

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

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-corporus 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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