

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
October 8, 2008**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Anna Baca
Kent Cattani
Donna Hallam
Dan Levey
Marty Lieberman
James Logan
Phil MacDonnell
Paul Prato
Hon. Ronald Reinstein

Guests:

James Beene
Robert Shutts
Sally Wells
Jennifer Garcia
John Pressley Todd
Dale Baich
Keli Luther
Rudy Gerber
Kimberly DeBeus
Kerri Chamberlin
Patricia Nigro

Staff: Mark Meltzer, Lorraine Nevarez

=====

1. Call to Order and Approval of the Meeting Minutes. The meeting was called to order at 12:03 p.m. The minutes of the September 18, 2008, Committee meeting were approved without objection.

2. Discussion of the draft Committee report. The Chair asked the members to comment on the draft report and the accompanying rules, both of which had been previously circulated, and the following topics were then discussed by the members.

a) Proposed Rule 15.10. The draft report included a proposed Arizona Rule of Criminal Procedure, Rule 15.10, regarding ex parte mitigation discovery conferences in capital cases.

Mr. MacDonnell opened with a comment that this proposal for a “shadow judge” was anathema to the principle of open judicial proceedings, as established in Article II, section 11, of the Arizona Constitution, as well as contrary to the constitutional right of victims to be present at criminal proceedings. He added that there has been no showing that mitigation discovery conferences expedite the capital case process; and that Rule 15.9(b) already allows ex parte proceedings, but only when there has been a proper showing of need. He also submitted that the mitigation discovery process has been abused by using it for discovery on issues relating to guilt. In support of this statement, he provided the members with a recent court minute entry, and he also related an incident in which sneakers with potential materiality to the guilt phase had been subpoenaed ex parte from a co-defendant’s mother.

Judge Reinstein noted that Rule 39(b) of the Arizona Rules of Criminal Procedure, which gives the victim a right to attend “all criminal proceedings”, is more expansive than either the

underlying constitutional or statutory provisions. He commented that while it was salutary to give a capital defendant a cooperation advisement, the victim and prosecutor should be present when this is done. He also pointed out that mitigation masters may issue an order which could lead to a case continuance, or an ex parte order may impact the victim's family, and these practices would be objectionable.

Mr. Levey joined in comments about the unfairness of excluding victims from these mitigation discovery proceedings.

Judge Baca stated that she had discussed proposed Rule 15.10 with other judges assigned to the criminal divisions. She did not believe that the concept of mitigation discovery conferences should be abandoned. She agreed that the mitigation discovery masters should have additional training on their role and function. She stated that the language of proposed Rule 15.10 requires further study and revision.

Mr. Cattani and Mr. Shutts inquired why existing Rule 15.9(b) is not adequate for mitigation discovery. Judge Baca responded by noting the broad responsibility of capital defense counsel under the A.B.A. Guidelines to do an extensive mitigation investigation, compared to the narrow application of Rule 15.9(b). She submitted that Rule 15.9(b) "ignores the whole picture" presented with a capital case defense. She added that a mitigation discovery master can only operate within the time lines set by the trial judge, and that any mitigation delays are referred to the trial judge.

Mr. Lieberman cited as a case management consideration the need for frank discussion on mitigation discovery with the mitigation discovery master. Mr. Logan noted that initially, mitigation discovery conferences were opposed by defense counsel, who thought the conferences would lead to micromanagement of their cases, although this opposition has dissipated. He also stated that capital cases typically take at least three years to process, and that because the mitigation discovery conferences have been used for only about one year, it is too early to tell if they expedite case processing.

Mr. Cattani asked why even though mitigation discovery may be an ex parte proceeding, the prosecutor should not be provided with any ex parte orders issued by the mitigation discovery master. Judge Baca replied that it is because defense counsel may or may not use the records described in the order. Mr. Logan added that the orders frequently contain specific information such as places of the defendant's medical treatment and the names of defendant's medical providers.

Mr. MacDonnell commented that while we have an adversarial system, the mitigation discovery conferences are not adversarial proceedings. Mr. Logan noted when a trial judge conducts ex parte proceedings, it increases the potential for recusal, which could result in more delay.

Judge Reinstein considered the possibility of changing the broad language in Rule 39, which gives the victim the right to be present "at all criminal proceedings," so that the rule conformed to the more limited constitutional and statutory provisions; and then mitigation conferences could be conducted without the defendant, the prosecutor, or the victim being present, thereby allowing

the defense attorney to make ex parte requests for resources or assistance in obtaining discovery. It was noted that the constitution and statutes create rights, but that rules of implementation cannot create new rights.

Justice Ryan commented that the mitigation discovery conferences should respect victims' rights, and that the mitigation conferences should be restricted to what was necessary for mitigation discovery. He raised the possibility of expanding Rule 15.9 to deal with mitigation discovery in capital cases. He asked Judge Baca, Mr. MacDonnell, Mr. Logan, and other members to confer prior to the next meeting and work on alternatives to the proposed Rule 15.10.

In later discussions during the meeting, it was agreed that there was not sufficient time before the report was due in which to draft, and to reach consensus on, new language for a proposed rule, and that this Committee would continue to work on a draft of a rule amendment regarding mitigation discovery conferences following submission of its report to the Arizona Judicial Council.

b) PCR counsel. Mr. Lieberman brought the members attention to a section in the draft report dealing with PCR counsel. Mr. Lieberman observed that there are three reasons defense attorneys are reluctant to accept appointments on capital case PCRs: the 200 hour "cap", the hourly rate, and the potential for "opting in". He noted that even if the hourly rate was increased from \$100 to \$125, as recommended by the Capital Case Task Force, that it would still be less than the federal rate. He stated that the 200 hour cap was contrary to the A.B.A. Guidelines. He submitted that the Committee should re-urge removal of the cap, as well as an increase in the hourly rate, even though these recommendations might be rejected because of the budget situation, because it was important to stress the need for these changes.

Mr. Lieberman also proposed that the Committee recommend removal of the statutory limit on the size of his office staff. If the recommendation is approved, it would not result in any additional expenditure until the positions are actually funded. He recommended as well that the State PCR office be a training resource for other PCR attorneys, as long as the training did not involve trials or appeals.

Mr. MacDonnell responded that the Committee should continue to advocate for the hourly rate increase and removal of the cap, notwithstanding the budget situation. Mr. Logan added that it would be irresponsible to not make the recommendations, and that the State PCR office was the logical resource for PCR training. Mr. Cattani thought that as a practical matter, hours above the cap were typically approved, so removing the cap would not encourage any additional attorneys to be appointed on PCRs, but he supported Mr. Lieberman's recommendations.

It was the consensus of the Committee that the section of the draft report dealing with the above issues be revised as recommended by Mr. Lieberman.

c) Proposed Rule 6.3(d). Mr. Lieberman commented that the draft of Rule 6.3(d) of the Arizona Rules of Criminal Procedure, regarding preservation and transfer of defense counsel's file, was a good concept, but that it micromanaged the requirement, and that the imposition of

sanctions was unnecessary. He submitted an alternative: a proposed Rule 6.8, which duplicated the A.B.A. Guidelines. Mr. Logan noted that placing this proposal in Rule 6.8 would make the requirement applicable only to appointed counsel rather than all counsel. Ms. Hallam suggested that this proposal be placed in Rule 6.3. The revised draft will reflect these changes.

d) Data. With regard to the section of the draft report dealing with data, the Chair and members noted certain apparent inconsistencies in section I of the draft report, along with issues concerning data collection generally. Mr. Shutts noted, for example, that if a death notice is dismissed while the matter returns to a grand jury for additional charges, the data reflects this as a dismissal, notwithstanding a re-filing. Mr. Logan asked whether a case should be counted as capital upon the filing of the underlying murder charge, or when the Rule 15.1(i) notice is filed.

Mr. Shutts and Mr. MacDonnell related that about one-third of death notices which are filed culminate in a death sentence. A discussion ensued about why two-thirds of death notices result in a sentence other than death, and whether the capital case process could be improved by reducing the number of notices of intent to seek the death penalty which are filed. Mr. MacDonnell noted that there has been insufficient time to generate statistics regarding the factors a jury considers appropriate for a death sentence, since the implementation of legislation requiring juries to determine penalty has been relatively recent.

The Chair determined that the members who collect data need to confer on defining data measurements, and he directed staff to coordinate these discussions prior to the next Committee meeting.

e) Judicial Rotation. Mr. MacDonnell reiterated that the Task Force recommendation for extended assignments of judges to capital case calendars should be adopted by the Oversight Committee, and he asked that a rule on this recommendation be implemented. Judge Reinstein stated that the difficulty judges have with keeping a capital case after rotating to a family or juvenile court would support longer assignments to a criminal division. Judge Reinstein concurred that rotation from the criminal bench should not be done just for the sake of rotation, and the members agreed generally with this concept.

Judge Baca, however, cautioned against putting this recommendation into a rule. She noted that the superior court has more than 100,000 cases, and 150 capital cases should not be the sole focus of whether and when judges should be rotated. She reminded the members that there are presently five special assignment judges in the criminal department who assist on capital cases. Mr. MacDonnell suggested that in lieu of a rule, the Committee make a recommendation to the superior court about having longer judicial rotations to criminal case calendars. The consensus of the members was that the term of judicial assignments was within the purview of the presiding judge of the superior court. Nevertheless, a majority of the Committee believed that the report should include a recommendation about judicial rotation similar to that made by the Capital Case Task Force.

f) Proposed Rule 39(c). The draft report proposed a statewide rule of criminal procedure which would require the prosecutor to advise the victim of the length of time needed for final resolution of a capital case, versus the comparative time period if a death notice was not filed.

Mr. MacDonnell thought that this proposal would infringe on the relationship the prosecutor has with the victim. He noted that there were too many vagaries about the future, including changes in statutory and case law, and that the advisement would simply become a statistical presentation or an advisement that death penalty cases take a long time.

Mr. Levey responded that it was important that the victims be educated about the time involved, and that victims be given realistic expectations. He added that many victims had not known how long the process actually took. Judge Reinstein and Judge Baca noted that victims often do not know about the length of the process until they are given this information as an incentive to agree to a resolution without a death sentence during the course of a resolution management conference.

The Chair stated that a compromise on this proposal may be that the Committee recommend a practice that the victim be given this advice, rather than reducing it to a rule.

g) Comments regarding the backlog of cases. Mr. Logan and Mr. Prato recommended that language in section I of the report regarding a “perception of a crisis” be deleted, and the Committee concurred. Judge Baca suggested, and the Committee agreed, that counsels’ calendar conflicts with trial dates, as well as mitigation discovery, need to be identified as factors which contributed to the backlog of cases. Mr. Logan noted that even though there may not be a trend of more death notices being filed, a spike in filings in fiscal year 2006 (when 41 notices were filed) continues to have an impact on the backlog, inasmuch as these cases are still being processed. Ms. Hallam added that although the number of *Ring* remands is relatively low now, this is still a contributing factor to the backlog.

h) Pending comments on the draft. Mr. Lieberman stated that his office has concerns with the proposal for case management conferences in Rule 32 proceedings. Mr. Gerber will prepare written comments detailing these concerns, and forward those comments to Mr. Cattani and to staff. Mr. Lieberman may also have additional comments regarding his suggestion that the Attorney General forebear from seeking “opt in” status for defendants awaiting the appointment of PCR counsel.

3. Department of Justice Grant. Judge Reinstein informed the members that the Department of Justice has provided \$40,000 in grant funds to Maricopa County. The funds were obtained by Robin Hoskins, a grant coordinator at the Maricopa County Superior Court. These funds are for training on capital case issues. Judge Reinstein noted that this training will be particularly valuable because judges, prosecutors, and defense counsel will be permitted to jointly participate in the training sessions.

4. Capital Case Staff Attorney. An announcement was made that a staff attorney for capital cases has been hired by the Maricopa County Superior Court. The attorney’s name is Patricia Nigro.

5. Call to the Public; Adjournment.

There was no response to the call to the public.

The Committee agreed to meet again in early November. The Chair advised that this meeting will be scheduled for two hours.

The meeting was adjourned at 1:40 p.m.