, there are two defendants in their 70's and five defendants that pose conflicts for CAP-SF. For the oldest twenty-five cases, as well as several of the other cases waiting for habeas counsel, finding qualified counsel with the necessary knowledge and experience will be a time consuming and involved process. The process is further complicated for those cases in which CAP-SF has a conflict and a qualified assisting entity or counsel will need to be found. CAP-SF, therefore, recommends limiting the first group of cases to 15, and subsequent groups to ten to twelve cases.

8.654(e)(3): Appointment of counsel

> "If the Habeas Corpus Resource Center declines to represent the person, the court must appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by proposed Rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

1. A modification is necessary to harmonize the rule with proposed Rule 8.655(d)(5), which states that the regional committee "must assist a participating superior court in matching one or more qualified attorneys from the statewide panel to a person for whom counsel must be appointed under Government Code section 68662."

CAP-SF recommends this rule be modified to clarify that the superior court will request the regional committee's assistance in identifying appropriate panel attorneys to appoint. The rule should be modified as follows: "If the Habeas Corpus Resource Center declines to represent the person, the court must *request that the regional committee identify an appropriate attorney or attorneys for the case, and then* appoint an attorney or attorneys from the statewide panel of qualified attorneys authorized by rule 8.655(d)(4), unless the court has adopted a local rule allowing appointment of qualified attorneys not on the panel. The court must at this time also designate an assisting entity or counsel to provide assistance to the appointed counsel."

2. As set forth in this rule and proposed Rule 8.655(g), CAP-SF objects to allowing superior courts to adopt local rules regarding the appointment of counsel. The process set forth in proposed Rule 8.655(d)(2)–(4) is not burdensome and should be followed by all appointed counsel. Giving superior courts the authority to deem an applicant qualified, without approval by the regional committee, permits the superior courts – whether intentional or not – to take a more lenient view of the qualification standards than the regional committee. Allowing a superior court to adopt local rules for the appointment of counsel unnecessarily introduces the possibility of unqualified counsel appointed to represent capital habeas petitioners. Requiring that

appointments be made only to counsel approved by the regional committees will assist in guaranteeing uniformity in the assessment of counsel's qualifications.

Proposed Rule 8.655: Recruitment and determination of qualifications of attorneys for appointment in death penalty–related habeas corpus proceedings.
The committee will have the following responsibilities

8.655(c): Composition of regional habeas corpus panel committees

Section (c) (1) states: Each committee must, at a minimum, be composed of:

(A) One justice, designated by the administrative presiding justice of the Court of Appeal, to serve as the chair of the committee;

(B) A total of three judges, as agreed on by the presiding judges of the superior courts located within the appellate district; and

(C) A total of three attorneys drawn from the following categories, as selected by the judicial officers on the committee [see definition of categories (i)-(vi)]:

CAP-SF opposes Section (c)(1)(C) of this rule unless minor but significant modifications are made.

The language of subsection (c)(1)(C) defining the participation on the committee by attorneys from six possible categories seems to suggest that only one attorney per category will be selected to the committee, but the language is not definitive. The subsection language should expressly state that only one attorney per category will be selected to the committee.

If subsection (c)(1)(C) allows only one attorney per category, CAP-SF's primary concerns are that the rule as written could lead to a scenario where the three selected attorney members on a regional committee would have little to no capital habeas experience/knowledge. For example, it is possible a regional committee could be comprised of one DCA project attorney, one attorney from the public defender's office, and one attorney "designated by another entity" (subsection (vi) see below discussion). There is nothing written in the rule that would require the DCA project attorney to have capital habeas knowledge/experience. This is important because most DCA project attorneys practice in non-capital appeals. There is nothing written in the rule that would require the attorney from the public defender's office to have capital habeas knowledge/experience. This is important because there is a wide range of skill levels at a public defender's office and the rule would allow for an attorney who practices solely in misdemeanor cases as well as an attorney who practices in serious felony cases. The third attorney as noted above from category (vi), one "designated by another entity," could be anyone the chair authorizes and there is nothing in this rule that would require that person have any capital habeas experience/knowledge.

To avoid this scenario and to ensure that the regional committee is staffed with experienced/knowledgeable capital habeas attorneys, the rule must indicate that at least two of

the three attorneys chosen from categories (i)-(vi) are representatives of capital post-conviction agencies (HCRC, CAP-SF, or a federal public defender capital habeas unit). These agencies are in the best position to vet and assess the skills of applicants and the volume and type of work necessary to litigate the case.

Further, to avoid subsection (c)(1)(C) (vi) being interpreted as allowing for an unqualified attorney to be named as regional committee member as illustrated above, section (vi) should be restated with clarity. Currently, subsection (c)(1)(C) (vi) states, "An attorney designated by another entity, as authorized by the chair." If the intent of this subsection is that one of the entities identified in subsection (i)-(v) may designate an attorney, it should state clearly state as much. If that is not the intent the subsection should be further defined so the intent is clear.

> Section (c)(2) states "Each committee may also include advisory members, as authorized by the chair."

CAP-SF objects to the vagueness of this rule. If the intent is for the committee to be able to seek out someone with specialized knowledge, for example DNA, that could assist in pairing cases, it appears there would be no need that this person be designated as a "member." Instead, the rule could be revised to allow the committee to consult with someone who has specialized knowledge. As written, there is no definition of when an advisory member would be necessary, what qualifications the advisory member must hold or how long an advisory member may serve. At a minimum, the advisory member should meet the same criteria as other panel committee members in order to avoid qualification concerns.

> Section (c)(3) states "When a member is unable to complete a term, a replacement will serve out the existing term."

Similar to 8.655(c)(2), this proposed provision is vague. Who selects the replacement member, and a requirement that the new member meet all of the panel committee qualifications, should be stated.

8.655(d)(4)(C): Reapplying to panel every 6 years

> "Unless removed from the panel under (d)(6), an attorney included on the panel may remain on the panel for up to six years without submitting a renewed application."

This proposed rule should provide a mechanism for evaluating appointed counsel's work on an ongoing basis as opposed to waiting six years. This could be accomplished by requiring the assisting entity to provide the committee with a confidential evaluation of appointed counsel's work on all appointed death penalty-related habeas corpus pleadings filed. A comprehensive confidential evaluation could be submitted to the committee within thirty days of the habeas matter being fully briefed. The committee could then consider the confidential evaluation in its assessment of future appointments to appointed counsel. A mechanism such as this, would provide a way to monitor counsel's work and ensure that those who produced valuable work would continue to receive appointments and those whose work was inadequate would be

precluded from future appointments or deemed qualified as supervised and not lead counsel. It would provide an incentive to counsel to provide competent representation and be a step towards the effort of appointing quality representation in capital cases.

8.655(d)(6): Removal from panel

> "Suspension or disbarment of an attorney will result in removal of the attorney from the panel. Other disciplinary action, or a finding that counsel has provided ineffective assistance of counsel, may result in a reevaluation of the attorney's inclusion on the panel by the committee that initially determined the attorney to have met minimum qualifications."

In conjunction with the comments made to §8.655(d)(4)(C), an assessment should be made based on the assisting entity's confidential evaluation. Where counsel's performance has been determined to be inadequate, this should be considered as a basis for removal.

Thank you for this opportunity to comment.

Very truly yours,

Joseph Schlesinger
Executive Director

Fighting for justice since 1973

California Attorneys for Criminal Justice

To: Judicial Council
From: Steve Rease, President of California Attorneys for Criminal Justice
Re: Comments on Proposed Rules SP18-12 and SP18-13

These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for qualification and appointment of habeas corpus counsel in capital cases. CACJ's comments would be more thorough and reflective but for the abbreviated comment period and complexity of the matters at issue.

Appointment and qualification of habeas corpus counsel was addressed by Proposition 66 through addition or amendment of the following statutes:

Statute	Purpose
Pen.Code 1239.1	Duty of Supreme Court to expedite review of capital cases
Pen.Code 1509	Writ filed by person in custody pursuant to judgment of death
Gov.Code 68660.5	Purposes of chapter; Construction and administration consistent with purposes
Gov.Code 68661	Creation of center; Powers and duties
Gov.Code 68662	Order for appointment of counsel for state prisoners
Gov.Code 68665	Competency standards for capital appellate and habeas corpus counsel

CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the appointment of competent post-conviction counsel.

The language of Proposition 66 imposes requirements that must be followed and cannot be amended, except by a three-fourths vote of the legislature or the voters. See Section 20 of the Proposition.

As amended by Proposition 66, Govt. Code Section 68661(d) provides that the Habeas Corpus Resource Center (HCRC) may

> recommend attorneys to the Supreme Court for inclusion in a roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases, provided that the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center.

The voters specifically voted on the amended language in this subsection. Hence, by statute,

the Supreme Court is responsible for the roster, and, makes "the final determination of whether to include an attorney in the roster" whether the Court previously maintained a roster or not.

As amended by Proposition 66, Govt. Code Section 68665 states that the Supreme Court and the Judicial Council are still responsible for adopting "by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings . . ." This is consistent with the constitutional obligation to appoint counsel that can meet the requirements of heightened reliability in capital litigation. In addition, the appointment of competent and experienced counsel is even more pressing because of the short time periods under which appointed habeas corpus counsel is expected to perform their duties under Proposition 66.

Considering the foregoing and commenting specifically on the proposals numbered SP 18-12 and 18-13, we are aware of the proposal to create regional committees to assist in evaluating candidates for appointment to capital habeas cases. We respectfully submit that such regional committees could accept applications and forward appropriate nominees to HCRC and the Supreme Court for inclusion, upon the Supreme Court's "final determination," on the roster. Unless the statute is amended by three fourths vote or approval of the voters, the statute clearly states that the Supreme Court's duties cannot be delegated and certainly cannot be delegated to individual superior courts or its judges.

CACJ's main concern is the appointment of competent and experienced counsel. That is the right of the condemned inmate. In addition, since Proposition 66 allows for the reopening on appeal of issues handled by first habeas counsel based on their ineffective assistance, failure to insure the appointment of competent and experienced counsel in the Superior Court will only require extensive re-litigation in the Court of Appeal with different counsel under new Penal Code Section 1509.1(b).

Comments Specific to SP18-13

- **Mechanics of Case Distribution to Superior Court**

Whenever possible, counsel should be appointed first for those inmates with the oldest judgments. Proposed Rules 8.654(c)-(d) require that HCRC compile and maintain a statewide list of condemned inmates, ordered by date of judgment. HCRC should devise and manage the process of distributing the cases to superior courts. While it is the obligation of the Judicial Council to "continuously monitor the timeliness of review of capital cases" (Pen.Code § 190.6(d)), there is no statutory requirement that the Judicial Council dictate the distribution of cases to the presiding judge of a jurisdiction.

- **Mechanics of Attorney Appointment**

First, a superior court judge should not be authorized to appoint counsel if the Supreme Court has not yet transferred the case to the superior court.

Second, for purposes of prioritizing judgments without counsel (where California Appellate Project-San Francisco (CAP-SF) is a placeholder attorney), a case with the oldest judgment should be treated as the oldest case whether the case has appointed counsel or not, and regardless of whether there is a petition pending. The rule should assign oldest judgment cases first where possible.

The rules for appointment of counsel should follow the "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) (Guidelines), and accordingly authorize the judge to appoint two habeas corpus attorneys at a minimum. The appointment of two qualified counsel is particularly crucial because of Proposition 66's shortened timeframes.

Superior courts should be required to designate CAP-SF as the "assisting entity." CAP-SF, and its staff, have decades of professional and institutional experience with litigating capital habeas corpus cases and assisting and monitoring private counsel in those cases. The expertise within CAP-SF is found in no other organization in California. CAP-SF provides education, training, training materials, a capital case databank, and an experienced lawyer who is personally assigned to assist appointed counsel in their capital habeas corpus proceedings. Regional appellate projects are not qualified, as their sole focus is assisting private counsel in providing quality indigent representation in non-capital criminal, juvenile, dependency and mental health appeals. As a result, these nonprofit entities should not be appointed to assist appointed capital habeas corpus attorneys.

If adequate CAP-SF resources are not available, or a conflict of interest exists preventing CAP-SF from assisting a particular capital habeas counsel, the court should appoint the most experienced counsel from the Supreme Court roster of qualified capital habeas corpus attorneys.

A superior court judge should not appoint a public defender or alternate defender because, as a general matter, those agencies do not have the experience in handling capital habeas cases, and their budgets do not provide for the additional time consuming work required in these cases.

- **Regional Committees and Vetting**

Regional committees should be encouraged to recommend attorneys to HCRC for qualification. However, neither a regional committee nor a superior court have authority to qualify an attorney or unilaterally include an attorney on the Supreme Court roster.

- **Appointment Orders and Forms**

The Judicial Council should create a form for attorneys to submit to HCRC with their applications for qualification. HCRC may develop forms to document that counsel is qualified to be included on the Supreme Court roster.

- **Timing of Implementation of Proposition 66**

The rules for qualification and appointment of habeas corpus counsel cannot be implemented within a month of promulgation. Before the rules can be implemented considerable infrastructure is required. The tasks include:

1. Defining agency responsibility for creation and management of the financial arrangements between appointed counsel and the court before implementation of the rules.

    a. No qualified attorney should be expected to accept appointment without a contract. The judicial branch must develop a contract between the funding agency and appointed contractor habeas corpus counsel.

    b. The judicial branch must create a budget for timely payment of appointed

habeas corpus counsel at competitive rates.

c. The judicial branch must allocate or appropriate funds for attorneys, mitigation specialists[1], investigators, experts and others prior to implementation of the rules.

d. The agency must define the mechanism for invoice submission, review, and payment.

e. The agency must create a mechanism for resolution of payment disputes prior to implementation of the rules.

2. Funding HCRC and CAP-SF in advance of appointment of counsel to adequately meet the demands of Proposition 66 while adequately serving existing appointed counsel, clients and the court. Funding additional staff as required by the demands of Proposition 66.

3. Funding attorney participation in mandatory training programs.

4. Funding and implementation of trial court training.

5. Instituting a process for trial court training and feedback.

Comments specific to SP18-12

CACJ endorses the standards established in the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The Guidelines have been cited with approval in Supreme Court, Ninth Circuit Court of Appeals and California Supreme Court cases as a starting point for determining professional standards for competent capital representation.[2]

To put attorney qualifications in perspective, CACJ will address the duties of habeas corpus counsel.

ABA GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through

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[1] Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L.R. 677 (2008).

[2] See, *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor,* 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688 (1985); *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005); *Washington v. Lampert*, 422 F.3d 864, 872 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 1001 (9th Cir. 2005); *Davis v. Woodford,* 384 F.3d 628, 661 (9th Cir. 2004); and *In re Welch,* 61 Cal 4th 689 (2015)).

all available fora.

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;

3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

Attorney Qualifications Considering Proposition 66's Expedited Timeframes

Proposition 66 requires filing the habeas corpus petition within 1 year of appointment of counsel. (Pen.Code s 1509(a).) This expedited deadline allows no time for learning-on-the-job. To meet the statutory deadlines, appointed habeas corpus counsel must demonstrate substantial:

- prior knowledge of state and federal habeas corpus procedures, including the implications of the Anti-terrorism and Effective Death Penalty Act (AEDPA);
- experience conducting evidentiary hearings;
- knowledge of current capital trial standards of practice;
- experience employing current standards in forensics and mental health;
- complex case management experience; and,
- effective use of expert witnesses.

Experience Necessary for Appointment as Habeas Corpus Counsel

The expedited timeframes of Proposition 66 necessitate a team approach to capital habeas corpus defense. A capital habeas corpus team must utilize at least the following:

- At least one team member must have capital habeas corpus experience.
- At least one team member must have substantial capital trial experience.
- At least one team member must have substantial experience in forensic sciences.
- At least one team member must have substantial experience with mitigation and mental health.

- Prosecution experience alone is not sufficient.
  Attorneys should have at least 5 years of murder trial experience with demonstrated skills in research and writing and forensics.
- A petition for a writ of habeas corpus is typically hundreds of pages in length with many dozens of exhibits. Experience with other types of writs is not comparable or sufficient.

Attorney applicants should electronically submit a sample complex habeas corpus petition for consideration. They should have been the one of the primary authors of the petition.

Training Requirements for Appointed Habeas Corpus Counsel

Criminal defense experience is no substitute for training. Specialized capital case training is available in California and through nation-wide criminal defense organizations. Qualified training programs must be vetted by the State Bar and the committee of attorneys who qualify counsel for inclusion on the Supreme Court roster.

Attorneys must participate in 18 hours of capital case training over 3 years. Attorneys must complete at least 9 hours of capital case training within the year prior to appointment.

Instructors of qualified training should receive credit for twice the number of Continuing Legal Education hours allotted for their session(s).

Removal of Appointed Counsel

If appointed habeas corpus counsel is not providing adequate representation, the rules must specify a mechanism for quick removal of appointed habeas corpus counsel, with a resetting of all deadlines. Assisting counsel, co-counsel, superior court, and the client should have authority to initiate proceedings for removal of appointed counsel.

Expanding Pool of Counsel

The proposed changes to the rules will expand the pool of qualified counsel with other systemic changes. Qualified experienced counsel earn $188 per hour in federal habeas corpus cases. State attorneys earn $145 per hour, with limitations on investigator and expert hourly rates. State habeas corpus practitioners are forced to accept deferred and denied payments, and arbitrary and inconsistent payment practices. On the other hand, the federal courts authorize ancillary funding for experts, mitigation specialists, investigators and others at reasonable rates and provide for prompt payment of these providers.

The expedited timeframes of Proposition 66 diminish the already shallow pool of qualified habeas corpus practitioners. Accepting appointment under Proposition 66 deadlines would require an attorney's full-time commitment and abandonment of current clients and other legal activities. Few experienced attorneys are willing to so limit their law practices to accept appointment on these cases without the safeguards of adequate funding and the protections afforded by these proposed comments.

These comments are respectfully submitted.

Sincerely,

STEVE REASE
President of California Attorneys for Criminal Justice

CLA
CALIFORNIA LAWYERS ASSOCIATION

LITIGATION SECTION
CAlawyers.org/Litigation

TO: Judicial Council of California
Presiding Justice Dennis M. Perluss, Chair

FROM: Committee on Appellate Courts, Litigation Section

DATE: August 24, 2018

RE: Invitation to Comment
SP18-12: Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings
SP18-13: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

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The Committee on Appellate Courts appreciates the working group's efforts to balance the mandates of Proposition 66 with the need to ensure qualified representation for death penalty appeals and habeas proceedings. The invitations to comment contain numerous issues, and the Committee provides the following responses for those issues where it has substantive suggestions.

SP18-12: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Proposal as a Whole:

The Committee agrees with the working group's concern that factors other than the current qualification standards dissuade private attorneys from seeking appointment in capital cases. As the working group identifies, these other factors include the level of compensation, the lengthy time commitment required, and the nature of the cases. The new one-year deadline for filing a habeas petition may very well exacerbate the problem. Holding this aside, the working group's proposed rules will help expand the applicant pool, but the Committee has some concerns and suggestions with regard to competency requirements.

Specific Comments:

- The Committee agrees that representation of either party—the prosecution or the defense—in felony appeals, habeas corpus proceedings, or jury trials should satisfy some case requirements for appointment in death penalty–related habeas corpus proceedings. However, we suggest that counsel should have experience representing the defendant/appellant/petitioner in at least half of the proceedings, including at least two qualifying habeas proceedings.

- For attorneys who do not have death penalty–related experience, the requirements should be increased, either by increasing the number of felony habeas cases to 5 or more, or by requiring that qualifying habeas cases involve post-conviction investigation.

- In terms of training, the Committee has the following suggestions:

  - The proposed rules require several training hours, only some of which have to be subject specific (either to "death penalty appeals" or to "death penalty habeas corpus proceedings"). The Committee questions whether the remaining hours of criminal defense training in unspecified topics is relevant and believes it is more important to focus on the subject-specific training and the recentness of the training.

    To this end, the Committee suggests using only the subject-specific training requirements proposed in the rule and perhaps increasing them. Additionally, the Committee suggests adding a requirement that (a) some number of the hours must be completed within the year prior to the application date and (b) persons placed on the habeas corpus panel must complete some number of hours of death-penalty-habeas-corpus training per year unless handling a case that year.

  - Prior capital case experience should be allowed to satisfy some or all of the training requirements, depending on the extent and recentness of the experience. The Committee supports the proposed rule that allows the appointing body to determine whether any additional training is required.

  - The Committee believes that trainings provided by other entities (such as appellate projects and state and criminal defense organizations) should qualify if they are subject-specific, in addition to any trainings approved by the State Bar and the vetting committees.

  - Instructors of qualifying trainings should be automatically credited with 2 hours of participation credit per hour taught.

SP18-13: Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings

Prioritization and Appointment:

- The Committee agrees with the general principle of prioritizing the appointment of counsel for those individuals who are subject to the oldest judgments of death. However, it may be preferable to leave it to the superior courts to decide prioritization for themselves. Doing so would allow the courts flexibility in deciding which case to assign to available counsel, taking into consideration the nature of the case, size of the record, and any complicating factors, along with counsel's experience. At the same time, superior courts could be encouraged to prioritize the oldest cases first. Along the lines suggested by the working group, the Habeas Corpus Resource Center (HCRC) could provide each superior court with periodic updates on the persons subject to a judgment of death for whom habeas corpus counsel has not been appointed, listed with the oldest judgments first.

- If the working group instead implements the proposed system of sending rolling lists of the oldest judgments to the courts, the Committee agrees with the specifics of the proposed system.

- The Committee agrees with proposed Rule 8.654(e)(3), which would require the superior court to "designate an assisting entity or counsel to provide assistance" at the same time that it appoints private counsel. Given the one-year deadline, it is important to have the assisting entity or counsel in place immediately.

Regional Committees and Vetting of Attorney Qualifications

- The Committee agrees with the proposal to form regional vetting committees and believes that at least two of the attorney members should have death penalty–related habeas corpus experience.

- To give sufficient direction, yet flexibility, the rules should indicate that the chair of the committee appoints the members, unless the committee adopts an alternative rule.

- The Committee agrees with the proposed term limits and the staggering of terms. However, the working group might consider allowing the committees to lengthen the term limits or allow members to serve a second term.

- The Committee agrees with proposed Rule 8.655(d)(6), which allows each committee to decide whether to reevaluate and remove an attorney following

a finding in any proceeding that the attorney provided ineffective assistance of counsel. Given the wide range of conduct that could constitute ineffective assistance of counsel, and the fact that ineffective assistance in a different case may or may not reflect on counsel's fitness for appointment, automatic removal from the panel does not seem warranted.

- With the goal of expanding the pool of available counsel in mind, the Committee agrees that a superior court should be authorized to appoint qualified attorneys who are not members of the statewide panel. No approval from the regional committee should be required. As well, attorneys who are on the statewide panel should be allowed to seek inclusion on a local panel.

- The Committee supports the mandatory use of Judicial Council Form HC-100 for all applications to the statewide panel. This requirement will help ensure that the necessary information is provided and will streamline the review of applicants.

- The Committee provides the following suggestions with regard to the proposed Judicial Council Form HC-100:

    - For section 2.a.(2).(b), consider allowing the applicant to provide the contact information for lead counsel, rather than requiring attestations and recommendations.

    - Consider omitting section 3, which states: "I am familiar with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings." The qualification requirements are meant to ensure familiarity, and this stand-alone statement is vague about what it means to be "familiar" with the practices and procedures.

    - For section 8, consider adding "(*if applicable*)" after "Previous application."

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August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA 94102

RE: <u>Rules and Forms: Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings</u>, Item Number SP18-12

Dear Judicial Council of California:

I am pleased to submit the following comments on behalf of the California Public Defenders Association (hereinafter, "CPDA") in regards to the proposed changes to the Rules of Court in regard to **<u>the Qualification of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings</u>**, Item Number SP18-12.

<u>Statement of Interest</u>

CPDA is the largest organization of criminal defense attorneys in the State of California. Our membership includes approximately 4000 attorneys who are employed as public defenders or are in private criminal defense practice. CPDA has been a leader in continuing legal education for defense attorneys for over 34 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. CPDA is the co-sponsor of the annual Capital Case Defense Seminar, co-sponsored by California Attorneys for Criminal Justice, which is held over four days every President's Day Weekend for more than thirty-five years; and the co-publisher of the California Death Penalty Defense Manual. CPDA is also active in the California Legislature, attending key Senate and Assembly committee meetings on a weekly basis, taking positions on hundreds of bills, and sponsoring legislation in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In addition, CPDA has appeared as amicus curiae in well over 50 decisions published by the California Supreme Court and Courts of Appeal, and served as amicus curiae in the United States Supreme Court.

Position

We agree with some of the proposals if they are modified. We do not agree with others. Our position is spelled out in detail below.

Comments

The Judicial Council asked, "[w]hether permitting any combination of case experience—instead of set numbers of each type of case—is appropriate, because an attorney could then qualify for appointment without having completed any felony appeals or any jury trials." (Invitation, page 8.) We agree with the concern expressed by the Judicial Council, and object to permitting any combination of case experience instead of set numbers. The specific requirements for each type of case are important. Each represents an important component that is necessary for competent representation in a capital habeas corpus proceeding.

With respect to "[w]hether counsel should be required to have handled a murder case and, if so, in what context (e.g., trial, appeal, habeas corpus proceeding), or whether it is sufficient that the past cases involve serious felonies" (page 8), we submit that counsel should be required to have handled a murder case as lead counsel at trial or on appeal, or as second (or lead) on a completed habeas petition. We recognize that experience in habeas corpus litigation is essential. However, previous representation on a murder case is critical because of the significant differences between murder charges and any other serious felony. Further, if counsel has not already represented an individual convicted of murder in a habeas proceeding, then they should have at least been lead counsel in a murder trial or a direct appeal from a murder conviction.

The Council considers whether prior service as counsel for the prosecution should satisfy the experiential qualifications. (Page 8.) We object to allowing service as counsel for the prosecution to satisfy any part of the requirements. The rules already allow for an alternative basis for qualification that does not require any prior defense experience. Thus, in the extremely rare (if ever) circumstance where an applicant must rely on prosecutorial experience in order to meet the minimum qualifications for appointment as capital habeas counsel, the existing rules allow for consideration of a potentially exceptional applicant.

We object to treating service as habeas counsel from convictions on serious felonies in two separate cases as a satisfactory substitute for having never represented a condemned prisoner on a habeas petition from a death sentence. (Page 8.) We believe that a lawyer who has never filed a habeas petition from a death sentence should have filed more than two prior habeas petitions from serious felony convictions in order to be appointed on a capital habeas case. The timeline in these cases will be so compressed that if the lawyer is not well-versed in habeas

procedure, he or she will not be able to meet the deadlines. Filing two habeas petitions from robbery or residential burglary convictions pales in contrast to the demands of filing a habeas petition from a death sentence. The consequences of procedural error or failing to raise all potentially meritorious issues can be catastrophic because of limitations on successor petitions. The requirement should be five habeas petitions with a minimum of three from violent felony convictions or two from murder convictions.

We salute the proposed increase in the training requirement from 9 to 15 hours. (Pages 9, 11.) However, 15 hours is insufficient. Habeas litigation is unique in that it requires knowledge and experience in both trial *and* appellate skills in defending murder cases, *and* expertise in the complex technicalities of habeas litigation. Thus, the training requirement should be more than required to represent a capital defendant at trial. Further, it is important to receive training from different sources. Therefore, we urge a dual requirement combining a minimum of (1) three separate trainings, (2) with a cumulative total of 20 hours of appellate criminal defense or habeas corpus defense training, at least 10 of which must address death penalty–related habeas corpus proceedings.

With regards to whether training credit should automatically be given for teaching (pages 9, 11), we believe that such credit should be acknowledged, but should be granted in the amount of one hour credit for one hour of teaching.

Regarding the recency of the trainings that have been attended (pages 9, 11), we agree that the trainings must be within two years before being included on the panel. However, because an attorney must continue to keep pace with new legal developments in capital habeas litigation, there must be a continuing training requirement, specifically requiring the same number of hours every two years in order to remain on the panel. (Again, we recommend 20 hours of training as the minimum.) In other words, no counsel should be appointed unless they have obtained the 20 hours within two years before being appointed; it is not sufficient to have had 20 hours within two years of being placed on the panel.

The Council also asked for comments on whether prior capital case experience should continue to satisfy some or all of the training requirement. (Page 12.) We think not. The experience requirement is separate from the training requirement, and for good reason. There can be no question that the substantive and procedural rules concerning capital habeas litigation continue to change. It is necessary to maintain training on current legal developments in these areas in order to be able to provide competent representation. Therefore, prior capital case experience should not satisfy any portion of the training requirement.

Finally, concerning the providers of the requisite training (see page 12), we recommend that the trainings for habeas counsel must be approved by a state-wide

entity, e.g., the State Bar, State Supreme Court, Habeas Corpus Resource Center or California Appellate Project.

Our additional comments to specific Rules are as follows:

Rule 8.605(c)(2)(A) and 8.605(c)(2)(B)(i): as explained above, we object to allowing prior experience as counsel for "either party" to satisfy the necessary qualifications. Instead, the proposed amendments to these subdivisions should be withdrawn.

Rule 8.605(c)(4)(B): for the reasons explained above, we urge the deletion of this subdivision.

Rule 8.605(d)(3): as explained above, we recommend increasing the required training hours from 18 to 20, and death-penalty specific habeas training from nine to ten hours, so that the first sentence reads, "Within two years before appointment, the attorney has completed at least 20 hours of Supreme Court–approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least ten hours of which involve death penalty appellate or habeas corpus proceedings."

Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C): for the reasons explained above, replace "for either party" with "as defense counsel". In addition, change "including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed" to "including as counsel of record for a petitioner in at least three habeas corpus proceedings, each involving a violent felony in which the petition has been filed, or at least two habeas corpus proceedings involving murder convictions in which the petition has been filed."

Rule 8.652(c)(4)(A): change "three years" to "two years". Change "15 hours" to complete at least "three separate trainings with a total of at least 20 cumulative hours". Further, the Rule needs to clearly provide that the requirement applies both to (1) being included on a panel and (2) the time of appointment. For example, change "or" to "and" immediately before "appointed" in the second line; alternatively, add a new sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment."

Rule 8.652(c)(4)(C): for the reasons explained above, we urge the deletion of this subdivision.

Rule 8.652(d)(3): change 18 hours (second line) to 20 hours, and make clear the requirement applies both to (1) being included on a panel and (2) the time of appointment. As with Rule 8.652(c)(4)(A), this may be accomplished by changing "or" to "and" immediately before "appointed" in the first line, or by inserting a new

second sentence providing: "This requirement applies both to the time of being included on a panel and to the time of appointment."

Thank you for your consideration,

Robin Lipetzky
President, California Public Defenders Association

Criminal Justice Legal Foundation

August 24, 2018

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Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: SP 18-12, Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, and

SP 18-13, Superior Court Appointment of Counsel in Death Penalty-Related Habeas Corpus Proceedings.

Proposition 66 Rules Working Group:

The Criminal Justice Legal Foundation, a nonprofit organization formed to protect and advance the rights of victims of crime, submits these comments on the above proposals.

The Judicial Council is tasked by statute, enacted in Proposition 66, to "adopt rules and standards of administration designed to *expedite* the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6, subd. (d).) It would be difficult to overstate the extent to which Proposal 18-13 fails in that goal. Instead of obeying the mandate of the voters to fix what is wrong with the present system and expedite the cases, the proposal doubles down on the current failures. It is contrary to Proposition 66 in spirit, in purpose, and in letter. Proposal 18-12 is also deeply flawed, violating the direction of Proposition 66 to avoid needlessly constricting the supply of attorneys.

Like the proverbial "elephant in the living room," the primary problem is completely absent from the background discussion. Before getting to the specific problems with the proposals, therefore, it is necessary to provide a rather lengthy description of the missing background.

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The Status Quo Ante

The best window into the problem is the California Supreme Court's decision in *In re Reno* (2012) 55 Cal.4th 428. *Reno* dealt specifically with successive habeas corpus petitions in capital cases. In that context, the court noted abusive practices that serve no purpose other than to throw sand in the gears, consume resources, and cause delay. In the particular case, the petitioner "filed a second habeas corpus petition . . . raising 143 claims in a 521-page petition, almost all of which are untimely without good cause." (*Id*. at p. 514.) In addition, almost all were additionally defaulted by not having been raised in prior reviews. (*Ibid*.) While these timeliness and default rules have exceptions, the petition made "no serious attempt to justify" the defaults. (*Id*. at p. 443.)

"The abusive nature of [the *Reno*] petition [was] by no means an isolated phenomenon." (*Id*. at p. 514.) Such abusive tactics "have become all too common." (*Id*. at p. 443.) The tactics are undertaken to delay for delay's sake (see *id*. at p. 515), a problem not limited to California. (See *ibid*., citing *Commonwealth of Pennsylvania v. Spotz* (2011) 610 Pa. 17, 171 (conc. opn. of Castille, C.J.).) Such tactics are unethical (*Reno*, *supra*, at p. 510) and sanctionable. (*Id*. at p. 512.) They are also poor advocacy, definitely *not* required for effective assistance. (See *Smith v. Murray* (1986) 477 U.S. 527, 536 (winnowing claims "is the hallmark of effective appellate advocacy," even in a capital case).)

Given all that California has invested toward providing quality representation, one might question how and why such abusive, wasteful, unproductive, and unethical tactics became the norm rather than the exception. California provides more generous resources than the typical state. (See *Reno*, 55 Cal.4th at pp. 456-457.) The State Bar established the California Appellate Project - San Francisco (CAP-SF), which acts as an "assisting entity" for appointed capital habeas attorneys. (See Proposal at pp. 2-3.) The Legislature established the Habeas Corpus Resource Center (HCRC) to provide representation directly, to assist with recruiting and selection of qualified private counsel, and to assist private counsel. (See Gov. Code, § 68661.) The Judicial Council provided by rule that specific training from an approved provider was part of the qualification for appointment. (Cal. Rules Court, rule 8.605 (e)(4),(f)(3).) Why was all this not sufficient to build a cadre of capital defense lawyers

with a culture of ethics and competence such that ethical and efficient while thorough representation was the norm and not the exception?

The simple reason is that the foxes gained control of the chicken house. The Legislature created HCRC in a bill that was intended to fix the problem of excessive delay in capital cases, yet it vested the governance of that office in a board elected by the regional appellate projects, organizations where opposition to capital punishment in its entirety is vehement and nearly unanimous. Regrettably but predictably, among the board's first actions was to choose as the first executive director a lawyer who had been chastised by the United States Supreme Court for "abusive delay . . . compounded by last-minute attempts to manipulate the judicial process." (See *Gomez v. United States District Court* (1992) 503 U.S. 653, 653 (*per curiam*).)

Capital defense presents a dilemma in that the system needs capable defense lawyers in order to operate, yet many and perhaps most of the people motivated to do this work full time are viscerally opposed to capital punishment and do not want the system to work. Many see their mission as the destruction of the system.

The abuses described *Reno* and the fact that they were pandemic within the capital defense bar demonstrates that good faith cannot be assumed in the existing capital defense institutions. Surely if the approved training and assisting entities had instructed appointed counsel to refrain from abusive tactics they would never have become the norm. More likely, these entities have been doing exactly the opposite, encouraging what they should have been discouraging.

Attorneys appointed to represent persons who have been convicted of major but noncapital crimes and sentenced to long terms in prison are not typically engaged in a crusade to abolish imprisonment, and their efforts do not delay the execution of the sentence. That is why protracted proceedings to certify the record, quibbling over insignificant imperfections, are nearly unknown. That is why massive petitions with hundreds of claims that are both obviously meritless and clearly defaulted are rare rather than the norm. In this respect, death *should* not be different.

Reform in this area needs to bring in more lawyers who want to provide competent representation in the same manner that they would for a life-sentenced prisoner and not engage in a crusade against capital punishment. The existing system discourages such lawyers, and the proposed rule would do nothing to fix it.

We know anecdotally that well-qualified lawyers seeking appointment after leaving district attorney offices have been rejected for no apparent reason other than not being part of the crusader clique. There are disturbing indications that the entities that are supposed to assist appointed counsel instead create a "hostile work environment" for attorneys with a different viewpoint. CAP-SF has been reported to pressure assigned counsel to make gifts to the clients, thereby reducing the compensation that the defense bar loudly claims is already inadequate.

There are often motions for counsel to withdraw with no public explanation, with the supporting material under seal, and there are anecdotal reports in some cases that a "conflict" with the assisting entity is the reason. Such a withdrawal requires the case to start over with appointment of another attorney, and the withdrawing attorney will likely never take another capital appointment. A "conflict" with an entity appointed only to advise and not control does not appear to be a ground for withdrawal, yet these motions are granted.

Any rule regarding assisting entities should make very clear that the entity is there to assist and not to command. The appointed counsel is counsel of record, is responsible for the case, and must be free to decline advice. While in rare cases it might be necessary for the assisting entity to bring to the attention of the court a matter that it regards as ineffective assistance, that entity must definitely not be allowed to be the judge of what is ineffective.

Proposition 66

Proposition 66 dealt with some of these issues directly. However, the drafters were aware that some of the problems are not susceptible to repair by an initiative, but instead may require change as needs and conditions change. The initiative relies on the Judicial Council to make rules and periodically review them in order to eventually meet the goal of

completing the direct appeal and first habeas corpus proceeding within five years. (See Pen. Code, § 190.6, subd. (d).)

The first and most important direct measure was to move the habeas corpus proceeding to the superior court and direct that court to make the appointment of habeas counsel. (Pen. Code, § 1509, subd. (a); Gov. Code, § 68662.) The model of appointing habeas counsel on a statewide basis is a dismal failure, and Proposition 66 scrapped it. The superior courts can and should recruit and appoint counsel locally from the same pool that takes appointments for serious noncapital criminal cases. The local pool can include the public defender, though the number of cases in which the public defender represented neither the petitioner nor a co-defendant at trial will be limited.

In terms of who can handle these cases, death is not nearly as different as it is cracked up to be. There are, to be sure, some rules that apply in the capital punishment context that are different from noncapital sentencing, but these rules are not difficult to learn. The guilt phase is largely the same. The essential skills needed to handle a habeas corpus petition do not depend on whether it is a capital or noncapital case.

The notion that these cases can only be handled by a select core of elite specialists is a myth that has been promulgated in order to restrict the pool of lawyers in an environment where a shortage of counsel means an extended delay in the case. In an earlier era, when there was no right to habeas corpus counsel in much of the country, the defense bar and the American Bar Association sang a very different tune. Then they proclaimed loudly that any experienced litigator could take these cases with some basic training and consultation with experienced death-penalty counsel. This point was made repeatedly in a special issue of Human Rights, the magazine of the ABA Section of Individual Rights and Responsibilities. (See Quade, From Wall Street to Death Row: Interview with Ronald Tabak, 14 Human Rights (Winter 1987) pp. 21, 62, col. 2 ("Even if you are a practitioner of civil litigation you can learn, as I did, how to do these cases"); Mikva and Godbold, "You Don't Have to Be a Bleeding Heart," same issue, pp. 22, 24, col. 2; Wanted: Pro Bono Counsel for Indigent Death Row Inmates, same issue, p. 29 ("Volunteer attorneys need not have extensive criminal law or postconviction experience").)

What has changed since then is not the nature of the work but the consequences of a shortage. Today, with death row inmates guaranteed habeas corpus counsel by both state and federal law (Gov. Code, § 68662; 18 U.S.C. § 3599, subd. (a)(2)), shortage means delay. To combat this delay, superior courts should be able to recruit and appoint attorneys from the same pool and in the same manner as they would for other major criminal cases.

Proposition 66 thus also contains provisions to expand the available pool of attorneys and particularly to encourage inclusion of those outside the crusader clique. The Judicial Council is expressly directed to "avoid unduly restricting the pool of available lawyers," a requirement violated by the standards proposal. The initiative contemplates continuation of a statewide roster of qualified attorneys, but it unambiguously commands that inclusion is the decision of the Supreme Court, removing that function from HCRC. (See Gov. Code, § 68661, subd. (d).) The appointment proposal violates that provision, as explained below.

The Habeas Corpus Appointment Proposal

Because the proposal proceeds from a misunderstanding of the background and the problem, it goes off in a very wrong direction. Far from obeying the statutory mandate to expedite, it appears to be crafted to obstruct.

Central Control of Appointment Priority

Proposed Rule 8.654, subdivisions (a)-(d) would construct an elaborate process to constrict the superior courts from appointing counsel on the theory that appointing counsel for a newer case causes increased delay in appointing counsel for an older case. The premise of the theory is that the pool of lawyers is statewide, and that the venue is irrelevant to a lawyer's ability and willingness to take the case. The text says that the principle is not meant to be applied rigidly and that the working group recognizes that "availability of counsel may vary regionally." Yet the rule proposed is rigid, and it appears to restrict the superior court of a county from appointing counsel (or at least give it "cover" for not doing so) when it might appoint a local lawyer who would not be able or willing to take a case in another county.

Certainly it is true that the ability of courts to recruit counsel may vary by county, and that newer cases in some counties might receive appointments. The proposal implies that this situation would be inequitable "to the families of the crime victims who have been waiting for a resolution to these cases." I have represented some of these families, and I very much doubt that any would be offended by the appointment of a local lawyer in another county to a newer case when that lawyer would not be available in their county. I also find it curious that the only mention of these families in the entire proposal is in the context of justifying a mechanism for increasing the delay overall. The absence of victim advocates from the Working Group may be a factor in this lack of understanding.

The principle of appointing lawyers for the oldest cases first should operate only by county, at least for appointment of local lawyers. A mechanism for rationing the appointment of lawyers from outside the area could conceivably be appropriate, but the result of such unavailability should be that the court recruits and appoints from the local bar.

Having no statewide rule would be better than the proposed rule. This proposal should be scrapped. If a prioritization rule is desired, the Working Group should start over and draft a much more limited and advisory rule.

Priority and Source of Appointment

Proposed Rule 8.654 (e)(2) would mandate that the superior court offer the appointment to HCRC first. Not a single shred of justification for this astonishing proposal can be found in the background material.

First, use of local counsel is particularly appropriate in habeas corpus proceedings. State habeas corpus is primarily concerned with claims arising on facts outside the record; claims that appear on the record generally can and must be made on direct appeal. (See *In re Dixon* (1953) 41 Cal.2d 756.) Proximity is both valuable and economical for fact-finding legwork and court appearances, and the local knowledge that comes with having practiced law for years in a community is a significant asset. HCRC is in San Francisco. Only 14.8% of California capital judgments come from the nine Bay Area counties, while 68.5% come from the nine counties south of the line that forms the northern boundary of San Bernardino,

Kern, and San Luis Obispo Counties. For most cases, HCRC is a long way from where the action is. The superior court could very well conclude that a local attorney is better positioned to take on a fact-intense case, and that decision ought not be precluded by rule.

Second, though it is rarely stated in public, it is well known among courts, prosecutors, and victim advocates that the institutional defense organizations are often more of the problem than the solution in capital litigation. Pennsylvania Chief Justice Castille's concurrence in *Commonwealth v. Spotz*, *supra*, cited by the California Supreme Court in *Reno*, is one of the few public statements, but his opinion is widely shared. Within California, HCRC is widely regarded on the prosecution side as a failed institution with a deep culture of obstruction.

If HCRC wants priority in appointments it can earn it by demonstrating that it has the ability and the will to handle capital habeas corpus cases expeditiously. Superior courts should have the authority to deal with obstructive lawyers, both individuals and institutions, by not appointing them. Giving HCRC a "right of first refusal" by statewide court rule is a needless restriction on the courts. It is certainly a violation of the spirit and probably a violation of the letter of Government Code section 68662, which now localizes the appointment decision and vests it in the superior court.

Proposed Rule 8.654(e)(2) is unjustified, unwise, and probably illegal. It should be removed from the proposal.

Proposed Rule 8.654(e)(3) would forbid the superior court to appoint an attorney not on the statewide list unless that court has adopted a local rule. This proposal also violates Government Code section 68662. The statute vests the appointment discretion in the superior court, and a court cannot be required to adopt a rule to maintain a discretion already vested in it by statute. The Judicial Council is constitutionally forbidden to adopt rules "inconsistent with statute," (Cal. Const., art. VI, § 6), and this proposal is inconsistent, as well as being bad policy.

One of the reasons that Proposition 66 vests the appointment decision in the superior court is that the judges of that court are familiar with the local lawyers. To put it candidly, they know who the stars are and who the turkeys are. The formal roster-making process is all well and good as an

advisory matter, but it should not prevent a superior court judge from appointing a lawyer whom the judge knows is fully capable of the task.

Proposed Rule 8.654(e)(3) should either be deleted or, if retained, amended to make unmistakably clear that the court has discretion to appoint an attorney not on the statewide roster if the court finds the attorney qualified, and no local rule to that effect is necessary.

The Statewide Roster

Before Proposition 66, Government Code section 68661, subdivision (d) assigned HCRC "[t]o establish and periodically update a roster of attorneys qualified as counsel . . . ." Proposition 66 amended that subdivision to make HCRC's role purely advisory and provided "the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center." Proposed Rule 8.655 is inconsistent with the statute.

The problem with having a capital defense roster assembled by defense organizations or committees dominated by defense lawyers is that attorneys who are not "true believers" in the anti-death-penalty crusade may be "blackballed." The very attorneys who would provide exactly what the system needs — competent yet expeditious representation — are subject to exclusion by those who do not want the system to work.

Having the recommendation done by regional committees rather than HCRC is a good idea, but the committees cannot have the last word. The statute unequivocally vests the final say in the California Supreme Court.

A rule for advisory committees needs to have strong protection against ideological blackballing. While the rule states the committee's job as determining "minimum qualifications," both the present and proposed rules have subjective elements. The rule should expressly forbid rejecting an application on the basis of the applicant's views on capital punishment or on prior experience as a prosecutor. An applicant who is not approved should have the right to a specific statement as to why he was not. There must be a mechanism for review. Consistently with the statute, that mechanism should be a final decision by the California Supreme Court. The court would no doubt routinely approve uncontested decisions and only be called upon to review the dubious and disputed ones.

The committee should have one district attorney member, recommended by the California District Attorneys Association or by the district attorneys of the region collectively, and one representative of the Attorney General's office. While the prosecution should not have a role in the actual appointment of counsel, it does have a legitimate interest in the composition of the pool from which attorneys are selected. This is not a conflict of interest. Having attorneys who will do a competent job is in the best interest of all concerned, as the prosecution is more likely to get the case back again if counsel is found ineffective. Representation on the committee would serve this interest and provide an additional safeguard against blackballing.

The proposal provides in Rule 8.655(d)(6) that a finding of ineffective assistance does not automatically result in removal of an attorney from the panel. We believe that is correct. Given the propensity of some courts to stretch for any reason to overturn a capital sentence, a finding of ineffective assistance may simply be wrong. This is particularly true where a claim of ineffective assistance was considered and rejected by the state courts and subsequently accepted by the federal courts.

However, the rule implies that a committee can unilaterally decide to remove an attorney from the panel. It cannot. The statutory vesting of the decision to include in the Supreme Court implies a similar assignment of the decision to remove.

Along with ineffective assistance, abusive tactics such as those denounced in *In re Reno*, *supra*, and *Gomez v. U.S. District Court*, *supra*, should also be expressly mentioned as grounds for removal.

Assisting Entities

The proposals show no awareness of the reality that the "assisting entities" can be as much of a hindrance as a help. We have been told that the difficulty of dealing with CAP-SF is one of the reasons that some appointed counsel say "never again," thus exacerbating an already critical shortage of attorneys.

The qualifications rule retains the language of present Rule 8.605(b): "An appointed attorney must be willing to cooperate with an assisting counsel or entity that the court may designate." This is not a qualification

and does not belong in this rule. A rule governing the relationship between appointed counsel and the assisting entity is in order, though, and it requires balance and a recognition of counsel's role as the decision-maker. Such a rule might read like this:

> "Appointed counsel and the assisting counsel or entity shall cooperate with each other. The role of the assisting counsel or entity is to advise and not to control. Appointed counsel remains responsible for case and shall make the decisions regarding representation in the best of his or her professional judgment after considering the advice offered. In the event that conflict between appointed counsel and the assisting counsel or entity becomes detrimental to representation, the court may (1) relieve the assisting counsel or entity if the court determines that appointed counsel can proceed without further assistance; or (2) designate a different counsel or entity to assist. Withdrawal or dismissal of appointed counsel on the ground of such conflict shall not be employed unless the court determines it is necessary to ensure effective representation."

Although it may be beyond the scope of the present rulemaking proceeding, the Judicial Council's monitoring of capital cases (see Pen. Code, § 190.6, subd. (d)) should include a review of how well or how poorly the assisting entities are actually assisting, including collection and review of evaluations of the entities by the appointed counsel. If the dissatisfaction in the reports we have received is widespread (and we have no way of knowing if it is), a change would be in order.

The Qualification Proposal

The statutory mandate for qualifications (see Gov. Code, § 68665, subd. (b)) requires consideration of four factors:

1. Achieving competent representation;

2. Avoiding unduly restricting the available pool of attorneys;

3. Qualifying for Chapter 154 of Title 28 of the U.S. Code; and

4. Not limiting experience requirements to the defense side.

Under criteria 2 and 4, changes from existing standards should all be in the direction of broadening the available pool, and particularly including attorneys who have recently left a prosecuting office, unless there is a compelling reason under criteria 1 or 3 for a more restrictive standard.

The proposal contains one, and only one, defensible increase in restriction. The present California standard for capital habeas attorneys is four years admission to the bar (see present Rule 8.605(e)(1)) while the corresponding federal standard is five years. (See 18 U.S.C. § 3599, subd. (c).) An increase to meet the federal standard does improve California's chance of qualifying for Chapter 154, if only marginally, with little impact on the available pool, and it is warranted. (See Proposed Rule 8.652(c)(1).)

For an increase in restrictiveness to be justified under the more general criterion 1, a compelling showing of need should be required, not just a vague impression. It is worth noting in this regard that even the American Bar Association—certainly no friend of capital punishment—has acknowledged that its earlier emphasis on "quantitative measures of attorney experience—such as years of litigation experience and number of jury trials"—was misguided. (See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 962 (2003).)

That said, Chapter 154 does require "standards of competency" (see 28 U.S.C. § 2265(a)(1)(C)), and the implementing regulations do employ quantitative measures for presumptive adequacy, so it would not be wise to abandon the existing standards. However, we are aware of no evidence that the existing bars are not high enough, and the background discussion in Proposal SP 18-12 does not cite any. Again, we should bear in mind the ABA's conclusion that quantitative measures are really not worth much.

The concerns expressed in the proposal that the one-year limit instead of three justifies higher hurdles is not well founded. Other jurisdictions have had one-year limits for many years, and their quantitative requirements are not typically higher than California's. (See, *e.g.*, 28 U.S.C. § 2255, subd. (f) (collateral review statute of limitation for federal defendants); 18 U.S.C. § 3599, subd. (c) (standards for counsel).) There is also little reason to believe that increased hours of instruction above the

current requirements will produce improved quality. Former capital appellate defense attorneys tell us that the instruction offered is frequently of poor quality and often far too elementary for the experienced attorneys required to attend it.

To the extent that the proposal increases quantitative measures and training requirements beyond the current rule, all such increases should be removed.

One essential element of the Proposition 66 reform for broadening the pool is to require prosecution experience to fully count. Relegating highly experienced former prosecutors to the "back of the bus" of alternative qualification was uncalled for from the very beginning. It is highly doubtful whether the Judicial Council has authority under Government Code section 68665 to require defense-side experience at all.

If we assume for the sake of argument that defense-side experience can be required in some degree, the requirement that counsel's experience include two habeas corpus cases *for the petitioner* in Proposed Rule 8.652(c)(2)(B)(ii) and (C) seems designed to insure that experienced attorneys leaving prosecuting offices will not qualify for some time, directly contrary to the intent of the Proposition 66 reform. An experienced attorney can learn the ropes of a procedure from either side. This restriction must be deleted.

Even worse, the "alternative experience" provision has a stealth provision to exclude recent departees from district attorney offices who could have qualified under the current "alternative" rule. Proposed Rule 8.652(d) incorporates (c)(5). That paragraph, in turn, requires submission of writing samples including "two or more habeas corpus petitions filed by the attorney *as counsel of record for the petitioner* . . . ." While the whole point of "alternative qualifications" under the current rule is to allow appointment without criminal defense experience, and the proposed rule ostensibly is for people who don't meet the (c)(2) requirements, the defense-side experience requirement is treacherously brought in through the back door of the writing sample requirement. "Dirty pool" would be an understatement.

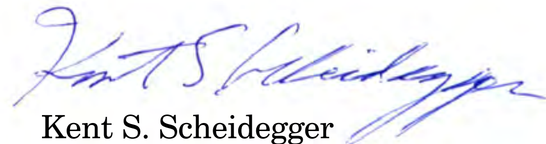
Training

Training can be helpful and may be necessary when learning a new subspecialty of practice, but we cannot assume that training will always be useful. As discussed near the beginning of this comment, it is difficult to believe that the abusive and unethical practices denounced in *In re Reno* could have become widespread if the ethics of practice and the duty of effective assistance (including *Smith v. Murray*, *supra*) had been correctly taught at the required training.

The defense bar likes to be secretive about its collective strategy, but if the power of government is going to be used to mandate attendance at training, then the public interest demands openness to insure that the course is correctly teaching ethics, not "unethics." As a condition of approval, all training providers should be required to admit any member of the bar who pays the fee.

It is deeply disappointing that these proposals do so little to advance the goal that the law requires the Judicial Council to advance. We hope that the Working Group will undertake a complete rewrite and produce a product that complies with the law's direction.

Very truly yours,



Kent S. Scheidegger

KSS:iha

Embajada de México

Washington, D.C.
August 23, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: SP 18-12, Comment from the Government of the United Mexican States

Dear members of the Judicial Council of California,

On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.

The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad.

There are currently 39 Mexican nationals on death row in California. Twenty-two of those do not yet have habeas corpus counsel appointed. Mexico thus has a legitimate interest in ensuring that rules governing the appointment of counsel for its citizens fully protect their rights. In addition, there are 22 nationals of other countries also on California's death row, to whom many of these concerns may also apply.

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[1] *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261.

Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals regardless of the case circumstances, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death.

As an initial matter, please understand that these are necessarily limited, provisional comments, submitted with the August 24, 2018 deadline in mind. The proposal is extensive and the topic complex; my government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Accordingly, we request permission to submit additional, more detailed comments within 90 days.

The proposal, SP 18-12, requests specific comments on 12 questions. With the exception of the first two questions, they all address the sufficiency of the proposed requirements for training and experience of attorneys appointed to represent petitioners in state habeas corpus proceedings. Mexico's primary concern about these proposed requirements is that they do not account for the special needs of foreign nationals in death penalty cases.

Representing foreign nationals requires additional skills, experience, and training beyond that necessary for capital habeas corpus representation generally. Indeed, the American Bar Association's widely cited *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* (Rev. ed. 2003) include an entire guideline, Guideline 10.6, specifically addressing "Additional Obligations of Counsel Representing a Foreign National." In addition to working with consulates, attorneys representing Mexican nationals in death penalty habeas corpus proceedings must at a minimum be familiar with relevant treaties and international law issues; have an understanding of the cultural differences that may affect the client and witnesses in their interactions with counsel and the legal system; be experienced in coordinating an extensive investigation in a foreign country; and be familiar with issues that frequently arise in these cases that are comparatively rare in U.S. citizen cases, such as problems with language barriers and interpreters, the location and evaluation of culturally knowledgeable and appropriate experts, and mitigation themes such as exposure to pesticides and immigration-related trauma. Because habeas corpus counsel must evaluate the sufficiency of trial counsel's representation in addition to re-investigating both the guilt-innocence and penalty portions of the case, he or she must understand what competent trial-level representation of a Mexican national entails.

The proposed rules fail to account for these necessary skills and experience. They require no training on cultural issues; indeed, proposed Rule 8.652(c)(4)(C) would allow an attorney who has completed just one death penalty-related habeas corpus proceeding for a U.S. citizen to be appointed on a Mexican national's case with no required training at all. They allow for the appointment of attorneys who have never litigated or even

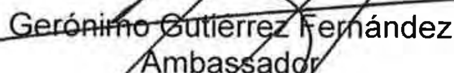
researched an issue regarding a treaty, such as the Vienna Convention on Consular Relations, the U.S./Mexico Mutual Legal Assistance Treaty,[2] and the bilateral U.S./Mexico Consular Convention. A Mexican national defendant could find himself represented by an attorney who had never before met a person from Mexico, never left the United States, speaks no Spanish and has never worked with an interpreter, and has never attempted to gather or analyze records or interview witnesses in a foreign country. While these omissions would be of concern any time an attorney takes on representation of a foreign national, they are especially worrisome in view of Proposition 66's one-year time limit on preparing and filing the petition. Appointed attorneys will have no time to familiarize themselves with new areas of law, unfamiliar cultural issues, or logistical challenges associated with investigation abroad. An attorney with no training or experience in these areas simply cannot provide effective representation to these individuals under such limitations.

At a minimum, the qualifications for counsel appointed in death penalty habeas corpus proceedings in the cases of foreign nationals must include substantial training and experience in representing such clients. The proposed rules already account for additional requirements in a subset of cases with greater needs; Rule 8.652(e) recognizes that experience conducting trials evidentiary hearings may not be necessary for adequate representation in every case, but may become necessary in certain cases, requiring the involvement of an attorney with such experience. Thus, including requirements for the requisite experience where necessary need not increase the required experience for counsel in every case. It would be quite feasible to account for the needs of this subset of specialized cases without significantly compromising the goal of increasing the pool of available counsel for death penalty habeas corpus cases generally.

Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States.

I avail myself of this opportunity to convey to you the assurances of my esteem and consideration.

Sincerely,



Gerónimo Gutierrez Fernández
Ambassador

[2] Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, S. TREATY DOC. NO. 100-13, eff. May 3, 1991, *27 I.L.M. 443*.

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: August 24, 2018

Re: SP 18-12 - Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

The below comments to SP 18-12 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. Given the breadth of the proposed rules and the time limitation for making comments, with the exception to comments on two provisions, we have limited our responses to what we believe are the most pressing questions within the Request for Specific Comments, found at pages 12-13 of the Invitation to Comment.

Comments on Specific Provisions:

Proposed Rule 8.601(5) suggests that HCRC may be designated by an appointing court as the "assisting counsel or entity" to "provide appointed counsel with consultation and resource assistance." HCRC's ability to serve as an assisting entity, however, is limited by Government Code section 68661. Specifically, Proposition 66 amended subdivision (g) of section 68661 to limit HCRC to providing "legal or other advice to appointed counsel in habeas corpus proceedings as is appropriate when not prohibited by law." Proposition 66 struck language from the original statute that permitted HCRC to provide "any other assistance" to appointed counsel "to the extent [the assistance was] not otherwise available." By limiting HCRC's functional mandate in subdivision (g), Proposition 66 has created uncertainty about the level of "consultation and resource assistance" HCRC could provide directly to appointed counsel when designated as an assisting entity.

Proposed Rule 8.652(c)(4) states that an attorney must complete specified training "[w]ithin three years of being included on a panel, appointed by the Supreme Court, or appointed by a court under a local rule as provided in rule 8.655." Proposed Rule 8.652(d)(3) requires that the training for the "alternate experience" qualification be

completed by the attorney "[w]ithin two years before being included on a panel or appointed by the Supreme Court." To make these rules consistent, and to ensure currency of knowledge in the frequently changing legal and forensic landscape of capital habeas corpus proceedings, the time period in subdivision 8.652(c)(4) should be modified from three years to two years. In addition, subdivision (c)(4) should be modified to make clear that the training requirement must be met by the appointed habeas corpus counsel not only within the specified period prior to inclusion on the statewide panel, but within the specified period *prior to any actual appointment* by a court that selected the habeas counsel from the statewide panel. This suggested modification creates uniformity in the training requirement regardless of whether the appointment is made by a court that selects counsel from the statewide panel, by the Supreme Court, or by a superior court under a local rule. It also ensures that appointed counsel's training is current, in the event counsel is included on the statewide panel but not immediately appointed to a habeas corpus case. Similarly, proposed Rule 8.652(d)(3) should be modified to require that the training for the "alternate experience" qualification be completed by the attorney within two years of both inclusion on the statewide panel and any appointment by a court that selects the attorney from the panel.

Responses to Selected Requests for Specific Comments:

- *Should service as counsel on behalf of any party satisfy the requirement for prior case experience, or should some or all of the experience be as counsel for the defendant/appellant/habeas corpus petitioner?*

The proposed rules do not and should not allow service as counsel on behalf of any party to satisfy the requirement for prior case experience. Representing petitioners in capital habeas corpus proceedings is unique and requires a high degree of skill and technical proficiency, especially regarding the identification, development, and presentation of mitigation evidence. In its 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the American Bar Association emphasized that "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases." 31 Hofstra L. Rev. 913, 923 (2002). Just as the defense of ordinary criminal cases is different from capital-case defense, so too is the prosecution of criminal cases – even death penalty cases. Prosecution experience alone should not satisfy the requirement of prior case experience.

- *How many hours of training is appropriate?*

Proposed Rule 8.652(c)(4)(A) currently requires, in part, that appointed counsel must have completed "at least 15 hours of appellate criminal defense or habeas corpus defense

training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which address death penalty habeas corpus proceedings."

Representation of petitioners in non-capital habeas corpus proceedings may bear little resemblance to such representation in capital proceedings. Non-capital habeas corpus proceedings often involve peripheral issues including parole eligibility and conditions of confinement. Even when related to the bases for the underlying criminal conviction, habeas corpus proceedings in non-capital cases do not deal with penalty phase issues. Thus, training on non-capital habeas corpus proceedings may not enhance an attorney's qualification to represent death row inmates in capital habeas corpus proceedings. Similarly, training in "appellate criminal defense," if that training is non-capital in nature, would not include penalty phase issues, and even if such appellate criminal defense training concerned capital representation, it would not cover development of extra-record facts – the quintessential task of the capital habeas litigator.

For these reasons, the rule should be modified to require "at least 15 hours of training in the representation of petitioners in death penalty habeas corpus proceedings."

- *What minimum combination of past case experience should counsel have before being eligible for appointment in a death penalty-related habeas corpus proceeding?*
- *Should counsel be required to have experience in habeas corpus proceedings, appeals, jury trials, and/or other writ proceedings?*
- *Should counsel seeking appointment in a death penalty-related habeas corpus proceeding have prior case experience relating to a murder charge or conviction?*

As discussed above with respect to training requirements, representation of petitioners in capital habeas corpus proceedings presents unique challenges not inherent in other areas of criminal practice. Non-capital criminal cases – even murder cases – do not involve a penalty phase, and therefore experience in non-capital cases will not prepare an attorney for that critical aspect of capital habeas corpus defense representation. Moreover, representation of defendants in capital in murder trials often does not involve extensive briefing and the understanding of labyrinthine state and federal procedural rules and standards of review required by counsel representing petitioners in capital habeas proceedings. Appellate cases – even in the capital context – do not involve development of extra-record facts, and therefore experience on criminal appeals, even when capital, will not prepare an attorney to do that work in a capital habeas proceeding. Representation of the state in criminal cases – even in capital cases – does not require mitigation investigation, nor does it present issues of client relations present in the representation of criminal defendants, and specifically death row inmates.

To better approximate the skills required for adequate representation of petitioners in capital habeas corpus proceedings, proposed rule 8.652(c)(2)(C) should require habeas corpus case experience in *at least* four serious felony cases, including at least two habeas corpus proceedings involving a murder conviction in which the petition has been filed. In addition, in keeping with the overall qualification standards of the ABA Guidelines, the combined case experience must be sufficient to demonstrate a familiarity and proficiency in criminal forensic issues, death qualification in jury selection, mental health issues (including intellectual disability), and social history investigation. Those who have not attained experience in these areas can acquire this experience by serving as supervised counsel in a capital case.

Downs, Benita

From: Invitations
Sent: Friday, August 17, 2018 9:29 AM
To: Invitations
Subject: Invitation to Comment: SP18-12

Proposal: SP18-12
Position: Disagree
Name: Marylou Hillberg
Title: Attorney at Law
Organization:
Comment on Behalf of Org.: No
Address: PO Box 1879
City, State, Zip: Sebastopol CA, 95473
Telephone: 707-575-0393
Email: hillberg@sonic.net
COMMENT:
Comments on Proposed Rule for New Qualifications for Appointment in Capital Habeas Petitions, California Rules of Court, Rule 8.652(c)

As counsel of record on two capital habeas appointments (S221802 & S211187), as well as un-appointed associate counsel for nearly ten years in another, (S168103), my evaluation of the proposed qualifications is that they will lead to grossly under-qualified counsel. Moreover, given the one year time line to file under Prop 66, there simply won't be enough time to climb the steep learning curve required to adequately investigate and prepare a constitutionally adequate habeas petition.

One of the most glaring omissions is that these rules do not even require prior experience in a murder case. That is extremely perplexing to me as most of the habeas work I have done, and what I have read in other cases, involves the impact of mental states and defenses on criminal behaviors. As a criminal defense attorney, one does not really begin to comprehend how the various forms of mental illness and disabilities affect the behaviors of our clients until we must apply them to defense in the varied degrees of homicide. I've handled more than seventy-five murder cases and can count on one hand (probably with fingers left over) how many of these cases were "who dun it"[s]. The issues I've encountered generally involved varied mental states as defenses to the crimes. Most other types of serious crimes, do not require this kind of analysis.

The other comment I have is that I greatly benefited from the assistance of an experienced, and extremely capable lawyer when I was an unappointed associate counsel with him in a case for nearly a decade. Then when I accepted my own capital habeas appointments, I learned just how overwhelming and difficult this work is for a sole practioner. I could not have done an adequate job in these petitions, within the three years of my appointments, without the assistance of CAP.

I think your MCLE requirements are grossly understated; since I started working on capital cases about 15 years ago, I've taken more 500 hours of MCLE, mostly in mental health areas. I do not believe that any attorney, without extensive prior training and experience, can adequately learn these areas AND file a petition within one year.

I do not see any provision for some form of intensive mentorship in your rules, which I also believe is sorely needed. I discovered it was a huge leap into capital work, even though I had extensive non-capital habeas and appellate experience, including many first degree murder cases. I know other attorneys who greatly benefited from "greening programs" that lasted several years and were offered by SDAP and CCAP, before they were appointed in murder cases. I see nothing of the sort offered for attorneys taking on death penalty cases with a one year filing date.

I find it ironic that it has taken me nearly 40 years of training, education and experience to learn enough to take on a capital habeas. Now I am too old to be able to do it in the sprint required under Prop 66. I gladly pass the torch to a

younger, faster generation, but I greatly fear they won't get far on their own power with the limited training and tools I see written in these rules.

My remaining concern is that the local appointment and oversight of habeas counsel will be inadequate to ensure competence, given discoveries I have made during investigations in state and federal cases of poor oversight and even, claims of corruption. It has shocked me even though I had "seen it all". I am not sure that these rules are intended to address adequate oversight on a state-wide level as my experience is that the adequacy of trial counsel varies greatly by locale. I hope this does not become true in death penalty cases.

Thank you very much for considering my thoughts.

Sincerely,
Marylou Hillberg,
Attorney at Law

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Eastern District of California

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BENJAMIN D. GALLOWAY
Chief Assistant Defender

KELLY S. CULSHAW
CHU Supervisor

CHARLES J. LEE
Fresno Branch Supervisor

August 24, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688
invitations@jud.ca.gov

RE: Comments of Federal Defender Heather E. Williams, Eastern District of California regarding *Invitation to Comment SP18-12, Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings*

Dear Judicial Council members:

I write to comment on the proposed *Rules and Forms: Qualification for Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, SP18-12*.

Introduction:

My Office - the California Eastern District Federal Defender's Office - represents individuals in federal court related to alleged criminal events occurring the 33 California counties making up the Eastern District. My Office's Capital Habeas Unit represents those sentenced to death in California Superior Courts in those same counties. Currently, we represent 37 such California death row inmates.

Of the 360 persons on California's death row awaiting the counsel appointment for their state habeas corpus proceedings, 50 are from counties in the Eastern District. It is important to my Office and vital to the clients we represent that California appoint qualified counsel to represent these persons.

Proposed Rule 8.605(c)(2):

Pursuant to Proposed Rule 8.605(c)(2) concerning the Panel for appointments to represent in their automatic appeal proceedings persons sentenced to death, attorney applicants must have served as counsel of record for either party (the State or a defendant) in a specified number of felony appeals.

We are concerned about the potential conflicts of interest when a Panel applicant previously represented the People of the State of California in felony appeals involving a capital appellant or witnesses involved in the capital appellant's case. Sometimes those conflicts are difficult to ascertain until the lawyer deeply involved in the case and reads the voluminous records. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate experience on behalf of the State of California are precluded from accepting automatic appeal appointments in cases from the county or counties in which they previously defended, for the State of California, criminal judgments on appeal."

This requirement would affect former California Attorney General's Office employees, from the Office which is charged with defending criminal judgments on appeal. While such an attorney may have defended criminal judgments from several California counties, thus disqualifying that person from accepting appointments in those counties, it would not prevent that lawyer from accepting any automatic appeal appointments from other counties. It is unlikely a former deputy attorney general would have defended criminal judgments from each of California's 58 counties.

Proposed Rule 8.652(c)(2):

This Proposed Rule provides the minimum qualifications for attorneys who accept appointment in capital habeas corpus cases in California. Like Proposed Rule 8.605, this Rule allows the committee to consider prosecutorial experience. The qualifying prosecutorial experience may include appeals, habeas corpus proceedings, and felony jury trials. *See* Proposed Rule 8.652(c)(2)(B)(ii) and 8.652(c)(2)(C).

As with Proposed Rule 8.605, we are concerned about the potential conflicts of interest when an applicant previously represented the People of the State of California in felony trials, habeas corpus proceedings or appeals involving a capital habeas petitioner or witnesses involved in the capital habeas petitioner's case. To avoid such conflicts, and to avoid the administrative problems attendant to appointed counsel needing to withdraw after identifying a conflict, we suggest this panel adopt a rule stating, "Applicants with prior appellate, habeas corpus or felony trial experience on behalf of the State of California are precluded from accepting capital habeas cases appointments in cases from the county or counties in which they previously tried felony cases for the State of California and/or defended, for the State of California, criminal judgments on appeal or in habeas corpus proceedings." This provision would affect prosecutors in the Attorney General's office and in the 58 California County district attorney offices.

We have a second concern regarding Proposed Rule 8.652(c)(2) and trial prosecutorial experience. This Rule accepts experience as prosecution trial counsel in habeas

corpus appointments. Representing the State in a trial may or may not provide relevant defendant/petitioner habeas corpus experience. As the Council is aware, a trial prosecutor may have nothing to do in a habeas corpus proceeding.

Once a petitioner files a petition for writ of habeas corpus in the superior court, the court may rule on the petition by issuing an order to show cause, denying the petition, or requesting an informal response. *See* Rule 4.551(a)(4). If the court summarily denies the petition, then the prosecutor never files anything. We suggest the Proposed Rule be modified to state, "A former state or county prosecutor's habeas corpus case experience qualifies under this rule only if the prosecutor filed an informal response or filed a return to an order to show cause."

As with habeas corpus petitions in the superior court, habeas corpus petitions filed in the Court of Appeal or the Supreme Court may be resolved summarily, without involving the prosecutor. *See* Rule 8.385. We recommend a prosecutor's qualifying experience regarding habeas corpus petitions filed in **any** court be limited to those cases where the prosecutor filed an informal response or a return to an order to show cause.

Proposed Rule 8.652(e):

Proposed Rule 8.652(e) directs an attorney appointed as habeas counsel, who does not have experience in trials or evidentiary hearings, must "associate with an attorney who has such experience" if an evidentiary hearing is ordered.

This proposal raises questions: What mechanism or process does appointed counsel use to "associate" with counsel who has trial experience? Is the superior court that appointed habeas counsel required to appoint an associate counsel once it orders an evidentiary hearing? Does associate counsel have to meet Proposed Rule 8.652(c)'s qualifications? Must associate counsel be appointed only from the panel?

We recommend the rule require the superior court appoint associate counsel from the panel.

Thank you for this opportunity.

Very truly yours,

HEATHER E. WILLIAMS
Federal Defender, Eastern District of California

/hew

Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712

August 24, 2018

Judicial Council of California
Attn: Invitations to Comment
Sent via email to: invitations@jud.ca.gov

Re: Comments on Item SP18-13, proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings

Comments on Item SP18-12, proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

Dear Members of the Judicial Council:

The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant habeas experience

We submit the following comments on the proposed rules relating to Superior Court Appointment of Counsel in Death Penalty—Related Habeas Corpus Proceedings, SP18-13.

1. We have deep concerns about the current length of time between the imposition of the judgment of death and the appointment of habeas counsel. Some of the appellants we represent have been waiting over a decade for habeas counsel. In the meantime, evidence is lost, memories fade, witnesses disappear or pass away. Thus, we note the rule provision that prioritizes the older cases, proposed rule 8.654(b), is a step in the right direction.

However, we wonder whether this rule and its "whenever possible" language will assure that the oldest cases get counsel first. We favor a more mandatory, direct rule. The language of 8.654(b) should read "shall", not "should."

2. While delay remains a significant problem, there is also a danger in appointing counsel too soon. New Government Code § 1509 subdivision (b) states that habeas counsel should be offered to defendants "[a]fter the entry of a judgment of death." This suggests that counsel might be appointed soon after entry of judgment. Of course, the prioritization of the older cases should prevent such an occurrence, but, in any event, no habeas counsel appointment should be made until after the record is certified. Habeas counsel, who will presumably – subject perhaps to equitable tolling – be expected to file a petition within a year of appointment, must have access to a complete and accurate record immediately. We favor a rule that specifically states that: "Regardless of any other provision, no appointment of habeas counsel in a death-penalty related case shall be made until after the record has been certified for completeness and accuracy pursuant to California Rules of Court, rule 8.622(b)(2)." This might be added to proposed rule 8.654 as subdivision (f).

3. There is a gaping hole in the proposed rules: the lack of any discussion of funding. Habeas counsel must be compensated. The reasonable expenses of habeas counsel must be funded. The rules do not make any provision for the payment of the attorneys who are supposedly going to receive appointments. It is simply unrealistic to expect any attorney to apply to be on the state-wide panel for habeas appointments without any provisions for when and how payment will be made for services and expenses.

Under current procedures, the California Supreme Court grants habeas counsel up to $ 50,000 in expenses for the preparation of habeas petitions. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, 2-2.1.) This policy has served to assure counsel taking an appointment that the Court anticipates that counsel will incur necessary expenses for investigation, forensic testing, experts, and other tasks. To have no similar provision in these rules creates uncertainty, confusion, and unfairness.

Further, the amended statute (Gov. Code § 68650.5) notes that one of the purposes of the law is to "qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154 of Title 28 of the United States Code." The Chapter 154 regulations specifically require a state system to provide for reasonable compensation for counsel and payment of litigation expenses, including investigators, mitigation specialists, mental health and forensic science experts, and support personnel. (See 28 C.F.R. § 26.22(c), (d).) Yet the proposed rules are, again, completely silent on the question of funding, compensation, and expenses. This is a glaring omission.

At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid.

Additionally, and related, is the question of funding and staff for the committees created by this rule. There is no provision for the funding of the operation of the committees, nor funding for staff and resources. The rule is silent and the omission also glaring.

4. We object to the "local rule" provision of rule 8.654(e)(3) and rule 8.655(e). The local rule provision is a mistake for a number of reasons. First, a local rule will invite inconsistency in the evaluation and selection of counsel. Second, a local rule will subvert the oldest case first proviso, since the local entity might not have cases within the 8.654(d) list of 25. Third, a local rule invites insular, separate decision making that will undercut the quality and consistency of the counsel appointments.

5. The "assisting entity" language of rule 8.654(e)0(3) does not mention any entities. The rule should designate CAP and HCRC as potential assisting entities.

We submit the following comments on the proposed rules relating to Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings, SP18-12.

1. As mentioned in our comments with regard to SP18-13, there is a significant and debilitating omission in these rules: the lack of provisions for the compensation of counsel and the funding of expenses.

2, Proposed rule 8.605(f) seems to be outdated and unnecessary. It appears to contemplate a joint appellate and habeas appointment in the California Supreme Court. Under the new procedures, it is unclear whether this situation would ever occur.

OSPD appreciates the Judicial Council's consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

Sincerely,

/S/

Mary K. McComb
State Public Defender

Item SP18-12 Response Form

TITLE: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings

X **Agree** with proposed changes
Agree with proposed changes **only if modified**
Do not agree with proposed changes

Comments:
The Los Angeles Superior Court supports this proposal as written.

PLEASE NOTE:
These comments are from the Los Angeles Superior Court and not from any one person in particular.

ORGANIZATION: LOS ANGELES SUPERIOR COURT
111 N. Hill Street, Los Angeles, CA 90012

RESPONSE TO: **Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102**

DEADLINE FOR COMMENT: **Friday, August 24, 2018**

Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

Circulation for comment does not imply endorsement by the Judicial Council.

From:	Invitations
To:	Invitations
Subject:	Invitation to Comment: SP18-12
Date:	Friday, August 24, 2018 4:58:49 PM

Proposal: SP18-12
Position: Agree if modified
Name: Kristin Traicoff
Title: Attorney
Organization: Law Office of Kristin Traicoff
Comment on Behalf of Org.: No
Address:
City, State, Zip: Sacramento CA, 95820
Telephone:
Email:
COMMENT:
I have four comments on the proposed rule changes:
1) Proposed rules 8.605(d) and 8.652(d)(1) provide for alternative qualifications for appointment as lead counsel in capital direct appeals and habeas corpus proceedings, respectively, allowing for appointment if the these qualifications are found to have been met. As a preliminary matter, it appears 8.605(d) vests solely in the Supreme Court authority to make this determination and 8.652(d)(1) allows both the Supreme Court and "the committee" to make this determination. It does not appear that there is any basis to give the committee this authority with regards to habeas appointments, but not appellate appointments, and thus I suggest 8.605(d) also include language that gives the committee this authority.

2) Proposed rules 8.605(g)(2) addresses the qualifications for assignment as lead counsel among the attorneys at OSPD. I am perplexed that this rule requires that, should the attorney be qualified under alternative qualifications (proposed rule 8.605(d)), the Supreme Court must remain the entity vested with the authority to determine if the person qualifies as lead counsel. It appears sensible that OSPD could be vested with this authority, given the other statutory and other mechanisms that exist to ensure that that agency--regardless of which attorney is assigned to represent a particular client--is, as a whole, providing effective representation to all clients whom OSPD has been appointed to represent. This is particularly true since and 8.652(h)(2) grants HCRC the authority to determine if an attorney qualifies as lead counsel under 8.652(d); again, the disparate treatment of these two agencies is perplexing and does not seem to be grounded in any material difference between the management capacities of the two agencies. Moreover, as a practical matter, it seems quite unlikely that a line attorney at OSPD would feel comfortable approaching the Supreme Court (or committee, should the rule be amended to grant the committee this authority) to essentially ask for greater work responsibilities at their job. As someone who worked at OSPD, doing so would have made me feel profoundly uncomfortable, as it would have felt as though I was essentially skipping over the internal management structure of the agency to essentially ask for a promotion form the Court. This simply seems unrealistic and I would be surprised if many OSPD attorneys chose to avail themselves of this option.

3) In response to the committee's question of whether filing two habeas corpus petitions in felony cases is too low or too high as an element of required experience for appointment as habeas counsel, I would suggest simply that the rules require that the writing samples the applicant submit be, at least, those two habeas petitions. The fact that someone has filed two habeas petitions does not necessarily mean that those petitions were of the quality that would ensure effective representation of a capitally-sentenced inmate in habeas corpus proceedings.

4) I believe the committee should require that the trainings discussed in the rule be recent, e.g., within the last 2 years. The reason is simply that capital case law is very volatile, in the sense that the US Supreme Court, 9th Circuit, and California Supreme Court frequently (i.e., multiple times per year) issue opinions that alter in some material way the understanding of the procedural or substantive law relevant to capital cases. As someone who has conducted trainings for other death penalty attorneys on legal developments, staying abreast of these developments requires significantly more effort than I have found is generally true in many other areas of the law with which I am personally familiar. An attorney who has an outdated understanding of the legal rules relevant to our work cannot

provide effective representation.

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: October 15, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Council: Judicial Branch Budget Committee

Committee or other entity submitting the proposal:
Executive and Planning Committee and Rules and Projects Committee

Staff contact (name, phone and e-mail): Susan R. McMullan
415-865-7990, susan.mcmullan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: N/A
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
The changes should be effective soon because this proposal creates a rule for an existing internal commiteee and makes other changes for clarity and consistency.

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 29–30, 2018

Title
Judicial Council: Judicial Branch Budget Committee

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 10.15; amend rules 10.10, 10.11, 10.13, and 10.16

Recommended by
Executive and Planning Committee
Hon. Douglas P. Miller, Chair
Rules and Projects Committee
Hon. Harry E. Hull, Jr., Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2019

Date of Report
October 15, 2018

Contact
Susan R. McMullan, 415-865-7990,
susan.mcmullan@jud.ca.gov

Executive Summary

The Judicial Council's Executive and Planning Committee and Rules and Projects Committee propose the adoption of rule 10.15 of the California Rules of Court on the Judicial Branch Budget Committee, an internal committee of the council. The committees also propose amending four other rules of court relating to the internal committees of the Judicial Council to make them consistent with the new rule and to eliminate duplication in the rules.

Recommendation

The Executive and Planning Committee and the Rules and Projects Committee recommend that the Judicial Council, effective January 1, 2019:

1. Adopt rule 10.15 to specify the purpose and budget responsibilities of the Judicial Branch Budget Committee; and

2. Amend rules 10.10, 10.11, 10.13, and 10.16 to make them consistent with the rule 10.15 and eliminate duplication in the rules.

The text of the new and amended rules is attached at pages 6–9.

Relevant Previous Council Action

The Judicial Branch Budget Committee (JBBC) was established July 1, 2016. The council did not immediately adopt a rule of court but set the committee's charge as follows:

> The Judicial Branch Budget Committee will assist the Judicial Council in exercising its duties under rule 10.101 with respect to the judicial branch budget. In performing this function, the committee's responsibilities will include:
>
> 1. Reviewing budget change proposals for the judicial branch; coordinating these budget change proposals; and ensuring that they are submitted to the council in a timely manner;
> 2. Reviewing and making recommendations on the use of statewide emergency funding for the judicial branch;
> 3. Reviewing and making recommendations on court innovations grant funding; and
> 4. Performing such additional tasks as may be assigned to the committee.
>
> The Judicial Branch Budget Committee shall endeavor to promote the efficient, fiscally prudent, effective, and fair allocation of branch resources so as to advance statewide judicial branch interests.

(Judicial Council of Cal., "Judicial Branch Budget Committee" page of the California Courts website, *www.courts.ca.gov/jbbc.htm* (as of October 15, 2018).)

Since July 2016, the JBBC has performed the charges assigned to it, including reviewing budget change proposals and reviewing and making recommendations on the use of statewide emergency funding and innovations grant funding.

Analysis/Rationale

Adoption of rule 10.15

No rule currently sets out the duties and responsibilities of the Judicial Branch Budget Committee. The adoption of rule 10.15 would formally recognize that the JBBC is one of the council's six internal committees, clearly define the parameters of the work of the committee, and make the duties and responsibilities of the committee clearer and more transparent for the judicial branch and the public.

Subdivision (a) of the rule states that the purpose of the JBBC is to assist the council to exercise its responsibilities under rule 10.101 with respect to the branch budget.[1] In assisting the council on the branch budget, the JBBC:

- Ensures that proposed judicial branch budgets, allocation schedules, and related budgetary issues are brought to the Judicial Council in a timely manner and in a format that permits the council to establish funding priorities in the context of the council's annual program objectives, statewide policies, and long-range strategic and operational plans;
- Reviews and makes recommendations annually to the council on submitted budget change proposals for the judicial branch, coordinates these budget change proposals, and ensures that they are submitted to the council in a timely manner;
- Reviews and makes recommendations on the use of statewide emergency funding for the judicial branch;
- Reviews and makes recommendations on the funding of grants on programs assigned to the committee; and
- Acts on other assignments referred to it by the council.

(Proposed Cal. Rules of Court, rule 10.15(b).)

Amendments to rule 10.10, Judicial Council internal committees
Rule 10.10 is amended to add the JBBC as the sixth committee on the list of internal committees in subdivision (a).

The rule is further amended to add new subdivision (h) on the oversight of advisory committees and other bodies. Provisions on oversight are currently included in three of the other internal committee rules. Instead of adding a fourth similar provision to rule 10.15 on the JBBC, a single provision about oversight of advisory bodies in the general rule on internal committees, rule

[1] Rule 10.101(b), on the duties of the Judicial Council with respect to budget and fiscal management, states:

The Judicial Council must:
(1) Establish responsible fiscal priorities that best enable the judicial branch to achieve its goals and the Judicial Council to achieve its mission;
(2) Develop policies and procedures for the creation and implementation of a yearly budget for the judicial branch;
(3) Develop the budget of the judicial branch based on the priorities established and the needs of the courts;
(4) Communicate and advocate the budget of the judicial branch to the Governor and the Legislature;
(5) Allocate funds in a manner that ensures equal access to justice for all citizens of the state, ensures the ability of the courts to carry out their functions effectively, promotes implementation of statewide policies as established by statute and the Judicial Council, and promotes implementation of efficiencies and cost-saving measures;
(6) Resolve appeals on budget and allocation issues; and
(7) Ensure that the budget of the judicial branch remains within the limits of the appropriation set by the Legislature.

10.10, clarifies that an important responsibility of the internal committees is oversight of advisory bodies and reduces the duplication in the rules.

Amendments to rule 10.11, Executive and Planning Committee

To reflect the budget responsibilities of the JBBC, subdivision (d) of rule 10.11 on budgets is relocated to rule 10.15 and deleted from rule 10.11.

Because a general provision on oversight of advisory committees is added as subdivision (h) to rule 10.10 on the internal committees, subdivision (i) of rule 10.11 on oversight of advisory bodies by the Executive and Planning Committee is no longer necessary and has been eliminated.

Amendments to rule 10.13, Rules and Projects Committee

Because a general provision on oversight of advisory committees is added as subdivision (h) to rule 10.10 on the internal committees, subdivision (e) of rule 10.13 on oversight of advisory bodies by the Rules and Projects Committee is no longer necessary and has been eliminated.

Amendments to rule 10.16, Technology Committee

Because a general provision on oversight of advisory bodies is added to rule 10.10, the subdivision in rule 10.16 on the Technology Committee no longer needs to contain a detailed provision on this same subject. However, the Technology Committee's provision on oversight has not been entirely eliminated because it is broader than the general provision in rule 10.10(h): it also provides that the Technology Committee oversee branchwide technology initiatives sponsored by advisory bodies under it. Thus, amended subdivision (i) contains a cross-reference to the committee's general oversight responsibilities over advisory bodies under rule 10.10(h) and retains its additional responsibilities for oversight over branchwide technology initiatives.

Policy implications

The policy implications of this proposal are limited. The role and scope of responsibility of the JBBC are unchanged, but are established in the California Rules of Court.

Comments

The proposal circulated for public comment from September 12 to October 9, 2018. No comments were received.

Alternatives considered

The Judicial Branch Budget Committee could have continued to function based on its charge and without a formal rule. But for the reasons presented above, it is better to have a rule specifying the purpose and responsibilities of the committee. The other proposed rule changes are needed either to make the rules on internal committees consistent with rule 10.15 or to simplify or clarify those rules.

Fiscal and Operational Impacts

The implementation requirements of the changes recommended in this proposal are insignificant.

Attachments and Links

1. Cal. Rules of Court, rules 10.10, 10.11, 10.13, 10.15, and 10.16, at pages 6–9

Rule 10.15 of the California Rules of Court is adopted, and rules 10.10, 10.11, 10.13, and 10.16 are amended, effective January 1, 2019, to read:

Rule 10.10. Judicial Council internal committees

(a) Judicial Council internal committees

The internal committees are:

(1) Executive and Planning Committee;

(2) Policy Coordination and Liaison Committee;

(3) Rules and Projects Committee;

(4) Litigation Management Committee;~~ and~~

(5) Technology Committee; and

(6) Judicial Branch Budget Committee.

(b)–(g) * * *

(h) Oversight of advisory committees and other bodies

When an internal committee has been assigned by the Chief Justice with the responsibility for oversight over one or more advisory committees or other bodies, the internal committee ensures that the activities of each advisory body overseen by it are consistent with the council's goals and policies. To achieve these outcomes, the internal committee:

(1) Communicates the council's annual charge to each advisory body;

(2) Reviews the proposed annual agenda of each to determine whether the agenda is consistent with the advisory body's charge and with the priorities established by the council; and

(3) After review, approves the final annual agenda for each advisory body.

Rule 10.11. Executive and Planning Committee

(a)–(c) * * *

~~**(d) Budgets**~~

~~The committee ensures that proposed judicial branch budgets, allocation schedules, and related budgetary issues are brought to the Judicial Council in a timely manner and in a format that permits the council to establish funding priorities in the context of the council's annual program objectives, statewide policies, and long-range strategic and operational plans.~~

~~(e)~~(d) * * *

~~(f)~~(e) * * *

~~(g)~~(f) * * *

~~(h)~~(g) * * *

~~**(i) Oversight of advisory committees and task forces**~~

~~For those advisory committees and task forces over which it has been assigned oversight by the Chief Justice, the committee ensures that the activities of each are consistent with the council's goals and policies. To achieve these outcomes, the committee:~~

~~(1) Communicates the council's annual charge to each; and~~

~~(2) Reviews an annual agenda for each to determine whether the annual agenda is consistent with its charge and with the priorities established by the council.~~

~~(j)~~(h) * * *

Rule 10.13. Rules and Projects Committee

(a)–(d) * * *

~~**(e) Oversight of advisory committees and task forces**~~

~~For those advisory committees and task forces over which it has been assigned oversight by the Chief Justice, the Rules and Project Committee ensures that the activities of each are consistent with the council's goals and policies. To achieve these outcomes, the committee:~~

~~(1) Communicates the council's annual charge to each; and~~

~~(2) Reviews an annual agenda for each to determine whether the annual agenda is consistent with its charge and with the priorities established by the council.~~

~~(f)~~(e) * * *

Rule 10.15. Judicial Branch Budget Committee

(a) Purpose

The Judicial Branch Budget Committee assists the council to exercise its responsibilities under rule 10.101 with respect to the branch budget.

(b) Budget responsibilities

In assisting the council on the branch budget, the committee:

(1) Ensures that proposed judicial branch budgets, allocation schedules, and related budgetary issues are brought to the Judicial Council in a timely manner and in a format that permits the council to establish funding priorities in the context of the council's annual program objectives, statewide policies, and long-range strategic and operational plans;

(2) Reviews and makes recommendations annually to the council on submitted budget change proposals for the judicial branch, coordinates these budget change proposals, and ensures that they are submitted to the council in a timely manner;

(3) Reviews and makes recommendations on the use of statewide emergency funding for the judicial branch;

(4) Reviews and makes recommendations on the funding of grants on programs assigned to the committee; and

(5) Acts on other assignments referred to it by the council.

Rule 10.16. Technology Committee

(a)–(h) * * *

(i) Oversight of advisory committees and ~~task forces~~ other bodies

In addition to performing its oversight responsibilities under rule 10.10(h), ~~For those advisory committees and task forces over which it has been assigned~~

~~oversight by the Chief Justice,~~ the Technology Committee ~~ensures that the activities of each are consistent with the council's goals and policies performs the responsibilities under rule 10.10(h). To achieve these outcomes, the committee:~~

~~(1) Communicates the council's annual charge to each;~~

~~(2) Reviews an annual agenda for each to determine whether the annual agenda is consistent with its charge and with the priorities established by the council; and~~

~~(3)~~ oversees the branchwide technology initiatives sponsored by each advisory body for which it is responsible.