

**CAPITAL CASE OVERSIGHT COMMITTEE**  
**MEETING AGENDA**

**Wednesday, February 29, 2012**

12:00 to 1:30 PM

State Courts Building \* 1501 W. Washington \* Conference Room 230 \* Phoenix, AZ

Conference call-in number: (602) 452-3192 Access code: 1112

|            |   |  |
|------------|---|--|
| Item no. 1 | <b>Call to Order</b><br><br><b>Approval of the October 5, 2011 meeting minutes</b>                  | <i>Judge Reinstein, Chair</i>  |
| Item no. 2 | <b>Status reports:</b><br><br><b>Maricopa County</b><br><br><br><b>Appeals and PCRs</b>             | <i>Judge Rayes<br/>Mr. Novitsky/Mr. Shutts<br/>Mr. Patterson<br/>Mr. Logan<br/><br/>Ms. Hallam</i> |
| Item no. 3 | <b>Maricopa County Administrative Order 2012-008</b>  | <i>Judge Rayes<br/>Mr. Logan</i>   |
| Item no. 4 | <b>Update on the State Capital Post-Conviction Public Defender</b>                                  | <i>Judge Rayes<br/>Mr. Cattani</i>   |
| Item no. 5 | <b>Update on SCOTUS proceedings concerning the effective assistance of counsel at the PCR stage</b> | <i>Mr. Cattani</i>   |
| Item no. 6 | <b>Discussion of proposals to screen applications for appointment on capital PCR petitions</b>      | <i>Mr. Lieberman<br/>Staff</i>   |
| Item no. 7 | <b>Jury instructions in capital cases</b>   | <i>Judge Reinstein</i>   |
| Item no. 8 | <b>Call to the Public</b><br><br><b>Adjourn</b>   | <i>Judge Reinstein</i>   |

*Items on this Agenda, including the Call to the Public, may be taken out of the indicated order.*

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Tama Reily at (602) 452-3637. Requests should be made as early as possible to allow time to arrange accommodations.

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
DRAFT MINUTES  
October 05, 2011**

Members Present:

Hon. Michael D. Ryan, Chair  
Hon. Douglas Rayes  
Kent Cattani, by proxy, John Todd  
Donna Hallam  
Dan Levey, by proxy, Amy Bocks  
Marty Lieberman  
James Logan  
Daniel Patterson  
Hon. Ronald Reinstein

Guests:

Natman Schaye  
Elizabeth Walker  
Jennifer Garcia  
Molly Weinstein  
Bruce Peterson  
Larry Hammond  
Paul Julien  
Theresa Barrett

Members not present:

William Montgomery

Staff:

Mark Meltzer  
Julie Graber

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**1. Call to Order; approval of the meeting minutes.** The meeting was called to order at 12:05 p.m. The Chair introduced proxies for Mr. Cattani and Mr. Levey, respectively Mr. Todd and Ms. Bocks. The Chair then asked the members to review the draft minutes of the May 16, 2011 Committee meeting. A member moved to approve those minutes, followed by a second, and the members unanimously approved the May meeting minutes.

**2a. Status reports: Maricopa County Superior Court.** The Chair invited Judge Rayes to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were sixty-six cases pending as of this week; three of those cases are remands. Five cases are currently in trial. Eight death notices have filed since June 1, and nine capital cases have been resolved in that period. In calendar year 2011 to date, the county attorney filed twenty death notices, and twenty-two capital cases have concluded. Judge Rayes also advised that he and Mr. Logan are working on a quality assurance plan for contract counsel.

Mr. Logan's figures for the number of pending cases varied from those provided by Judge Rayes. Mr. Logan included six cases that are "potential" capital cases in which the time to file a notice has not yet run, and seven cases in which the time to file a death notice has been extended. He also included three cases in which the notice has been withdrawn, but that are still fully staffed with a capital team. One capital case was assigned recently to contract counsel because of the existence of a three-way conflict with the staffed agencies, but those agencies accepted assignments on all the other new cases. Mr. Logan observed that the number of pending cases appears to be leveling off, but because the new county attorney has been in office for less than a year, he cautioned members that it would take additional time to determine what the new "normal" for pending cases will be. Mr. Logan reported that he presently has adequate operating funds.

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**2b. Status reports: appeals and PCRs.** Ms. Hallam advised that there are twenty-seven pending appeals. Fifteen notices of appeal were filed in 2009, ten were filed in 2010, and six have been filed so far in 2011. The Court issued seven opinions in capital cases in 2007, nine opinions in 2008, five in 2009, eleven in 2010, and five so far this year.

There are ten defendants awaiting the appointment of counsel on petitions for post-conviction relief. The oldest case involves a March 2010 opinion on direct appeal. Ms. Hallam surmises that to accommodate the current backlog of PCR cases needing counsel and future PCR cases resulting from the current number of appeals, there should be about fifteen to twenty active counsel. An “active” counsel would be able to take a new PCR every two or three years. About fifteen attorneys have accepted appointments on PCRs from 2009 to the present. This figure does not include two cases that went to the Maricopa County Public Defender.

There are three pending PCRs with lawyers appointed under Rule 6.8(d). These lawyers must associate with other attorneys who are fully qualified under Rule 6.8. The Court does not currently identify the associate attorneys in the appointment orders for these cases. Counsel appointed under Rule 6.8(d) must notify the Supreme Court’s staff attorneys with whom they have associated, and staff can verify that associated counsel is qualified, but staff does not currently contact associated counsel to confirm that they have agreed to render pro bono services in the case, or to confirm their duties.

A discussion of the current appointment process ensued, and members posed the following questions. If Rule 6.8(d) lawyers are required to associate with a Rule 6.8 qualified attorney, should the court appoint a fully qualified attorney on the case instead? Would it be feasible for the county to appoint and to compensate associated counsel on capital PCRs? Mr. Logan said that the county is already spending more money on PCR counsel than previously because of the increased number of post-conviction proceedings, and the county would be reluctant to pay the additional cost of associated counsel without a mandate that it do so.

The discussion then turned to the subject of training for Rule 6.8(d) counsel. Jennifer Garcia, who is with the Federal Public Defender, organizes two full days of training on post-conviction relief in the fall, with supplemental training throughout the year, because of the increasing number of post-conviction proceedings. This training is specifically on capital post-conviction matters, such as PCR procedures, competency, and recent Supreme Court opinions. Attorneys who attend the training are typically from staffed defender offices rather than contract counsel. Questions were asked whether an amendment to Rule 6.8(d) should require this training, or if the appointment order should require that counsel obtain this training. The consensus of the members was that improvements are needed in the appointment and training of Rule 6.8(d) counsel.

**3. Search for a new Capital Post-conviction Public Defender.** Staff reported that all members of the Nomination Commission have been appointed. The Governor’s office will staff the Commission. The administration has received applications, and the Commission may meet later this month to review them.

**4. Discussion concerning the effective assistance of counsel at the PCR stage.** Mr. Cattani argued before the United States Supreme Court yesterday in *Martinez vs. Ryan*. The Court also heard argument yesterday in *Maples vs. Thomas*, an Alabama case. Mr. Todd explained that each of these cases involved a procedural default and the loss of an opportunity to raise a constitutional challenge to a conviction because of ineffective counsel. Mr. Hammond said he had reviewed transcripts of these oral arguments, and he believes these reveal an inclination of the Court to require a constitutionally effective lawyer in a post-conviction proceeding.

**5. Screening committee.** If the Court reaches the holding suggested by Mr. Hammond, applications for PCR counsel may require careful screening. Should the creation of a screening committee abide the opinions in *Martinez* and *Maples*?

Mr. Lieberman, who provided a written proposal for a screening committee, held the view that the Arizona Supreme Court should establish a committee as soon as possible. While the SCOTUS opinions could affect how the committee operates, Mr. Lieberman stated that a committee is required regardless of the outcome in those cases.

The Chair noted that a death penalty project representative of the American Bar Association had recently visited Phoenix, and advised that Ohio has established within the past year a committee that screens capital appointments at all court levels. The screeners also monitor the performance of counsel, and the screeners receive compensation. The following questions were raised: Would such a committee work in Arizona, when the county appoints trial and appellate counsel, and the Supreme Court appoints PCR counsel? How would the committee obtain funding? How would the counties and the Legislature view the creation of a screening committee?

Maricopa County has an ad hoc committee with members from the staffed defender offices whose purpose is to evaluate applicants for appointments on criminal cases. The committee reviews multi-page applications that include a list of references and cases, and it discusses each applicant. The county has various contracts, such as capital appeals, capital trials, and major felonies, and an applicant receives a contract only if they have the appropriate skill level. The award of a contract to an applicant is no assurance that the applicant will get appointments on any case. Mr. Logan would support Mr. Lieberman's proposal, with a few administrative changes, because he believes it will provide the Court with more information before making appointments.

A member suggested that judges who have not practiced criminal law might not have the requisite experience to evaluate applicants, but other members believe that judicial officers should be on the committee, even if they are not voting members. Judge Rayes reminded the members that he and Mr. Logan have a plan for a screening committee for trial counsel in Maricopa County, and that this plan would not be a cost to the county. Mr. Lieberman does not know how many attorneys in Arizona may be qualified to represent defendants on capital PCRs; he added that being qualified means more than the mere number of cases an attorney has handled. Currently in Arizona, no large law firms are engaging in pro bono representation of defendants on capital PCRs, and few if any of those firms employ Rule 6.8 qualified attorneys.

The Chair concluded this discussion by referring the matter to the workgroup consisting of Judge Rayes, Mr. Lieberman, and Mr. Cattani. Ms. Hallam was added to the workgroup.

**6. Report to the Arizona Judicial Council.** The Chair stated that the topic of a screening committee for trial and appellate appointments, in additions to appointments on PCRs, will require further study, and that it might be premature to report to the Arizona Judicial Council in December 2011. There are also unknown outcomes that could affect the December report, including the Nomination Commission's appointment of a new statewide capital PCR defender, and the impact of the *Martinez* and *Maples* decisions. The Chair suggested that a request to extend the time to report to the AJC would be appropriate, and the members unanimously concurred. If the Committee obtains an extension to 2012, all of the members present agreed to continue to serve.

It was also noted that based on the leveling off of the number of cases in the Maricopa County Superior Court, the crisis in that court which gave rise to this Committee may be abating. However, the crisis may be transferring to the appellate courts as cases work their way through the judicial system, and the Committee should continue to monitor case volumes.

**7. Proposed amendments to A.R.S. § 13-4041.** Mr. Todd presented proposed amendments to A.R.S. § 13-4041, which were developed with Mr. Cattani. The proposed amendments would:

- Authorize the appointment of a PCR defender upon certification that the record on appeal is complete, thereby allowing development of the PCR before the appeal is completed;
- Require the appointment of the State Capital PCR PD, or a public defender agency, unless a conflict exists that requires the appointment of private counsel;
- Raise the hourly rate from \$100 to \$175, and the allowable number of hours from 200 to 300, if a case did go to private counsel; and
- Delete sub-section (H), i.e., the provision that allows the county to seek reimbursement from the State for fifty percent of the cost incurred by the county.

Member comments included the following:

- The presentation of mitigation evidence at a PCR hearing while an appeal is pending could be problematic.
- If counsel is appointed on the PCR while the appeal is pending, and the appeal is successful, considerable resources that were spent on the PCR would be wasted;
- Why should a state statute set the hourly rate if the county is going to bear the cost of compensation? The State currently does not set the rate for trial or appellate counsel appointed by the county, and it should not set the rate for PCR counsel either.

Based on the discussion, there was no interest in supporting this proposal.

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*Capital Case Oversight Committee*

**8. Call to the public; adjourn.** In response to a call to the public, Mr. Schaye advised that the problem of screening lawyers for capital cases in Pima County is a serious one. The county's list combines trial and appellate counsel. There is a low rate of compensation and a lack of qualified applicants. He encouraged the members to look beyond PCRs and beyond Maricopa County when considering the establishment of a screening committee.

The meeting was adjourned at 1:35 p.m.

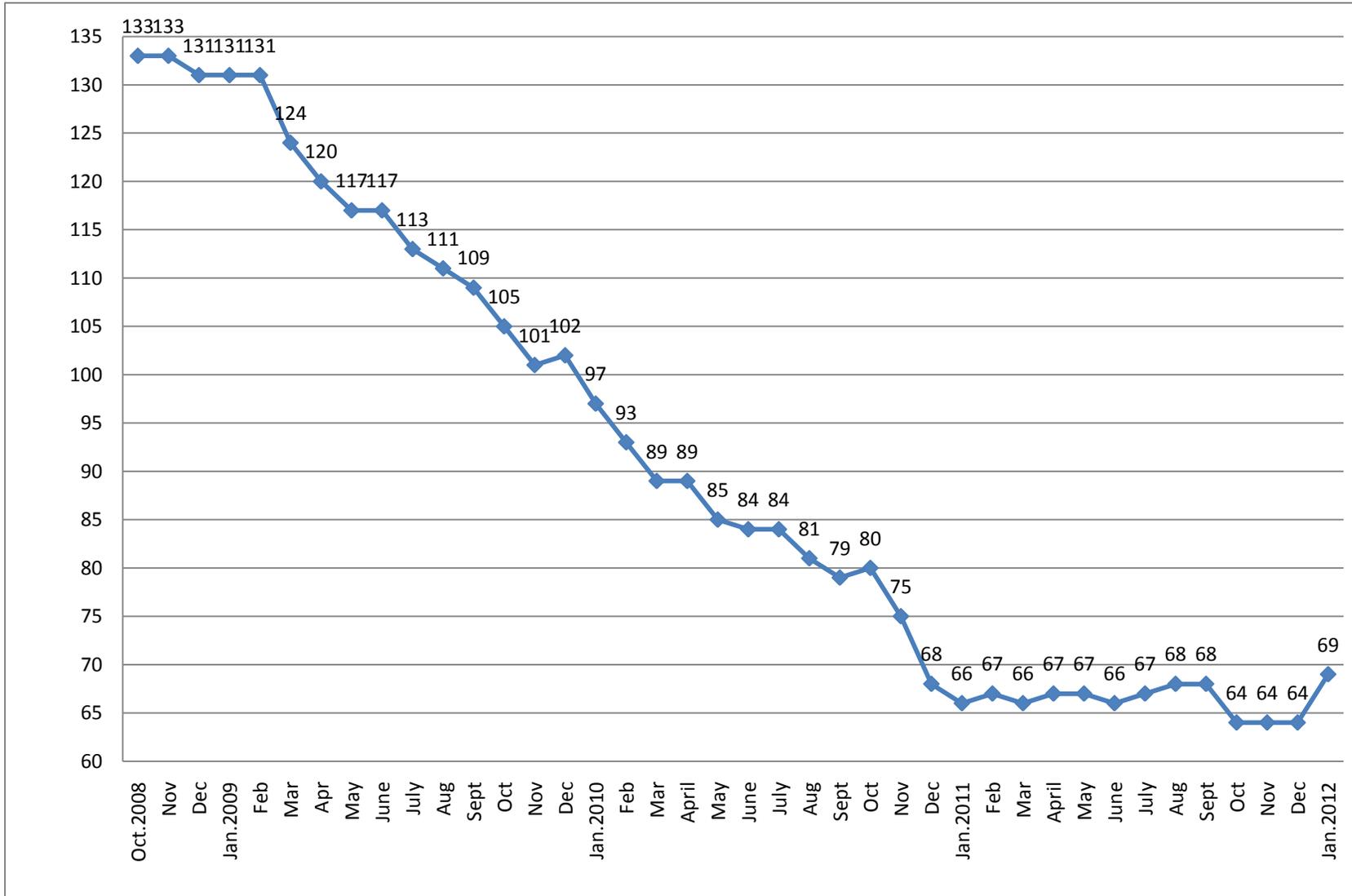
**Maricopa County Capital Case Recap: October 2008 to September 2011 (3 years)**

| <b><u>MONTH</u></b>       | <b><u># OF NEW CASES</u></b> | <b><u># ACTIVE CASES TERMINATED</u></b> | <b><u>DEFENDANTS SENTENCED TO DEATH</u></b> |
|---------------------------|------------------------------|---|---|
| October 2008              | 3                            | 1                                       | 0   |
| November                  | 2                            | 2                                       | 0   |
| December                  | 1                            | 3                                       | 0   |
| <b>January 2009</b>       | 1                            | 2                                       | 1: Prince [ <i>Ring</i> ]                   |
| February                  | 2                            | 2                                       | 0   |
| March                     | 0                            | 7                                       | 1: Hausner                                  |
| April                     | 2                            | 5                                       | 1: Lehr [ <i>Ring</i> ]                     |
| May                       | 0                            | 4                                       | 1: Delahanty                                |
| June                      | 0                            | 3                                       | 1: Gallardo                                 |
| July                      | 3                            | 4                                       | 1: Grell [ <i>Ring</i> ]                    |
| August                    | 3                            | 5                                       | 2: Cota, Hardy                              |
| September                 | 1                            | 5                                       | 1: Manuel                                   |
| <b>12 month sub-total</b> | <b>18</b>                    | <b>43</b>                               | <b>9</b>                                    |
| October                   | 3                            | 7                                       | 0   |
| November                  | 1                            | 5                                       | 1: Van Winkle                               |
| December                  | 7                            | 6                                       | 1: Patterson                                |
| <b>CY 2009 sub-total</b>  | <b>23</b>                    | <b>55</b>                               | <b>11</b>                                   |
| <b>January 2010</b>       | 1                            | 6                                       | 1: Medina                                   |
| February                  | 0                            | 5                                       | 2: Boyston, Ovante                          |
| March                     | 1                            | 5                                       | 0   |
| April                     | 2                            | 2                                       | 2: Joseph, Martinez                         |
| May                       | 2                            | 6                                       | 1: Parker                                   |
| June                      | 5                            | 6                                       | 0   |
| July                      | 5                            | 5                                       | 0   |
| August                    | 3                            | 6                                       | 1: Fitzgerald                               |
| September                 | 2                            | 4                                       | 0   |
| <b>12 month sub-total</b> | <b>32</b>                    | <b>63</b>                               | <b>9</b>                                    |
| October 2010              | 4                            | 3                                       | 2: Gomez, Rose                              |
| November                  | 1                            | 6                                       | 0   |
| December                  | 1                            | 8                                       | 1: Hernandez                                |
| <b>CY 2010 sub-total</b>  | <b>27</b>                    | <b>62</b>                               | <b>10</b>                                   |
| <b>January 2011</b>       | 3                            | 5                                       | 0   |
| February                  | 3                            | 2                                       | 1: Burns                                    |
| March                     | 2                            | 3                                       | 0   |
| April                     | 1                            | 0                                       | 0   |
| May                       | 3                            | 3                                       | 2: Naranjo, Reeves                          |
| June                      | 1                            | 2                                       | 0   |
| July                      | 1                            | 0                                       | 0   |
| August                    | 4                            | 3                                       | 0   |
| September                 | 2                            | 2                                       | 1: Miller                                   |
| <b>12 month sub-total</b> | <b>26</b>                    | <b>37</b>                               | <b>7</b>                                    |
| <b>36 month total</b>     | <b>76</b>                    | <b>143</b>                              | <b>25</b>                                   |

*Maricopa County Capital Case Recap: Continuation Beginning October 2011*

|                          |           |           |            |
|--------------------------|-----------|-----------|------------|
| October 2011             | 2         | 6         | 1: Benson  |
| November                 | 2         | 2         | 1: Goudeau |
| December                 | 1         | 1         | 0          |
| <b>CY 2011 sub-total</b> | <b>25</b> | <b>29</b> | <b>6</b>   |
| <b>January 2012</b>      | <b>6</b>  | <b>1</b>  | <b>0</b>   |
| February                 |           |           |            |
| March                    |           |           |            |

**Pending Capital Cases in the Maricopa County Superior Court: October 2008 through January 2012**



**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

|                                    |                      |
|------------------------------------|----------------------|
| IN THE MATTER OF ADOPTING A PLAN ) | ADMINISTRATIVE ORDER |
| FOR REVIEW OF APPOINTED DEFENSE )  | NO. 2012-008         |
| COUNSEL )                          |                      |
| _____ )                            |                      |

WHEREAS, Rule 6.2 of the Arizona Rules of Criminal Procedure requires the Presiding Judge to establish procedures for appointment of counsel; and

WHEREAS, Rule 6.5 of the Arizona Rules of Criminal Procedure provides that appointments shall take into account “the skill likely to be required in handling a particular case;” and

WHEREAS, Rule 6.8 of the Arizona Rules of Criminal Procedure sets standards for appointment and performance of defense counsel in capital cases,

**IT IS ORDERED** adopting the Plan for Review of Appointed Defense Counsel, attached as Exhibit A.

**IT IS FURTHER ORDERED** this Administrative Order expires automatically without further Order on a date ten (10) years from the date of issuance in accordance with Arizona Code of Judicial Administration, Section 3-402(C), unless sooner modified, amended or replaced.

Dated this 11th day of January, 2012.

\_\_\_\_\_  
Norman J. Davis  
Presiding Judge

Original: Clerk of the Superior Court

Copies: Hon. Douglas Rayes, Criminal Presiding Judge  
Superior Court Judges and Commissioners – Criminal Department  
Hon. Tom Horne, Attorney General  
Hon. Bill Montgomery, County Attorney  
James Logan, Public Defense Services  
Jim Haas, Public Defender  
Marty Lieberman, Legal Defender  
Bruce F. Peterson, Legal Advocate  
Marcus Reinkensmeyer, Judicial Branch Administrator  
Phil Knox, General Jurisdiction Courts Administrator  
Bob James, Criminal Court Administrator

## Exhibit A

### **PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL**

#### **AUTHORITY**

This “Plan for Review of Appointed Defense Counsel Criminal” (the “Plan”) is created pursuant to the Arizona Rules of Criminal Procedure. The Rules of Criminal Procedure assign certain judicial functions to the Presiding Judge in relation to the appointment of counsel in criminal cases. Rule 6.2 provides that the Presiding Judge shall establish procedures for appointment of counsel. Rule 6.5(c) provides that appointments shall take into account “the skill likely to be required in handing a particular case.” Rule 6.8 sets standards for appointment and performance of defense counsel in capital cases. The persons implementing and carrying out this Plan, specifically including the members of the two review committees, are acting under the authority of the Presiding Judge of the Superior Court of Arizona in Maricopa County to assist the Presiding Judge in carrying out his or her judicial responsibilities.

#### **PURPOSE OF PLAN**

This Plan is intended to further the goals articulated in the “Resolution on Indigent Defense Services Provided by the Court to Juveniles and Adults” adopted by the Maricopa County Board of Supervisors and approved by the Superior Court of Arizona in Maricopa County in 1992. The Plan establishes “performance requirements” and “a system which allows for regular evaluation of contract attorneys . . . including provisions leading to contract termination when performance is below standard.” It creates “Review Committee[s]” to assist in “reviewing, selecting and monitoring indigent legal services contracts.” These mechanisms are “consistent with . . . applicable standards of the National Legal Aid and Defenders Association (NLADA) and the American Bar Association (ABA),” which require institutionalized quality control for indigent defense services.

The Plan is intended to ensure, to the extent possible, that attorneys appointed to represent indigent defendants in the Superior Court of Arizona in Maricopa County provide skilled, knowledgeable and conscientious legal representation to their clients. That representation should be commensurate with the gravity of the charges and the severity of the potential consequences for the defendant. These principles shall inform the operation and administration of the Plan. With respect to capital cases, the Plan is intended to serve as a “Legal Representation Plan” as described in Guideline 2.1 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the “ABA Guidelines”). The Capital Defense Review Committee is intended to perform some of the duties of a “Responsible Agency” as provided in Guideline 3.1 of the ABA Guidelines.

The Plan will at all times be administered in a manner consistent with and in furtherance of an attorney’s ethical and professional obligations under Supreme Court Rule Rules 41 (obligations of lawyers including respect for courts and professionalism) and 42 (Arizona Rules of Professional Conduct). Nothing in this Plan is intended to confer on any attorney any right to

enter into or continue under or renew a contract for indigent defense services, or any right or benefit of any kind not provided for by such a contract.

## **REVIEW COMMITTEES**

### **Capital Defense Review Committee**

A Capital Defense Review Committee shall be established. That committee shall be composed of:

- The director of OPDS and the heads of the three Maricopa County adult indigent criminal defense offices, or their designees;
- The Presiding Criminal Judge or a Maricopa County Superior Court Judge designated by the Presiding Criminal Judge; and
- Four members of the criminal defense bar, appointed by the Presiding Criminal Judge, who do not hold a current OPDS contract or have a contract application currently pending and who are not currently employed by a Maricopa County indigent defense agency.

All members of the Capital Defense Review Committee must have substantial experience in the defense of capital cases or experience presiding over capital trials. Current active membership in the Bar is not required.

### **Felony Defense Review Committee**

A separate Felony Defense Review Committee also shall be established. That committee shall be composed of:

- The director of OPDS and the heads of the three Maricopa County adult indigent criminal defense offices, or their designees;
- The Presiding Criminal Judge or a Maricopa County Superior Court Judge designated by the Presiding Criminal Judge; and
- Four members of the criminal defense bar, appointed by the Presiding Criminal Judge, who do not hold a current OPDS contract or have a contract application currently pending and who are not currently employed by a Maricopa County indigent defense agency.

All members of the Felony Defense Review Committee must have substantial experience in the defense of felony cases or experience presiding over felony trials. Current active membership in the Bar is not required.

Where this Plan refers to “the Committee,” the reference is intended to apply to both the Capital Defense Review Committee and the Felony Defense Review Committee unless the context requires otherwise.

## **Committee Procedures**

The Committee chairs and vice-chairs shall be appointed by the Presiding Criminal Judge from among the current Committee members for a term of one year which can be renewed for up to three consecutive years

Upon the establishment of each Committee, the Presiding Criminal Judge shall appoint one of the criminal defense bar members for a one-year term, another for a two-year term, and the other two for three-year terms. All subsequent appointments or re-appointments shall be for three-year terms.

Each Committee shall establish guidelines for its operation, with the approval of the Presiding Criminal Judge. Operating guidelines may be reviewed and revised from time to time at the discretion of the Chair. Proposed guidelines shall be submitted to the Director of OPDS and to Maricopa County Materials Management or its designee before adoption, to ensure compliance with the Maricopa County Procurement Code.

## **FUNCTION OF THE COMMITTEE**

The Capital Defense Review Committee and the Felony Defense Review Committee shall function, in each Committee's respective area of responsibility, as the "evaluation committee" provided for in the "document of explanation" entitled "Contracting With Maricopa County to Provide Legal Services Pursuant to the Adult Criminal Contract (0902-ROQ)."

### **Review of Qualifications**

The Capital Defense Review Committee shall review the qualifications of each attorney listed on the OPDS Attorney Services Registry as to whom OPDS requests evaluation for assignment to capital cases. The Capital Defense Review Committee shall determine, based on the Committee's review of qualifications, what type of cases (if any) the attorney may be assigned from the following categories:

- Capital – Lead counsel
- Capital – Co-counsel
- Capital Direct Appeal

The Felony Defense Review Committee shall review the qualifications of each attorney listed on the OPDS Attorney Services Registry as to whom OPDS requests evaluation for assignment to non-capital felony cases. The Felony Defense Review Committee shall determine, based on the Committee's review of qualifications, what type of cases (if any) the attorney may be assigned from the following categories:

- Major Felony
- Felony

To be deemed qualified for assignment to felony cases, the attorney must demonstrate that he or she meets the following criteria:

- The attorney is a member in good standing of the State Bar of Arizona.
- The attorney meets, and can be expected to continue to meet, the minimum qualifications established by the Arizona Rules of Criminal Procedure.
- The attorney complies with, and can be expected to continue to comply with, Arizona Supreme Court Rule 41 (obligations of lawyers including respect for courts and professionalism), Rule 42 (Rules of Professional Conduct) and Rule 45 (continuing legal education); and OPDS contract obligations.
- The attorney provides, and can be expected to continue to provide, skilled, knowledgeable, thorough and conscientious representation to his or her clients, commensurate with the gravity of the charges and the severity of the potential consequences for the defendant.
- The attorney meets, and can be expected to continue to meet, the performance and practice standards of the profession and this Plan

Each calendar year, OPDS shall forward to the Felony Defense Review Committee the names of one-sixth of the attorneys currently receiving assignments to non-capital felony cases and the names of all attorneys newly placed on the OPDS Attorney Services Registry for possible assignment, along with copies of each attorney's most recent contract application and the additional information called for in this Plan. Effective six years from the date of adoption of this Plan, an attorney shall not be eligible for assignment to non-capital felony cases pursuant to a Maricopa County Adult Criminal Contract unless that attorney has completed the required review of qualifications and has been approved for assignment by the Presiding Criminal Judge.

To be deemed qualified for assignment to capital cases, the attorney must demonstrate that he or she meets all of the above criteria, and also the following additional criteria.

- The attorney meets, and can be expected to continue to meet, the minimum eligibility requirements of Criminal Rule 6.8.
- The attorney possesses the qualifications set forth in Guideline 5.1 of the ABA Guidelines.
- The attorney has a demonstrated history of practice, and can be expected to continue to practice, in accordance with the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.

Each calendar year, OPDS shall forward to the Capital Defense Review Committee the names of one-third of the attorneys currently receiving assignments to capital cases and the names of all attorneys newly placed on the OPDS Attorney Services Registry for possible assignments, along with copies of those attorneys' most recent contract application and the additional information called for in this Plan. Effective three years from the date of adoption of this Plan, an attorney shall not be eligible for assignment to capital cases pursuant to a Maricopa County Adult Criminal Contract unless that attorney has completed the required review of qualifications and has been approved for assignment by the Presiding Criminal Judge.

## **Evaluation Process**

When OPDS forwards the name of an attorney to the Committee, the Committee shall initiate a review of the attorney's qualifications to determine whether the attorney meets the criteria established by this Plan and therefore should be recommended for case assignment.

The Committee shall require an attorney undergoing review of qualifications to complete a written application separate from the contract application. The application form shall be created by the Committee and revised from time to time as necessary. The application shall require the attorney to provide, at a minimum, a list of representative cases handled by the attorney; references from judges, opposing counsel, and co-counsel; writing samples; and a summary of relevant continuing legal education for at least the three years immediately preceding the application. The Capital Defense Review application also shall require a complete list of capital cases in which the attorney has participated in the ten years immediately preceding the application, including case name and number; assigned judge; names, business addresses and telephone numbers of all attorneys in the case; and names, business addresses, and telephone numbers of all non-attorney defense team members. An attorney seeking assignment to capital cases also must identify a comprehensive training program in the defense of capital cases that the attorney will complete within one year of approval for assignment, unless the attorney can demonstrate that he or she has completed such a program within the two years immediately preceding the application.

The Committee shall review applications, check references, evaluate work product, and conduct additional inquiry to determine whether an attorney applicant possesses the qualifications required by this Plan. The Committee may solicit input or comments from judges, attorneys, and others. The inquiry by the Capital Defense Review Committee shall include, and the inquiry by the Felony Defense Review Committee may include, interviews of persons not listed as references who are familiar with the applicant's work.

Upon completion of its inquiry, the Committee shall meet and discuss each attorney applicant. The Capital Defense Review Committee shall interview an attorney applicant before recommending the attorney for assignment to capital cases. The Felony Defense Review Committee may interview attorney applicants at its discretion.

The Committee shall recommend whether an attorney applicant should receive assignments in each category of cases for which assignment is authorized under the attorney's Maricopa County Adult Criminal Contract. An attorney whom the Committee has tentatively decided not to recommend for assignment, in one or more of the categories of cases for which the attorney is eligible under his or her contract, shall be notified in writing of the tentative adverse recommendation and given an opportunity to be heard as to his or her qualifications either in writing or by in-person meeting with the Committee or both, before the Committee makes a final recommendation.

The Committee shall issue a final recommendation as to whether an attorney should receive case assignments within 180 days of receipt of the attorney's written application, unless the circumstances make action within 180 days impracticable. The Committee chair shall transmit

the Committee's final recommendations to the Presiding Criminal Judge in writing. The Presiding Criminal Judge may meet with the Committee chair to discuss the recommendations, at the Presiding Criminal Judge's discretion.

When the Committee recommends to the Criminal Presiding Judge that an attorney should not receive case assignments, in one or more of the categories of cases for which the attorney is eligible under his or her contract, the Criminal Presiding Judge shall give the attorney an opportunity to submit a written statement or other written information concerning his or her qualifications before making a final decision.

After reviewing and considering the Committee's recommendations and any attorney submissions, the Presiding Criminal Judge shall provide to the Director of OPDS a list of attorneys currently approved for the assignment of cases and the category or categories of cases to which each attorney may be assigned. OPDS shall notify attorney applicants in writing of the Presiding Criminal Judge's final decision.

The materials and information collected by the Committee during an attorney evaluation shall not be used for any other purpose, or disclosed to the public except as required by law.

### **Re-evaluation**

The Committee shall periodically re-evaluate the attorneys approved for case assignments under this Plan, to ensure that each attorney continues to meet the criteria established by the Plan. The Capital Defense Review Committee shall re-evaluate attorneys at intervals of not more than three years. The Felony Defense Review Committee shall re-evaluate attorneys at intervals of not more than six years.

The Committee may re-evaluate an attorney at any time, at the request of the Presiding Criminal Judge or at the Committee's discretion, when there is reason to believe that the attorney has not met or may not continue to meet the applicable criteria. Grounds for non-routine re-evaluation may include (but are not limited to) Bar discipline; sanctions imposed by a court; a complaint from a judge, a member of the bar or a client; misconduct or gross negligence in the representation of a client, or a pattern of inadequate representation of clients; excessive caseload; failure to comply with training requirements; or violations of contract terms. An attorney being re-evaluated on other than a routine basis shall be notified in writing and given an opportunity to submit a written statement or other written information to the Committee, before the Committee meets to discuss the attorney.

The Committee shall require an attorney undergoing re-evaluation to update the attorney's prior written application. The attorney also shall provide a list of representative court-appointed cases since the prior application, a summary of recent continuing legal education and certification of compliance with training and professional development requirements. The Capital Defense Review application shall require the attorney to provide a complete list of capital cases in which the attorney has participated since the prior application, including case name and number; assigned judge; names, business addresses, telephone numbers of all attorneys in the case; and names, business addresses, and telephone numbers of all non-attorney defense team members.

When re-evaluating an attorney's qualifications, the Committee shall utilize the information that the Maricopa County Adult Criminal Contract requires the attorney to submit to OPDS, such as case logs, final disposition records, time sheets and requests for approval of expenditures. The Committee also shall review complaints about the attorney and requests for a different attorney, if any, received by OPDS or the Committee from any source. The Committee may review any records and accounts, relating to the work performed or the services provided by an attorney in a particular case, that OPDS is authorized to review pursuant to the contract.

The process for re-evaluating attorney qualifications, and the right of an attorney to be heard during the process, shall be the same as the initial review of qualifications. When the Presiding Criminal Judge makes a final decision as to whether an attorney should continue to receive case assignments, the Presiding Criminal Judge shall revise the list of approved attorneys accordingly and provide the revised list to the Director of OPDS. OPDS shall notify each attorney in writing of the Presiding Criminal Judge's final decision.

### **PERFORMANCE AND PRACTICE STANDARDS**

For purposes of determining whether an attorney possesses "the skill likely to be required" in handling the cases to which the attorney will be appointed, as required by Rule 6.5(c), the Committee shall apply the following performance and practice standards.

- I. Attorney represents clients in accordance with applicable ethical rules and standards of professional conduct, including but not limited to:
  - a. Contacting and conferring with the client concerning the representation within a maximum of 48 hours of notice of assignment;
  - b. Maintaining reasonable contact and adequately communicating with the client until the representation is terminated;
  - c. Using reasonable diligence in notifying the client of necessary court appearances including any court action that arises out of the client's non-appearance;
  - d. Conducting all out-of-court preparation required for competent representation of the client, including a prompt and thorough client interview and such additional interviews and investigation as may be appropriate;
  - e. Appearing in court on time and prepared for scheduled proceedings;
  - f. Displaying appropriate respectful professional demeanor and conduct in all dealings with the court, opposing counsel, victims and witnesses, and the client.
  
- II. Attorney demonstrates and maintains proficiency in all applicable aspects of substantive law, procedural rules, and trial advocacy, including but not limited to the following:
  - a. Recognition of legal issues;

- b. Effective legal research and use of pretrial motions;
- c. Effective case development including thorough client interviews, appropriate use of investigators and timely and comprehensive witness interviews;
- d. Effectiveness in plea negotiations;
- e. Effective use of experts when necessary;
- f. Thorough and effective trial preparation including anticipation of key legal issues, evaluation of admissibility of evidence, discussion of the defendant's role including possible testimony, and preparation of witnesses including the defendant if necessary;
- g. Willingness to try cases;
- h. Advocacy skills;
- i. Effective sentencing presentation.

III. Attorney manages law practice efficiently and effectively in relation to assigned clients and complies with OPDS contract obligations.

The Capital Defense Review Committee shall apply, in addition to the foregoing performance and practice standards, the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.

## **OTHER ASPECTS OF INDIGENT DEFENSE REVIEW**

### **Training and Professional Development**

An attorney seeking assignment to capital cases must attend and successfully complete a comprehensive training program in the defense of capital cases within one year of the attorney's initial approval for assignment, unless the attorney has completed such a program within the two years immediately preceding approval. In order to maintain eligibility for assignment to capital cases, the attorney must attend and successfully complete, at least once every two years, at least twenty-four hours of continuing legal education specifically relating to the defense of criminal cases, at least twelve hours of which shall consist of specialized training in the defense of capital cases.

An attorney seeking assignment to non-capital cases felony must attend and successfully complete twelve hours of continuing legal education specifically relating to the defense of criminal cases within one year of the attorney's initial approval for assignment, unless the attorney has completed such training within the two years immediately preceding approval. In order to maintain eligibility for assignment to non-capital felony cases, the attorney must attend and successfully complete, at least once every two years, at least twelve hours of continuing legal education specifically relating to the defense of criminal cases.

An attorney receiving case assignments under this Plan shall maintain records demonstrating compliance with training requirements. The Committee may require an attorney to show satisfactory evidence of compliance at any time.

Although each Committee (or the two of them together) may present or facilitate relevant continuing legal education and training, each attorney is responsible for his or her own compliance with training requirements. It is not anticipated that the Committees will underwrite or subsidize attorney training.

### **Collection and Reporting of Information**

An attorney receiving case assignments under this Plan shall create and maintain all records required by the Maricopa County Adult Criminal Contract, including detailed and accurate case logs, final disposition records and time sheets relating to client representation. The attorney also shall comply with contract requirements relating to OPDS approval of case-related expenditures (for expert witness fees, travel expenses, investigators, mitigation specialists in capital cases, service of process, court transcript fees and other reasonable and necessary expenditures) and notice to OPDS of requests for judicial approval of expenditures or additional compensation. Copies of required records and documentation shall be retained by the attorney and provided to the Committee on request.

The Presiding Criminal Judge shall work with the Clerk of the Court to create a process by which OPDS and the appropriate Committee routinely receive notice that a defendant has asked to terminate an assigned OPDS attorney's representation, and the result of that request.

### **Complaints**

Upon receipt by OPDS of a complaint about an attorney, from any person, OPDS shall forward or refer the complaint to the appropriate Committee.

The Committee may forward a complaint about an attorney to that attorney, with or without a request for response. Before considering a complaint in the evaluation or re-evaluation of an attorney, the Committee shall forward the complaint to the attorney and ask for a response. When asked to respond to a complaint, the attorney must do so in writing within 10 days as required by the Maricopa County Adult Criminal Contract.

If the Committee receives a written complaint or communication from a defendant specifically asking to terminate an ongoing representation, the Committee shall immediately forward the communication to the assigned judicial officer unless OPDS has already done so

## Capital PCR Advisory Committee

1. Purpose
  - A. To recruit attorneys who are qualified to represent petitioners in state capital post conviction proceedings and who have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.
  - B. To review the applications of attorneys seeking appointment to capital PCR cases and to recommend to the Arizona Supreme Court, whether the attorney should be added to the roster of attorneys qualified to be appointed to represent capital defendants in state post conviction proceedings. Recommendations from the committee are non-binding
2. Composition of the Committee
  - A. The Committee shall be composed of:
    - i. One Superior Court Judge
    - ii. The Director of the State Capital Post Conviction Public Defender's Office or his/her designee
    - iii. Three criminal defense attorneys who are not active<sup>1</sup> members of the roster of attorneys qualified to represent defendants in state capital post conviction proceedings but who have significant experience in the defense of capital cases and who are not applicants.
  - B. The Chief Justice of the Arizona Supreme Court shall appoint the members described in (i) and (iii) above. Terms shall be for two years and may be extended
  - C. The committee shall select a chair and create its procedures within two months of its formation. The procedures shall include the due diligence required in the review of applications
3. Initial Review of Applicants
  - A. The Committee will consider all applicants forwarded to it by the Arizona Supreme Court.
  - B. The Committee shall consider whether the applicant has demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases and base its recommendation on that criterion
  - C. Process

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<sup>1</sup> ACTIVE MEANS MEMBERS OF THE ROSTER WHO ARE CURRENTLY ASSIGNED TO A CAPITAL PCR CASE OR EXPECT TO BE ASSIGNED A CASE DURING ANY EXPECTED TENURE ON THE COMMITTEE.

- i. The Chair shall assign the task of reviewing an application and conducting due diligence to a committee member or members.
- ii. As part of the due diligence investigation, the reviewer shall contact at least two persons who have professionally interacted with the applicant in relevant matters who are not listed as references.
- iii. The Committee shall meet to discuss applications. Interviews with applicants are at the discretion of the committee.
- iv. The Committee will make one of the following recommendations:
  - i. Add the applicant to the roster of attorneys qualified to be appointed to state capital post conviction cases
  - ii. Reject the applicant
  - iii. Add the applicant to the roster but with conditions
- v. The committee's recommendation shall be supported by a memorandum if the recommendation is to reject the applicant or to add the applicant to the roster with conditions. The memorandum shall specify the reasons for the recommendation describing, among other things, the due diligence conducted. Any member or members may prepare a dissent which shall be included with the memorandum. The recommendation and memorandum shall be transmitted to the Chief Justice of the Arizona Supreme Court or his/her designee
- vi. The committee shall maintain any and all paperwork, documents and minutes related to its work.

**Capital PCR Advisory Panel**

1. A.R.S. § 13-4041(C) provides in part that "...the supreme court shall establish and maintain a list of persons who are qualified to represent capital defendants in those cases in which the court does not appoint counsel from the state capital post conviction public defender office."
2. The Supreme Court's staff attorneys currently maintain a list of persons pursuant to the foregoing statute.
3. The staff attorneys currently receive applications for appointment on capital PCRs, review and investigate the applications, and submit applications, materials, and recommendations for appointment to the Supreme Court. The Supreme Court then decides whether an applicant is qualified and if the attorney should be included on the list maintained by its staff attorneys.
4. The Supreme Court believes that its staff attorneys would benefit from the assistance of judges and defense counsel to recruit qualified candidates for appointment on capital PCRs, and to review and investigate applications for appointment, and that a capital PCR advisory panel ("advisory panel") may informally provide this assistance to its staff attorneys.
5. The advisory panel will consist of five members, including one or more judges and two or more criminal defense attorneys. One of the defense attorneys must be the director of the State Capital Post-conviction Public Defender's Office. The other attorney or attorneys should have significant experience in the defense of capital cases. The members will serve at the invitation and pleasure of the Chief Justice, or his or her designee, for a period of one year, and may serve successive terms.
6. The advisory panel will meet as often as necessary. The staff attorneys' office will staff the advisory panel.
7. Staff will make available to the members of the advisory panel every application of an attorney who seeks to be added to the appointment list, and any related materials. The advisory panel members will then conduct a due diligence investigation concerning the applicant's proficiency and commitment that is required for the defense of a capital case. The due diligence investigation of the advisory panel members must include reviewing and discussing written materials submitted or prepared by the applicant; contacting references provided by the applicant; and contacting people who have interacted with the applicant in relevant matters, including judges, but who were not identified as references. The advisory panel may interview the applicant at the discretion of the panel.
8. After the advisory panel's due diligence investigation is completed, the panel or a majority of its members will make a recommendation to staff concerning whether the applicant should be added to the appointment list, and staff will transmit the recommendation to the Supreme Court. Staff will note and convey to the Supreme Court any disagreement by a member of the advisory panel with the majority's recommendation, or any conditions of the recommendation.

***Capital Case Oversight Committee***

***Draft: Feb 29 2012***

9. The advisory panel must also conduct periodic reviews of attorneys on the list of qualified persons to assure that each attorney continues to have the necessary proficiency and commitment. An attorney on the list must be reviewed (a) when information is brought to the panel's attention that warrants a review; (b) when the attorney requests appointment to another case; or (c) every five years, whichever first occurs. The periodic review need not include the full investigation required by paragraph 7, and the panel may determine what is appropriate and sufficient diligence for a periodic review. The panel's recommendations following a periodic review will be communicated to staff as provided in paragraph 8.

10. The notes and other records of the advisory panel are judicial work product and closed records under Supreme Court Rule 123(e)(9).

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## CAPITAL CASE OVERSIGHT COMMITTEE

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| <b>Date of Meeting:</b><br><br><b>February 29, 2012</b> | <b>This agenda item is for:</b><br><br><input checked="" type="checkbox"/> Formal Action/Request<br><br><input type="checkbox"/> Information Only<br><br><input checked="" type="checkbox"/> Other | <b>Subject:</b><br><br><b>Capital case jury instructions</b> |
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### **Discussion:**

Attached to the e-mail distribution to the members dated December 8, 2011, which noticed today's meeting, was an ABA Resolution and Report that included proposed model jury instructions for the penalty phase of a death penalty case. This e-mail noted, *"The Oversight Committee may discuss these model instructions at the upcoming meeting and consider whether they could improve the existing State Bar approved instructions."*

A December 22, 2011 e-mail from Mr. Schaye reported:

*"The ABA Criminal Justice Section has withdrawn the model jury instructions that were proposed for adoption at the February mid-year meeting in 2012. Instead, the proposed Resolution now urges all death penalty jurisdictions to 'develop model jury instructions in language understandable by jurors untrained in law and legal terms and to provide those instructions to jurors both orally and in written form'."*

Judge McMurdie is chair of the State Bar's Committee on Criminal Jury Instructions. That committee has prepared recommended Arizona jury instructions for capital cases that were updated in 2011. The updates include revisions to conform the instructions to recent changes in Arizona law.

### **Recommended Actions or Requests:**

1. Does the Oversight Committee have any recommendations concerning the ABA's current, proposed resolution or model instructions?
2. Would the Oversight Committee defer further study of the ABA resolution and model instructions to the State Bar Committee on Criminal Jury Instructions?
3. Does the Oversight Committee have any specific recommendations for the Committee on Criminal Jury Instructions?