

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

President Judge General Court Regulation No. 2011-01

In re: Adoption of Philadelphia Criminal Rule No. 122-1; rescission of Philadelphia Criminal Rules 406-1, 406-2, 406-4, 410, 420, and 421; and Amendment of Philadelphia Criminal Rules 406(A) and 424 (B)(1)

Order

AND NOW, this 10th day of June, 2011, the Board of Judges of Philadelphia County having voted at the Board of Judges' meeting held on March 10, 2011 to adopt *Philadelphia Criminal Rule 122-1*; to rescind *Philadelphia Criminal Rules 406-1, 406-2, 406-4, 410, 420, and 421*; and to amend *Philadelphia Criminal Rules 406(A) and 424 (B)(1)*, IT IS HEREBY ORDERED that *Philadelphia Criminal Rule 122-1; Philadelphia Criminal Rules 406-1, 406-2, 406-4, 410, 420, 421; and Philadelphia Criminal Rules 406(A) and 424 (B)(1)* are adopted, rescinded and amended as attached.

As required by Pa.R.Crim.P. No. 105 (D), the proposed amended rule has been submitted to the Supreme Court's Criminal Procedural Rules Committee for review and written notification has been received from the Committee certifying that the proposed amended rule is not inconsistent with any general rule of the Supreme Court. The original Administrative Order and amended local rule shall be filed with the Prothonotary and the Clerk of Courts in a docket maintained for General Court Regulations issued by the President Judge of the Court of Common Pleas, and, as required by Pa.R.Crim.P. No. 105(E), two certified copies of this Administrative Order and amended local rule as well as a copy on a computer diskette shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. The adopted, rescinded and amended local rules will become effective on the dates noted therein. As required by Pa.R.Crim.P. No. 105 (F) one certified copy of this General Court Regulation and amended local rules shall be filed with the Administrative Office of Pennsylvania Courts and the local rule will also be published on the Unified Judicial System's web site at <http://ujportal.pacourts.us/localrules/ruleselection.aspx> and posted on the First Judicial District's website at <http://courts.phila.gov>. Copies of this General Court Regulation and amended local rules shall be published in *The Legal Intelligencer* and will be submitted to *American Lawyer Media, Jenkins Memorial Law Library*, and the Law Library for the First Judicial District.

BY THE COURT:

/s/ Honorable Pamela Pryor Dembe

HONORABLE PAMELA PRYOR DEMBE
PRESIDENT JUDGE
COURT OF COMMON PLEAS

COURT OF COMMON PLEAS
CRIMINAL DIVISION
PHILADELPHIA CRIMINAL RULES

RULE 122-1. HOMICIDE APPOINTMENT SYSTEM

The Judges of the First Judicial District (FJD) adopt the following Homicide Appointment System (HAS) Plan for the competent representation of any person otherwise financially unable to obtain competent representation in cases wherein a charge of homicide has been filed.

I. Provision for Furnishing Counsel

A. This Plan provides for the continued appointment of private counsel in homicide cases for which the Defender Association of Philadelphia (Defender Association) is not appointed.

B. This Rule is promulgated to insure that counsel who participate in homicide cases possess the ability, knowledge and experience to do so in a competent and professional manner.

C. To that end, although not the focus of this Rule, privately retained and *pro bono* counsel must meet the educational and experiential requirements of Pa.R.Crim.P. 801 or, if counsel is licensed to practice law in a jurisdiction other than Pennsylvania, the court is satisfied that the attorney has equivalent experience and educational qualifications and is a member in good standing of the Bar of the attorney's home jurisdiction, before counsel may enter an appearance at any stage of the proceedings in which he or she wishes to represent a defendant charged with a capital case.

D. The office of Active Criminal Records¹ shall determine whether any person entitled to representation (hereinafter, defendant) will be represented by a private attorney appointed pursuant to this Rule or by the Defender Association.

II. Selection of Attorneys

A. Panels of Attorneys

1. Approval. The FJD, through the process promulgated by the Selection Committee described in paragraph C herein, shall establish Panels of attorneys who are eligible and willing to be appointed to provide representation to defendants under the FJD Homicide Appointment System (FJD-HAS) Plan.

2. Equal Opportunity. All qualified attorneys shall be and are encouraged to participate in the furnishing of representation under the FJD-HAS Plan, without regard to race, color, religion, gender, age, national origin, sexual orientation or disabling condition.

3. Seven panels of Homicide attorneys will be created. These shall be known as the “Capital Trial Panel,” the “Non-capital Trial Panel,” the “Defender Association Panel,”² the “Capital Appeals Panel,” the “Non-capital Appeals Panel,” the “Capital PCRA³ Panel,” and the “Non-capital PCRA Panel.” Attorneys on each Panel must demonstrate substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the Commonwealth of Pennsylvania. Although the term of service for a private attorney who becomes a member of a Panel pursuant to this Rule may expire, the appointments

¹ When the office of Active Criminal Records is mentioned in this Rule, it is understood to include any successor office to the office of Active Criminal Records.

² This Panel is made up of attorneys from the Defender Association who are assigned to that organization’s Homicide Unit, which handles both capital and non-capital matters. The Defender Association’s Appeals Unit will also handle appeals as regards those matters. This Plan does not address the selection process for the attorneys of the Defender Association. Nor does anything in this Plan imply that the City of Philadelphia will continue its current contractual arrangements with the Defender Association.

³ The Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*

that have been made during the course of the term shall remain in full force and effect as set forth by Pa.R.Crim.P. 120(A)(4), Pa.R.Crim.P. 122(B)(2) and Pa.R.Crim.P. 904(F)(2).

4. Capital Trial Panel

- A. To be approved for this Panel, it is required that an attorney:
- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good standing of the Bar of the jurisdiction in which the attorney is admitted to practice;
 - (2) is an active trial practitioner with a minimum of 5 years criminal litigation experience;
 - (3) has maintained a practice of which, during the 5 year period immediately preceding the date of the filing of the application for membership in this Panel, 75% has consisted of serving as trial counsel in criminal cases before the FJD or before any trial court of record of the Commonwealth of Pennsylvania, or before any federal court within the boundaries of Pennsylvania;
 - (4) has served as lead counsel in a minimum of 10 felony cases⁴ that were given to the jury for deliberations, and
 - (a) 4 of which were non-capital homicide cases and
 - (b) (i) at least one in which the death penalty was sought and was tried through the penalty phase, or

⁴ A “felony case” for purposes of this Panel requires that the defendant was arraigned before the jury on a charge of murder, manslaughter, vehicular homicide, or a felony of the first degree.

(b)(ii) 2 in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase;

- (5) is familiar with the practice and procedure of the Pennsylvania Supreme Court, as pertains to the appeal of capital cases;
- (6) demonstrates, by training or experience, knowledge of principles of criminal and constitutional law as they apply to death penalty cases;
- (7) has extensive knowledge of the Pennsylvania Rules of Criminal Procedure, the Pennsylvania Rules of Evidence, and the case law as promulgated by the Pennsylvania Courts and the U.S. Supreme Court, and has substantial familiarity with and extensive experience in the use of expert witnesses, and forensic, psychiatric, scientific and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.
- (8) is in full and current compliance with the minimal educational requirements mandated by the Pennsylvania Supreme Court in Pa.R.Crim.P. 801(2)⁵;

B. Members of the Capital Trial Panel will be appointed to represent defendants charged with capital homicide as either Lead Counsel or as Mitigation Counsel. Lead Counsel appointed to a capital case shall select Mitigation Counsel for the case, which selection shall be from the members of the Capital Trial Panel, but not before the case has reached the Homicide Calendar Room. If the case is still designated as a

⁵ Every attorneys who accepts a capital homicide appointment at any stage of the proceedings must be Rule 801 certified at the time of the appointment and must remain certified throughout the entire period of the representation, at every stage of the proceedings, including pretrial, trial, appellate and post-conviction.

capital case at that time, Lead Counsel shall then immediately confer with the Mitigation Counsel to be selected to ensure his or her availability. Once a member of the Capital Trial Panel agrees to serve as Mitigation Counsel, Lead Counsel shall immediately, in writing, notify the Calendar Judge⁶ and the office of Active Criminal Records. The Calendar Judge shall then appoint Mitigation Counsel and enter an order of appointment in accord with Pa.R.Crim.P. 122.

C. The Capital Trial Panel shall initially consist of not more than 18 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3 years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term.⁷ Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee. Members of this Panel shall also be members of the Non-capital Trial Panel.

5. Non-capital Trial Panel

- A. To be approved for this Panel, it is required that an attorney:
- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good

⁶Mitigation Counsel should, as a general practice, have been identified and have been appointed by order of the Calendar Judge prior to the case leaving the Homicide Calendar Room. In an extraordinary case, if the selection is made after the case has left the Calendar Room, Lead Counsel shall then immediately notify the assigned trial judge in writing instead of the Calendar Judge. The assigned trial judge shall then appoint Mitigation Counsel and enter an order of appointment in accord with Pa.R.Crim.P. 122. Although these are distinct areas of the trial which must be addressed consistent with the law, the trial court will view the two attorneys as co-counsel, and will not segregate their responsibilities; the two attorneys will function as a team, shepherding the case as a whole.

⁷ The Selection Committee shall make every effort to select the attorneys with the highest qualifications and greatest experience to serve in the initial three year staggered term, rather than in the one or two year staggered terms. This same principle shall be applied by the Selection Committee to each of the additional Panels with staggered terms.

standing of the Bar of the jurisdiction in which the attorney is admitted to practice;

- (2) is an active trial practitioner for whom, during the 5 year period immediately preceding the date of the filing of the application for membership in this Panel, not less than 75% of his or her practice has consisted of serving as trial counsel in criminal cases before the FJD or before any trial court of record of the Commonwealth of Pennsylvania, or before any federal court within the boundaries of Pennsylvania;
- (3) has served as Lead Counsel in a minimum of 10 felony cases⁸ that were given to the jury for deliberations, at least one of which was a non-capital homicide case, except that if the attorney only sat as second chair in that non-capital homicide case, the attorney must have participated as second chair in at least 2 non-capital homicide cases;
- (4) is familiar with the practice and procedure of the Pennsylvania Superior Court;
- (5) has extensive knowledge of the Pennsylvania Rules of Criminal Procedure, the Pennsylvania Rules of Evidence, and Pennsylvania case law and has substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence;

⁸ A “felony case” for purposes of this Panel requires that the defendant was arraigned before the jury on at least a felony of the second degree or an offense which is punishable by a maximum sentence of 10 years.

(6) is in full and current compliance with the educational requirements of Pa.R.Crim.P. 801(2), which are mandated by the Pennsylvania Supreme Court in capital cases.

B. The Non-capital Trial Panel shall initially consist of not more than 36 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3 years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term. Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee.

6. Second Chair Counsel

In order to meet the required “non-capital case” experience, attorneys seeking to attain membership on a Panel or Panels of this HAS Plan may participate as second chair counsel to Lead Counsel in non-capital cases. In order for this experience to qualify, such attorney must:

- At or before the scheduling conference of the case for which she or he seeks to sit as second chair, submit to the trial judge a request to sit as second chair, certifying that 10 felony jury trials⁹ have in fact been tried by him or her to completion within the past 5 years, or that 10 non-capital homicide appeals (direct or PCRA appeals) have been filed by him or her, through to a decision of the Superior Court, or that she or he has handled 10 non-capital homicide PCRA matters for which an evidentiary hearing

⁹ Felony jury trial means that the defendant was arraigned on a felony of the second degree or an offense which is punishable by a maximum sentence of ten years.

was held, or a combination thereof, and listing those cases on the appropriate application.

- Request that the trial court designate the case as one in which the second chair experience will be appropriate.
- Obtain a certification from the Lead Counsel Non-capital Trial Panel member that the applicant participated in every aspect of the trial, beginning with the initial trial Scheduling Conference.
- Be present at all substantive proceedings regarding the case, through conclusion of the trial.
- Actively participate in the preparation and examination of at least one witness at trial.

7. Defender Association Panel

This Panel shall consist of the staff attorneys of the Defender Association assigned to that organization's Homicide Unit and certified by the Chief Public Defender to be qualified to fulfill the duties of staff attorney. The Defender Association will be appointed to represent defendants charged with capital as well as non-capital homicide in accordance with any allocation agreement then in effect and established between the Defender Association, the City of Philadelphia, and the FJD.

8. Capital Appeals Panel¹⁰

A. An attorney who is appointed at the post-sentence motions/ appeal stage of a case for a defendant who has received a sentence of death shall only be appointed if the attorney:

¹⁰ Although appointed counsel are required to represent defendants through direct appeal, Pa.R.Crim.P. 122, it is understood that in some cases it will serve a defendant's best interests to have new counsel appointed for a defendant upon being sentenced to death. Attorneys serving on this Panel will help meet that need, in addition to being available for appointment opportunities when the court otherwise must appoint counsel at the appellate stage.

- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good standing of the Bar of the jurisdiction in which the attorney is admitted to practice;
- (2) has represented clients in appellate or post conviction matters in at least 8 “significant cases”, as defined in Pa.R.Crim.P. 801(1)(c), has had primary responsibility for at least 5 briefs in those significant cases, and has prior experience within the last 5 years as appellate or PCRA counsel, in federal or state court, in at least one case in which a sentence of death was imposed.
- (3) submits to the Selection Committee at least one appellate brief written primarily by herself/himself and demonstrates to the Selection Committee excellence in written legal advocacy;
- (4) is familiar with the practice and procedure of the Pennsylvania Supreme Court, particularly as pertains to the appeal of capital cases;
- (5) demonstrates, by training or experience, knowledge of principles of criminal and constitutional law as they apply to death penalty cases;
- (6) is in full and current compliance with Pa.R.Crim.P. 801(2);

B. The Capital Appeals Panel shall initially consist of not more than 9 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3 years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall

serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term. Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee.

9. Non-capital Appeals Panel

A. An attorney who is appointed at the post-sentence motions/ appeal stage of a case for a defendant who has not received a sentence of death shall only be appointed if the attorney:

- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good standing of the Bar of the jurisdiction in which the attorney is admitted to practice;
- (2) is familiar with the practice and procedure of the Pennsylvania Superior Court;
- (3) is an experienced and active trial or appellate practitioner (whether via direct appeals or appeals of PCRA cases) with at least 5 years experience in the field of criminal defense;
- (4) has filed briefs within the past 5 years as appellate counsel in either the Pennsylvania Supreme or Superior Court in no fewer than 3 capital or non-capital homicide matters and 5 felony matters;
- (5) submits a writing sample to the Selection Committee for which she/he was primarily responsible.

B. The Non-Capital Appeals Panel shall initially consist of not more than 15 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3

years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term. Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee.

10. Capital PCRA Panel

A. An attorney may be appointed to represent a post-conviction petitioner under sentence of death only if that attorney:

- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good standing of the Bar of the jurisdiction in which the attorney is admitted to practice;
- (2) is an active practitioner with at least 5 years criminal litigation (trial and/or appellate) experience in this or any other jurisdiction;
- (3) has maintained a practice of which, during the 5 year period immediately preceding the date of the filing of the application for membership in this Panel, 75% has consisted of serving as trial or appellate or PCRA counsel regarding criminal cases before the FJD or before any court of the Commonwealth of Pennsylvania or before any federal court within the boundaries of Pennsylvania;
- (4) has served as lead counsel in a minimum of 8 “significant cases” that were given to the jury for deliberations and or has represented clients in appellate or post conviction matters in at least 8 “significant cases, as defined in Pa.R.Crim.P. 801(1)(c); has had primary responsibility

for at least 5 briefs in those significant cases; and has prior experience, within the last 5 years, as PCRA or appellate counsel before any court in the Commonwealth of Pennsylvania, including federal court, in at least one case in which a sentence of death was imposed;

(5) submits to the Selection Committee at least one sample of legal writing for which she/he was primarily responsible. This writing must advocate the position of a party in an adversary proceeding and must demonstrate excellence in written legal advocacy;

(6) is familiar with the practice and procedure of the Philadelphia Court of Common Pleas and of the Pennsylvania Supreme Court, particularly as it pertains to the handling of appeals in post-conviction matters in which a sentence of death has been imposed;

(7) demonstrates, by training or experience, knowledge of principles of criminal and constitutional law as they apply to death penalty cases;

(8) has extensive knowledge of the Pennsylvania Rules of Criminal Procedure, the Pennsylvania Rules of Evidence, and the case law of not only Pennsylvania but also of the U.S. Supreme Court, and has substantial familiarity with, and extensive experience in, the use of expert witnesses, and forensic, psychiatric and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence;

(9) Is in full and current compliance with the minimal educational requirements mandated by the Pennsylvania Supreme in Pa.R.Crim.P. 801(2).

B. The Capital PCRA Panel shall initially consist of not more than 9 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3 years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term. Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee. No member of this Panel may be appointed in any 12 month period to represent more than 1 death penalty PCRA petitioner.

11. Non-capital PCRA Panel

A. To be approved for this Panel, it is required that an attorney:

- (1) is a member in good standing of the Bar of the Pennsylvania Supreme Court, or admitted to practice *pro hac vice* and a member in good standing of the Bar of the jurisdiction in which the attorney is admitted to practice;
- (2) has maintained a practice of which, during the 3 year period immediately preceding the date of the filing of the application for membership in this Panel, not less than 25% has consisted of serving as counsel representing petitioners who have filed a post-conviction petition pursuant to the PCRA before any court in the Commonwealth of Pennsylvania;
- (3) has experience, within the past 3 years, as PCRA counsel in no fewer than 10 felony cases, including 2 cases in which a PCRA hearing was

held, or in 1 case in which a PCRA hearing was held *and* has completed one CLE program on Pennsylvania post-conviction practice within the past year;

(4) has participated in the preparation and litigation of 3 adversary hearings where factual issues were contested. (This may include the 2 PCRA hearings required in ¶3);

(5) submits to the Selection Committee an Amended Petition and a Finley letter that was filed by him or her within the past 2 years;

(6) is familiar with the practice and procedure of the Pennsylvania Superior Court.

B. The Non-capital PCRA Panel shall initially consist of not more than 18 members, which number may be adjusted based on the needs of the Court. Panel members shall serve staggered terms, with each Panel member serving for a term of 3 years, except that the initial Panel shall serve staggered terms as follows: 1/3 of the initial Panel shall serve for 1 year, 1/3 shall serve for 2 years, and the remaining 1/3 shall serve the full 3-year term. Any member of the initial Panel or subsequent Panels whose term expires may be reappointed or replaced, pursuant to an evaluation and selection by the Selection Committee.

12. Initial Year Consideration of Alternative Qualifications

In the initial year of this Rule, due to respect for the body of work an experienced attorney may have achieved and who may nevertheless not meet the technical requirements of this new local rule, such experienced attorney may petition the Selection Committee to review his or her credentials and to allow such attorney to explain how that attorney will be able to meet the spirit if not the letter of this new Rule. There are no exceptions

to the requirements of Pa.R.Crim.P. 801 as regards any of the Capital Panels. If, after a determination that the attorney's experience, knowledge and training are clearly equivalent to the standards for the Panel to which the attorney seeks admission, the Selection Committee approves the attorney for inclusion on a Panel, such attorney must thereafter comply with all the performance standards of this Rule which pertain to the Panel for which the attorney has been selected.

13. Continuing Legal Education

Every attorney selected to serve on any Panel is required to, and agrees to, obtain a minimum of 6 hours annually of CLE courses, as approved by the Selection Committee, which are relevant to the Panel for which that attorney was selected to represent defendants facing homicide charges, above and beyond, where applicable, the CLE requirements of Pa.R.Crim.P. 801. The additional CLE hours may be obtained as either participants or presenters. The number of CLE hours and the nature of the continuing legal education may be increased or modified by the Selection Committee as may be relevant and appropriate for the adequate representation of indigent defendants in homicide matters.

In addition, as approved by the Selection Committee, all attorneys selected for the Capital Trial Panel must complete a live¹¹ capital homicide course during the first year on the Panel, except that any attorney intending to serve only as Mitigation Counsel must complete a 6 hour course in mitigation advocacy during the first year on the Panel; all attorneys selected for the Non-capital Trial Panel must complete a live homicide course during the first year on the Panel.

¹¹“Live” as used in this section require attendance “in person” and not via broadcast or by viewing a previously recorded presentation.

14. Exclusive Compensation

Every attorney who is selected to be a member of any Panel under this FJD-HAS Plan agrees not to request or accept any payment, or promise of payment, from the defendant or the defendant's family or from any source other than from the FJD, in connection with his or her representing a defendant whom they were appointed to represent pursuant to this Rule.

B. Application for Admission to a Panel

1. Every admission to a Panel must be by application.
2. Application forms will be available annually from the Chair of the Selection Committee and from the office of Active Criminal Records.

C. Selection Committee

1. The Selection Committee shall consist of thirteen members as follows:
 - (a) 6 judges of the FJD, at least 3 of whom are presently assigned to the Homicide Program; 2 of whom are currently assigned to the Majors Program of the Trial Division–Criminal; and the Supervising Judge of the Trial Division–Criminal;
 - (b) 1 attorney who is a member of the FJD-HAS Capital Panel¹²;
 - (c) the Chair of the Screening Committee for Court Appointed Counsel, who must be a member of the Criminal Justice Section of the Philadelphia Bar Association;
 - (d) the Chair of the Criminal Justice Section of the Philadelphia Bar Association, or his or her “permanent designee”¹³;

¹² In the initial year, an attorney who has handled at least 5 homicide appointments within the past 3 years as court-appointed counsel will fill this position.

¹³ As used in this sub-section, the “permanent designee” must be someone who, for effectiveness, commits to attending all meetings of the Committee for the duration of the entire selection process in at least that calendar year.

(e) the President of the Philadelphia Chapter of the Pennsylvania Association of Criminal Defense Lawyers, or his or her “permanent designee”;

(f) the Chief of the Homicide Unit of the Defender Association, or his “permanent designee” and the Chief of the Appeals Unit of the Defender Association, or his “permanent designee”;

(g) the Chief of the PCRA Unit of the Philadelphia District Attorney’s Office, or her “permanent designee”.

2. The President Judge, or his/her designee, shall be an *ex-officio* member of the Selection Committee. The Court Administrator, or his/her “permanent designee”, will attend all meetings in a non-voting capacity.

3. The Committee members described in subparagraphs 1 (a) and (b) above shall be appointed by the Administrative Judge of the Trial Division, with the exception of the Supervising Judge.

4. Any Judge who resigns from the Committee prior to the expiration of his or her term due to a transfer in judicial assignment will be replaced by an appropriate appointment by the Administrative Judge of the Trial Division.

5. The Supervising Judge of the Trial Division–Criminal shall be the Chair of the Selection Committee.

6. Each Committee member shall serve for a period of 3 years and may be reappointed for succeeding terms at the discretion of the Administrative Judge of the Trial Division.

7. Eight members of the Committee shall be deemed a quorum.

8. Each member of the Committee shall be committed to ensuring that, prior to approving any applicant for inclusion on a Panel, the applicant has fully met the requirements set forth in this FJD-HAS Plan as to the Panel for which he or she is applying.

9. The Committee shall thoroughly review all applications for admission to the Panels, and shall conduct the necessary interviews or other inquiry into any matter deemed by the Committee to be necessary to make its determinations in regard to any applicant.

10. a. The Committee shall prepare an Evaluation Form, which will be distributed to all judges hearing Homicide cases.

b. This Evaluation Form will also be available to attorneys who seek to obtain evaluations from Judges in the Majors Program or other appropriate forum.

D. Additions to the Panel

The submission of an application to the Selection Committee shall be confidential unless the applicant is accepted to a Panel. Notification of acceptance or rejection shall be made in writing to the applicant. The membership of the Panels shall be published at least annually.

E. Removal from the Panel

The Selection Committee may determine from time to time, prior to the expiration of a Panel member's term that, by reason of information received by the Committee and concerning a Panel member's ability to continue to perform as competent counsel, a Panel member should be recommended for removal from the Panel. In such instance, the Panel member shall first have the opportunity for a hearing before the Selection Committee, pursuant to procedures to be established by the Selection Committee. Upon a two-thirds vote by the Selection Committee, a Panel member shall be removed from receiving any further appointments

pursuant to this Rule. Any Panel member so removed will not be barred from reapplying in the future for appointment to a Panel for which he or she is qualified. A copy of such removal decision shall be furnished to the President Judge as well as to the Court Administrator, who shall cause that attorney's name to be removed from each Panel on which his or her name appeared.

III. Determination of Need for Counsel and Appointment of Counsel

A. When Appearing Before the Court in a Criminal Case.

1. In every criminal case in which a defendant is charged with homicide and appears without counsel at any stage of the trial proceedings, the presiding judge shall advise the defendant that he or she has the right to be represented by counsel throughout the case and that counsel will be appointed to represent the defendant if the defendant is financially unable to retain counsel. Any statements elicited from a defendant regarding such an inquiry by the presiding judge are inadmissible in any criminal proceeding against the defendant, except as may be provided by law.

It shall be the duty of the presiding Judge to direct that the appropriate entity within the FJD which makes inquiry into whether a defendant meets the criteria for court-appointed counsel do so, in a timely manner.

In every criminal case in which a determination is made that a defendant charged with homicide qualifies for court-appointed counsel, it is the duty of the presiding judge to promptly cause counsel to be appointed to represent the defendant by forthwith communicating electronically with the office of Active Criminal Records, which will effectuate the appointment.¹⁴ An order of appointment shall be entered and served in accord with

¹⁴ Nothing in this paragraph or in local Rule 122-1 is intended to modify current law that a petitioner will ordinarily not be eligible for court appointed counsel concerning second and subsequent PCRA petitions. See Pa.R.Crim.P. 904 (C), (D) and (E).

Pa.R.Crim.P. 122. The defendant shall not have the right to select his or her attorney from the Panel of attorneys or otherwise.

2. The presiding judge shall cause separate counsel to be appointed for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

3. If at any time after the appointment of counsel pursuant to this FJD-HAS Plan the presiding judge finds that the defendant is financially able to retain counsel, the judge shall terminate the appointment of counsel. Being able to “retain counsel” includes the ability to pay for all investigators, experts or other services, including mitigation evidence in a capital case. Prior to terminating the appointment of counsel, the presiding judge shall conduct a colloquy both with the defendant for whom representation is to be terminated because the defendant is able to retain counsel, and with the attorney to be retained, and ensure that both acknowledge, on the record, that they are fully able to meet the responsibility for the provision of these services.

4. Any counsel appointed to represent a defendant charged in a homicide pursuant to the FJD-HAS Plan who wishes to withdraw his appearance and be relieved of further representation of a particular defendant shall comply with the requirements of Pa.R.Crim.P. 120(B) and shall immediately make a motion for withdrawal to the judge before whom the case is then pending. If new counsel is to be appointed, pursuant to Pa.R.Crim.P. 120(B)(3), the judge before whom the case is pending shall promptly communicate electronically with the office of Active Criminal Records of the need for new counsel and of the appropriate Panel from which the appointment is to be made. An order of appointment shall be entered and served in accord with Pa.R.Crim.P. 122.

B. Appointment of Appellate Counsel

Although it is anticipated that an attorney who has been appointed to represent a defendant will continue to represent that individual for appellate purposes, as set forth in Pa.R.Crim.P. 120(A)(4) and Pa.R.Crim.P. 122(B)(2), in an appropriate case (including the defendant having retained counsel), the court may permit the attorney to withdraw from further representation pursuant to Pa.R.Crim.P. 120(B); additionally, an appellate court may direct that new counsel be appointed to represent a defendant whose case is already on appeal. In all such cases, the trial judge shall promptly communicate electronically with the office of Active Criminal Records, and notify that office that an appointment is necessary and the appropriate Panel from which the appointment is to be made. An order of appointment shall be entered and served in accord with Pa.R.Crim.P. 122.

C. The Court Administrator and the office of Active Criminal Records

1. The Court Administrator may delegate to the office of Active Criminal Records the responsibility for effectuating the appointments of counsel as regards this FJD-HAS Plan, but maintains the responsibility for ensuring that their duties are properly discharged.

2. In effecting the appointment of counsel for a defendant, the office of Active Criminal Records shall verify that a determination of financial inability to retain counsel has been made and the office of Active Criminal Records shall then arrange for the appointment of counsel consistent with the system provided in subsection 4 and 5 of this Section C.

3. The Court Administrator shall collect data regarding this FJD-HAS Plan to document that the Rule is being complied with. In addition, the Court Administrator will maintain the names of all attorneys, and the defendant they were representing, whom the appellate courts order removed, and the reason therefor, as well as all attorneys, and the

defendants they were representing, found to have been ineffective in a post-conviction matter, and the reason therefor. The Court Administrator will provide this information annually to the President Judge and, upon request, to the Selection Committee.

4. The office of Active Criminal Records shall maintain a current list of all attorneys selected to serve on each Panel. For each Panel, the office of Active Criminal Records shall maintain a “wheel” of all attorneys admitted to serve on such Panel, which will operate alphabetically from A to Z. After making a determination of which Panel is the appropriate Panel from which an appointment shall be made, the office of Active Criminal Records shall go to the next name on the wheel and contact that attorney electronically to see if that attorney is able to accept that appointment. The attorney shall be provided with sufficient information about the case/prospective defendant so as to be able to conduct a conflict check, to ensure there will be no problem with the representation of a prospective defendant. The attorney must respond electronically to the office of Active Criminal Records within 48 hours of being contacted.

5. If an attorney fails to respond electronically within 48 hours of being contacted, the office of Active Criminal Records shall go on to the next name on the wheel, and the attorney who failed to respond timely shall be placed at the bottom of the wheel, as if an appointment had in fact been made. Any attorney on any Panel has the ability to decline or reject a prospective appointment when contacted by the office of Active Criminal Records. Such declination or rejection will cause that attorney to be placed at the bottom of the wheel, as if an appointment had in fact been made. The exception to this is when a true conflict exists, in which case the attorney shall be required to provide the name of the other defendant or client as to whom the conflict exists. In the event of such a conflict, the office of Active Criminal

Records will go on to the next name or names until an appointment has successfully been made, but shall then go back to the attorney who was conflicted out.

6. The Court Administrator will have responsibility for overseeing the promulgation of standard forms for the submission of requests for counsel fees and fees for investigative, expert and other services.

IV. Investigative, Expert and Other Services¹⁵

An attorney appointed under this HAS Plan who seeks investigative, expert or other services necessary for an adequate defense in the case, in accordance with Phila.Crim.R. 424 B(3)(a) and 425 G(4), must seek prior authorization, which must be presented in a written application, *ex parte*, to the Homicide Calendar Judge, if the case has not yet been assigned to a trial judge, or to the trial judge. Upon finding, after appropriate inquiry in such *ex parte* proceeding, that the services are necessary, the Court shall issue an Order authorizing counsel to obtain the services. The Judge may establish a limit on the amount which may be expended for such services within the maximum prescribed by the FJD, subject to the provider of such services providing proper and detailed accounting for the services rendered in a fee petition. Phila.Crim.R. 424 B and 425 shall continue to govern these services.

V. Compensation

Payment of fees and expenses to private counsel appointed under this FJD-HAS Plan, and payments for investigative, expert and other services incurred pursuant to Title IV hereof, shall be made in accordance with Phila.Crim.R. 424 B and 425, and such rules and regulations and guidelines as have been or may be prescribed by the President Judge and in accordance with the fiscal policies of the FJD.

¹⁵ An attorney who is retained by a client to represent him or her in a homicide case must be able to certify to the Court that the entire defense is funded by the client, including all investigative and expert services, whether the case is capital or not. There is no provision under this Rule for retained counsel to obtain funds from the Court for these services. *Pro bono* counsel may apply to the Court for funds for these services, provided that *pro bono* counsel is certified pursuant to Pa.R.Crim.P. 801. Any such funds will be within the limits set by the FJD.

VI. Forms

Where standard forms have been approved and promulgated, such forms shall be used by the court and by attorneys appointed pursuant to this Rule.

Adopted at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

Explanatory Note: *Implementation of the Homicide Appointment System will commence immediately upon the effective date of this Rule, thirty (30) days after publication in the Pennsylvania Bulletin. However, the actual appointment of counsel in Homicide Cases pursuant to this Rule will commence on January 2, 2012, the effective date of the amendment to Rule 424 (B)(1) and the rescission of Rule 410.*

COURT OF COMMON PLEAS

CRIMINAL DIVISION

PHILADELPHIA CRIMINAL RULES

AMENDMENTS TO PHILADELPHIA CRIMINAL RULES

Board of Judges Meeting: 3-10-2011

*Deletions are bracketed []; additions are **highlighted** and underlined*

RULE 406. STANDARDS FOR APPOINTMENT OF COUNSEL

(A) *Lists of Qualified Attorneys.* The Appointment Clerk in the Office of the Secretary of the Board of Judges will maintain a list of attorneys qualified for appointment in each of the following five categories of cases:

(1) [Homicide]. **Rescinded effective January 2, 2012.**

Amended at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

Rule 406-1. STANDARDS FOR APPOINTMENT IN HOMICIDE CASES

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 406-2. APPEALS IN DEATH PENALTY CASES.

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 406-4. POST-CONVICTION PETITIONS BY PRISONERS UNDER SENTENCE OF DEATH

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 410. APPOINTMENT OF COUNSEL IN HOMICIDE CASES.

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 420 APPOINTMENT OF COUNSEL FOR CASES APPEALED TO THE SUPREME COURT OR SUPERIOR COURT OF PENNSYLVANIA.

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 421 PETITION FOR LEAVE TO WITHDRAW AS PRIVATE OR COURT-APPOINTED COUNSEL IN HOMICIDE CASES.

Rescinded at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.

RULE 424 COMPENSATION RATES FOR COURT-APPOINTED COUNSEL

* * *

B. Homicide Cases

(1) The appointment of counsel in homicide cases shall be made in accordance with the procedures contained in Phila.Crim.R. [410] 122-1.

Amended at the March 10, 2011 meeting of the Board of Judges of the Court of Common Pleas, effective on January 02, 2012.