



Judicial Council of California

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INVITATION TO COMMENT

W24-02

Title

Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(f)

Action Requested

Review and submit comments by January 19, 2024

Proposed Effective Date

September 1, 2024

Proposed Rules, Forms, Standards, or Statutes

Adopt Cal. Rules of Court, rule 4.553

Contact

Sarah Fleischer-Ihn, 415-865-7702

sarah.fleischer-ihn@jud.ca.gov

Proposed by

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Executive Summary and Origin

The Criminal Law Advisory Committee proposes a rule of court to implement legislation requiring the Judicial Council to develop qualifications for the appointment of counsel in superior court habeas corpus proceedings under Penal Code section 1473(f).¹ Section 1473(f) is part of the Racial Justice Act, which prohibits the state from seeking or obtaining a conviction or sentence based on race, ethnicity, or national origin and allows petitioners to make claims for relief based on violations of this Act.

Background

The Racial Justice Act of 2020 (Assem. Bill 2542; Stats. 2020, ch. 317) enacted Penal Code section 745,² which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin. The bill allowed defendants to file motions in the trial court for claims under section 745 or, if judgment had been imposed, a petition for writ of habeas corpus or a motion to vacate a conviction or sentence under section 1473.7 (section 745(b)). The

¹ Effective January 1, 2024, subdivision (f) of section 1473 will be re-lettered as (e). (See Sen. Bill 97; Stats. 2023, ch. 381.)

² All further references are to the Penal Code unless otherwise specified.

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 It is circulated for comment purposes only.

Act also added subdivision (f) to section 1473 specifically addressing habeas corpus petitions that raise claims under section 745.

On June 30, 2023, the Legislature enacted new section 1473.1,³ which took effect immediately. Section 1473.1 requires the Judicial Council to develop standards for appointment of private counsel in superior court for claims filed under section 1473(f) by individuals who are not sentenced to death. These standards are required to include a minimum of 10 hours of training on the California Racial Justice Act of 2020. Further, this training must meet the requirements for Minimum Continuing Legal Education credit approved by the State Bar of California. The statute notes that appointment standards for counsel where an individual has been sentenced to death shall be consistent with existing standards set forth in the California Rules of Court.

The Proposal

The committee is proposing new rule 4.553 to fulfill the requirements of section 1473.1. The proposed rule is modeled in part after two other rules in the California Rules of Court addressing counsel qualifications in criminal and related matters: rule 4.117, Qualifications for appointment of counsel in capital cases, and rule 8.652, Qualifications of counsel in death penalty–related habeas corpus proceedings. Like these rules, the proposed rule includes a purpose section defining the rule’s scope, attorney qualifications, alternative qualifications, and guidance around public defender appointments.

The committee consulted advocates that supported section 1473.1 about priority qualifications. From their perspective, it was important for appointed counsel to have the experience required to have represented the individual in the underlying criminal case. They did not think prior experience in habeas proceedings was necessary. They also indicated that training in implicit bias, as part of or separate from the 10-hour Racial Justice Act training requirement, was important. The committee incorporated both priorities into the proposed rule, while adding alternative qualifications that appointed counsel have experience as counsel of record in at least two habeas corpus proceedings or criminal appeals. The committee also included training on habeas corpus procedure as part of the 10-hour Racial Justice Act training requirement.

The committee also proposes an advisory provision addressing Public Defender appointments because it is anticipated that a significant percentage of appointments for claims under section 1473(f) will be handled by agencies providing services to indigent defendants, such as the Public Defender. Subdivision (d) recommends that the Public Defender assign attorneys who meet the rule’s qualifications. While rules of court usually are mandatory, the committee thought an advisory provision was appropriate since section 1473.1’s only directs the council to promulgate standards for appointment of private counsel for claims under section 1473(f). However, the committee thought that if the rule did not address Public Defender appointments, there would be

³ Sen. Bill 133 (Stats. 2023, ch. 34).

no guidance around minimum qualifications for counsel in a significant percentage of appointments of counsel for claims under section 1473(f).

The committee proposes rule 4.553 do the following:

- Describe the purpose and scope of the rule (sub. (a));
- Include the following qualifications for appointed counsel (sub. (b)):
 - Active membership in the State Bar of California (par. (1));
 - Experience as one of the following (par. (2)):
 - Counsel of record for a petitioner in at least two habeas corpus proceedings filed in the Supreme Court, a Court of Appeal, or a superior court (subpar. (A));
 - Counsel of record in at least two criminal appeals filed in the Supreme Court, a Court of Appeal, or a federal appellate court (subpar. (B)); or
 - Have the experience required to have represented the individual in the underlying class of criminal case (subpar. (C));
 - Familiarity with the practices and procedures of California criminal courts (par. (3));
 - Demonstrated proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy (par. (4)); and
 - Have completed a minimum requirement of 10 hours of training on the California Racial Justice Act of 2020, including training on implicit bias and on habeas corpus procedure, approved for Minimum Continuing Legal Education by the State Bar of California (par. (5));
- Allow the court to appoint an attorney who does not meet all the qualifications if the attorney has completed the 10 hours of training on the California Racial Justice Act of 2020, including training on implicit bias and on habeas corpus procedure, and demonstrates the ability to provide competent representation (sub. (c)); and
- Provide guidance to public defender offices on assignment of qualified attorneys (sub. (d)).

The committee discussed whether the proposed qualifications in subdivision (b)(2)(a)–(c) of the rule could be too onerous. The committee agreed that it was important for appointed counsel to have some prior experience in habeas corpus proceedings, criminal appeals, or criminal case representation, and that a court could, if needed, rely on the alternative requirements to appoint counsel who did not meet all of the qualifications in subdivision (b).

Alternatives Considered

Section 1473.1 requires the Judicial Council to promulgate standards for appointment of counsel in superior court for claims filed under section 1473(f), so the committee did not consider the alternative of not proposing such standards.

Section 1473.1 contains an exception for death penalty cases, but it does not appear to prohibit developing qualifications related to the Racial Justice Act in these types of cases. However, given that qualifications for counsel in death penalty habeas proceedings are quite extensive and already difficult to meet, the committee decided not to develop qualifications related to the Racial Justice Act for counsel in death penalty–related habeas proceedings.

Fiscal and Operational Impacts

The fiscal and operational impacts of this proposal are attributable to the legislation that mandated it.

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?

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 4.553, at pages 5–6
2. Link A: Penal Code section 1473.1,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.1.&lawCode=PEN

Rule 4.553 of the California Rules of Court would be adopted, effective September 1, 2024, to read:

1 **Rule 4.553. Qualifications for appointed counsel for claims under section 1473(e) in**
2 **noncapital case**

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4 **(a) Purpose**

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6 This rule defines the minimum qualifications for appointment of counsel for a
7 petition for writ of habeas corpus claim filed under section 1473(e) in a noncapital
8 case in the superior court. These minimum qualifications are designed to promote
9 competent representation in habeas corpus proceedings related to the Racial Justice
10 Act of 2020 and to avoid unnecessary delay and expense by assisting the courts in
11 appointing qualified counsel. Nothing in this rule is intended to be used as a
12 standard by which to measure whether a person received effective assistance of
13 counsel. An attorney is not entitled to appointment simply because the attorney
14 meets the minimum requirements.

15
16 **(b) Qualifications**

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18 To be eligible as appointed counsel, an attorney must:

- 19
20 (1) Be an active member of the State Bar of California.
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22 (2) Have experience as one of the following:
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24 (A) Counsel of record for a petitioner in at least two habeas corpus
25 proceedings filed in the Supreme Court, a Court of Appeal, a superior
26 court, or a federal court.
27
28 (B) Counsel of record in at least two criminal appeals filed in the Supreme
29 Court, a Court of Appeal, or a federal appellate court.
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31 (C) Have the experience required to have represented the individual in the
32 underlying class of criminal case.
33
34 (3) Be familiar with the practices and procedures of California criminal courts.
35
36 (4) Demonstrate proficiency in investigation, issue identification, legal research,
37 analysis, writing, and advocacy.
38
39 (5) Have completed a minimum requirement of 10 hours of training on the
40 California Racial Justice Act of 2020, including training on implicit bias and
41 on habeas corpus procedure, approved for Minimum Continuing Legal
42 Education by the State Bar of California.

Rule 4.553 of the California Rules of Court would be adopted, effective September 1, 2024, to read:

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(c) Alternative requirements

The court may appoint an attorney who does not meet all the qualifications stated in (b)(1)–(4) if the attorney meets the qualifications of (b)(5) and demonstrates the ability to provide competent representation to the petitioner. If the court appoints counsel under this subdivision, it should state on the record the basis for finding counsel qualified.

(d) Public defender appointments

When the court appoints the Public Defender under section 987.2, the Public Defender should assign an attorney from that office or agency who meets the qualifications described in (b) or assign an attorney who the Public Defender determines would qualify under (c).