

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

**FROM:** Committee on Appellate Courts, Litigation Section

**DATE:** July 19, 2018

**RE:** Invitation to Comment  
Criminal and Appellate Procedure: Record Preparation in  
Death Penalty Cases

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The Committee on Appellate Courts supports the proposed new rules and amendments to the Rules of Court relating to preparation of the record on appeal in death penalty cases. The Committee notes that the new rules and amendments apply almost exclusively to the trial courts and trial counsel, and therefore the Committee has no specific comments with respect to most proposed changes.

The Committee, however, believes the proposed changes regarding inclusion of documentary exhibits in the clerk's transcript are not sufficient and do not advance the stated purpose of streamlining the record preparation and certification process.

The Working Group proposes to amend Rule 8.622 to provide that, after delivery of the record to defendant's appellate counsel, any party may request that documentary exhibits admitted, refused, or lodged in the trial court be added to the record. The proposal, however, would require the requesting party to provide a justification for including any documentary exhibits in the record. The Committee strongly believes that all documentary exhibits should automatically be included in the record at the outset and no justification should be required.

We note that the Working Group had considered making it automatically permissive or even mandatory to include documentary exhibits in the record, but ultimately concluded that "requiring a justification for inclusion of exhibits in the record on appeal was preferable because inclusion of exhibits that are not relevant to the issues on appeal would make these records even larger, increasing record

review time and storage costs.” (Invitation to Comment, p. 9.) The Committee believes that the alternative proposal considered by the Working Group is far preferable to the proposed changes to Rule 8.622.

As the Working Group noted, the proposed overhaul of the rules governing record preparation in death penalty cases is based on two main premises: (1) it is more efficient for necessary items to be identified and included in the record from the outset, and (2) the trial courts and trial counsel are in the best position during and immediately after proceedings to identify and include necessary items in the record. (Invitation to Comment, p. 4.) Both of these premises should lead to a rule that includes all documentary evidence in the record at the outset.

It is reasonable to assume that all documentary exhibits offered in evidence at trial were considered relevant by at least one of the parties. Therefore, it would be much more efficient to have all such exhibits included automatically in the record rather than requiring a party to file an inevitable request to add exhibits to the record and requiring the trial court to hold a hearing to address the issue. While including all documentary exhibits in the record at the outset may increase the size of the record, it will not increase record review time as appellate counsel will need to review all documentary exhibits regardless to determine whether to request that any exhibits be added to the record.

Further, trial courts and trial counsel are in the best position to ensure that all documentary exhibits admitted, refused, or lodged are included, and that none inadvertently get overlooked. Trial counsel should not be tasked with the responsibility of determining what exhibits may or may not be relevant to issues on appeal or in habeas proceedings; appellate counsel with expertise in making those determinations should have the final say. However, requiring appellate (and habeas) counsel to determine what exhibits may be relevant to issues on appeal or habeas shortly after getting the record is unrealistic, and potentially raises due process issues for the defendant. If exhibits are not automatically made part of the record initially, Appellate (and habeas) counsel may not recognize that a particular exhibit is relevant and may overlook an opportunity to raise an issue on appeal or investigate a claim on habeas. Further, if new evidence comes to light later (sometimes many years later), it can be difficult, if not impossible, to locate the trial exhibits. This is especially important in capital cases where someone’s life is at stake.

The Committee therefore recommends adding “any exhibit admitted in evidence, refused, or lodged that is a document in paper or electronic format” to Rule 8.610 governing the contents of the record. Alternatively, the Committee recommends deleting “The requesting party must state the reason that the exhibit needs to be included in the clerk’s transcript” from the proposed new subsection (A) to Rule 8.622(a)(1).

We appreciate your consideration of the Committee's comments. Please do not hesitate to contact us if you have questions or would like to discuss these comments further.

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