

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR23-12

Title	Action Requested
Criminal Procedure: Appointment of Trial Counsel in Capital Cases	Review and submit comments by May 12, 2023
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 4.117	January 1, 2024
Proposed by	Contact
Criminal Law Advisory Committee Hon. Brian. M. Hoffstadt, Chair	Sarah Fleischer-Ihn, 415-865-7702 sarah.fleischer-ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes amending the rule governing qualifications for appointed trial counsel in capital cases to clarify that appointment of qualified counsel applies to all capital cases unless the district attorney affirmatively states on the record that the death penalty will not be sought.

Background

Rule 4.117 was adopted by the Judicial Council effective January 1, 2003. The Criminal Law Advisory Committee developed the rule because there were no statewide minimum standards for appointment of trial counsel in capital cases at the time. The rule was designed to set standards to help ensure adequate representation in death penalty trials and to avoid unnecessary delay and expense in appointing counsel.

The Proposal

This proposal would amend subdivision (b), General qualifications, to clarify that qualified counsel should be appointed in all capital cases unless the district attorney has made an affirmative statement on the record that the prosecution will not be seeking the death penalty:

In cases in which the death penalty is sought where a person is charged with capital offenses, the court must assign qualified trial counsel to represent the defendant unless the district attorney has made an affirmative statement on the record that the prosecution will not be seeking the death penalty. The attorney may be appointed only if the court, after reviewing the attorney's background,

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.

The committee was concerned that the phrase “in which the death penalty is sought” could be interpreted as applying only when the district attorney has made an affirmative statement in a capital case indicating that they are seeking the death penalty. The Judicial Council report recommending adoption of the rule noted that

[t]he rule specifies that counsel must meet the qualifications in cases “in which the death penalty is sought” (Rule 4.117(b).) The committee noted that it is not always clear at arraignment, when counsel would normally be appointed, whether the District Attorney will be seeking the death penalty. Thus, as a practical matter, the rule would apply to all special-circumstances cases, unless there has been an explicit statement by the District Attorney that the death penalty will not be sought. This procedure is consistent with the current practice in counties with local standards. In those counties attorneys who are qualified to be assigned to death penalty cases are appointed to all cases involving special circumstances.

(Judicial Council of Cal., Advisory Com. Rep., *Minimum Standards for Appointed Trial Counsel in Capital Cases* (Aug. 19, 2002), pp. 3–4.)

A capital case has been defined in a similar manner when interpreting Penal Code section 987.9, which allows indigent defendants charged in a capital case or under Penal Code section 190.5(a) to seek funds for investigators, experts, and others whose assistance is needed to prepare or present a defense. The state regulations on reimbursement to counties for the cost of homicide trials under section 987.9 allow for reimbursement in a special circumstances case unless it “no longer involves the death penalty.” This is defined as dismissal of the special circumstance allegations or where “the prosecution has formally elected not to seek the death penalty.” (Cal. Code Regs., tit. 2, § 1026.2.)

In *People v. Gardner* (2010) 185 Cal.App.4th 1003, the trial court denied a section 987.9 request for indigent defense funds in a case in which special circumstances were charged because the district attorney had not announced that he was seeking the death penalty and, until he did, the case was not “presently a capital case.” (*Id.* at p. 1007.) On appeal, the First Appellate District held that “capital case,” as used in section 987.9, means one where the defendant faces the possibility of the death penalty, so that unless the district attorney makes an announcement to the contrary, a defendant charged with special circumstances is exposed to that punishment and a section 987.9 request should be heard on the merits. (*Id.* at p. 1014.)

Although these examples are about eligibility for indigent capital defense funds under section 987.9, the underlying rationales are comparable with the committee’s position when first

developing the rule that qualified counsel should be appointed in a special circumstances case, unless the district attorney states that they will not seek the death penalty.

Alternatives Considered

The committee discussed whether the rule should require that the district attorney’s statement not seeking the death penalty be made on the record. As noted above, regulations and cases interpreting section 987.9 do not require the statement to be on the record, but state that the prosecution must “formally elect[]” not to seek the death penalty, or “make an announcement to the contrary.” Upon discussion, the committee agreed to require that the statement be made on the record, noting that this appears to be the standard practice, but is seeking specific comments on whether remaining silent about the record requirement is preferred.

Fiscal and Operational Impacts

No implementation or operational impacts are likely.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Would the following phrasing be preferable to explicitly requiring that the statement be on the record?

In cases in which the death penalty is sought where a person is charged with capital offenses, the court must assign qualified trial counsel to represent the defendant unless the district attorney has made an explicit statement that the death penalty will not be sought.

The advisory committee 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 three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 4.117, at page 4

Rule 4.117 of the California Rules of Court would be amended, effective January 1, 2024, to read:

1 **Rule 4.117. Qualifications for appointed trial counsel in capital cases**

2
3 (a) * * *

4
5 (b) **General qualifications**

6
7 In cases ~~in which the death penalty is sought~~ where a person is charged with capital
8 offenses, the court must assign qualified trial counsel to represent the defendant
9 unless the district attorney has made an affirmative statement on the record that the
10 prosecution will not be seeking the death penalty. The attorney may be appointed
11 only if the court, after reviewing the attorney’s background, experience, and
12 training, determines that the attorney has demonstrated the skill, knowledge, and
13 proficiency to diligently and competently represent the defendant. An attorney is
14 not entitled to appointment simply because he or she meets the minimum
15 qualifications.

16
17 (c)–(i) * * *