

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
February 29, 2012**

Members Present:

Hon. Ronald Reinstein, Chair  
Hon. Douglas Rayes  
Kent Cattani  
Donna Hallam  
Dan Levey  
Marty Lieberman  
James Logan  
William Montgomery, by proxy,  
    Anthony Novitsky  
Daniel Patterson

Guests:

Hon. Paul McMurdie  
Robert Shutts  
John Todd  
Jennifer Garcia  
Bruce Peterson  
Kristine Fox  
Paul Rubin  
Diane Alessi  
Elizabeth Walker  
Theresa Barrett  
Dale Baich  
Charles Babbitt III  
Paul Julien

Staff:

Mark Meltzer  
Tama Reily

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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 expressed his respect for Justice Ryan, and conveyed the enjoyment Justice Ryan had described to him about working with members of this Committee.

The Chair then asked the members to review the draft minutes of the October 5, 2011 meeting.

**Motion:** A member moved to approve those minutes, followed by a second, and the members unanimously approved the October 5 Oversight Committee 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 currently seventy-one pending cases. There have been nine death notices filed in the past two months. A jury trial commenced this morning, and other trials are set for March and April. There have been eight jury trials and three death sentences in fiscal year 2012 to date. Fifteen cases concluded during that time. Judge Rayes also noted that there are thirty capital petitions for post-conviction relief pending in Maricopa County; twenty-five of these are in the briefing stage. Usually the defendant files a petition within two years following the appointment of counsel. There are occasionally issues involving delay in the transfer of a defendant's file to PCR counsel. The court has stayed four cases assigned to the State Capital Post-conviction Public Defender.

Judge Rayes reported that three capital cases judges will rotate with the next judicial assignments. Twenty-seven capital cases are assigned to these judges. Three judges who have completed training with the National Judicial College will rotate on to the capital case bench. A member expressed his concern about the rotation of experienced capital case judges, but was also

mindful that the presiding judge considered this factor when making assignments. Capital case judges meet in conference every two weeks. Judge Rayes added that he conducts a conference following the filing of each new death notice to assure that the capital case is compatible with counsels' caseloads.

Mr. Novitsky reported that his office is maintaining a consistent approach to capital cases. Mr. Patterson noted that the new county attorney has been more receptive to utilizing bench trials and other alternative dispute resolution procedures for capital cases. Mr. Logan added that his list of capital cases is longer than the court's because he tracks potential capital cases, and that several of his potential capital cases were resolved without the filing of a death notice because of increased early-stage disclosure of information. The Maricopa County stakeholders believe that the recent spike in the number of death notices is probably circumstantial rather than a trend, but a wait-and-see approach is advisable. The public defender's office can take three new capital cases. Private counsel are appointed only when the staffed offices are full, or if there is a three-way conflict of interest, and consequently only one capital case has been assigned recently to private counsel.

With regard to the thirty pending capital PCRs, a member noted that several years ago, the number was in the single digits. The office of public defense services now operates near its budget allocation, but the increased number of capital PCRs could place a considerable strain on county resources. The volume of pending PCRs is an extension of the 2007-2008 crisis and the higher number of capital cases that were pending trial in Maricopa County at that time. On a related matter, a member raised an issue concerning the difficulty PCR counsel have in scheduling prison visits with death row inmates. The Department of Corrections reportedly permits a maximum of two, two-hour attorney visits weekly with a death row inmate, and because of high demand for visitation, counsel must schedule visits at least a month in advance. These restrictions also affect the scheduling of expert witness examinations of these inmates. The situation appears to be a matter of DOC resource limitations, and Mr. Cattani advised he would speak with DOC officials concerning this issue.

**2b. Status reports: appeals and PCRs.** Ms. Hallam advised that there are twenty-eight pending capital appeals. Eleven of these cases are in chambers. There were eight notices of capital appeals filed in 2011; there were no notices filed during the first two months of 2012.

There are at most four defendants, and possibly none, awaiting the appointment of counsel on petitions for post-conviction relief. A large local firm may take two of these cases, although the firm may have recently uncovered a conflict of interest that would preclude accepting them. An out-of-state firm might take one case, and a local attorney has been located to associate with pro hac vice counsel. An attorney has also agreed to take the fourth case upon conclusion of any certiorari proceedings. In sum, there is no longer a backlog in the appointment of counsel for the first PCR petition in a capital case.

Ms. Hallam also reported that two motions for execution warrants are pending.

**3. Maricopa County Administrative Order 2012-008.** The Maricopa County presiding judge entered this administrative order on January 11, 2012. Judge Rayes explained that this AO is a

quality assurance plan for appointed private attorneys; it does not apply to counsel in staffed defender agencies. There are two committees under this plan, one for capital cases and the other for felony cases. The capital case committee is composed of the director of the Office of Public Defense Services, the presiding criminal judge or a designated judge, the heads of the three defender agencies, and four members of the criminal defense bar. Every year the capital committee will evaluate all new applicants for capital case appointments and one-third of the attorneys already eligible for appointment. The attorney must submit specified information to the committee, including a list of representative cases, recommendations, writing samples, and a summary of relevant CLE, and the committee will interview the attorney. The committee may request case logs, final disposition records, and time sheets. The committee will make recommendations to the presiding criminal judge, who will make final decisions on whether an attorney should receive capital case assignments.

Although a less formal evaluation process had been in place, attorneys' professional and personal issues sometimes resulted in motions to withdraw at a late stage of a capital case, and the impact of those events on capital case management contributed to the need for this more formalized procedure. The court expects that AO 2012-008 will help to avoid such delays in the future.

**4. Update on the State Capital Post-Conviction Public Defender.** Judge Rayes serves on the commission responsible for nominating a new director of this state office. He advised that the commission sent its list of nominations to the Governor earlier this month. At the time of the Oversight Committee's meeting, a legislative appropriation proposal for the FY 2013 budget is pending that does not fund the office.

The Attorney General is considering introduction of legislation that would require the counties to pay the full cost of capital PCR defenders, including services rendered by the state defender's office and services provided by appointed private counsel. Several members questioned whether it was fair to require that the counties provide funding for a state agency. The Attorney General's office believes that this proposed structure will provide a fiscal incentive for counties to provide capital PCR defender services "in-house," and that the counties will use their resources more efficiently by appointing staffed county defender agencies in capital PCR proceedings. The proposed legislation would also provide for the appointment of PCR counsel in a capital case concurrently with the appointment of counsel for a direct appeal. The Attorney General believes this would expedite the post-sentencing process and, as a possible side-benefit, minimize the loss of documents during the transfer of a file after an appeal. Discussion ensued.

- If PCR counsel and appellate counsel were appointed at the same time, and the conviction was reversed on direct appeal, wouldn't the expense of PCR counsel be a waste of resources? An alternative view was that in the event of a reversal, PCR counsel might have developed information that could be useful at defendant's re-trial or re-sentencing.
- Are there enough qualified attorneys to allow for the concurrent appointment of appellate and PCR counsel in capital cases? Inherent in the proposal is a notion that when the county decides to seek the death penalty, the county will be responsible for providing sufficient resources for the case, including available and qualified attorneys at all stages

of the proceedings. A member commented that the availability and expense of PCR defenders is probably a remote consideration when the county attorney decides whether to file a death notice.

- The Attorney General's office provides prosecution services following conviction, and it does not require reimbursement from the counties. Why shouldn't the state also provide defense services? The Attorney General believes that until the 1990's, the counties bore the cost of capital post-conviction defense, and that this was a better model than the current one. In addition, a statute requires the attorney general to represent the state on appeals, although a member noted that changing statutory descriptions of duties is at the heart of this discussion and that the attorney general's duties might be similarly changed.

The Chair concluded that the Oversight Committee would remain neutral on the Attorney General's proposal. A member noted in closing that pending legislation would further reduce the state's obligation to reimburse counties for capital PCR expenses. Although a statute now provides that the state will reimburse a county fifty percent of the cost of a capital PCR defender, as a practical matter, for this year and the prior one, the counties have received only about twelve percent of their fifty percent reimbursement requests.

**5. SCOTUS update.** Mr. Cattani updated the members on two post-conviction cases before the United States Supreme Court, one of which, *Martinez vs. Ryan*, he argued on October 5, 2011. Argument in the other case, *Maples vs. Thomas*, occurred on the same day, and the high court's opinion followed in January. Mr. Cattani believes that *Maples* will have minimal impact on Arizona because its limited holding was that good cause to overcome a procedural default could arise from counsel's complete abandonment of his client, which is an uncommon situation. On the other hand, if *Martinez* broadly concludes that there is a constitutional right to an effective lawyer in a post-conviction proceeding, the impact on Arizona could be significant. Would a second PCR be required to challenge the effectiveness of counsel in the first proceeding? Mr. Cattani expects an opinion in *Martinez* this spring.

**6. Screening committee.** The Oversight Committee considered two written proposals developed by the "screening committee" workgroup concerning attorneys' applications for appointments on capital PCRs. One proposal contemplated a screening committee with judge and attorney members, including the state PCR defender, appointed by the Chief Justice. The screening committee would submit a memorandum with its recommendations concerning applicants to the Chief Justice. The second proposal suggested a more informal advisory panel composed of judges and attorneys, including the state PCR defender, who would serve at the invitation and pleasure of the Chief Justice or a designee. Both proposals included requirements for due diligence evaluations of applicants for capital PCR appointments, but the second proposal envisioned a panel that would, without a required memorandum, make recommendations to the Court's staff attorneys, who would in turn transmit the recommendations to the Court. This second proposal included many of the elements of the first, but suggested a different structure designed to promote candid and protected discussions of these applicants. The second proposal also contained a provision for periodic review of attorneys who remain on the appointment list.

**Motion:** Mr. Lieberman moved that the Oversight Committee recommend that the Court adopt the advisory panel proposal. The motion was seconded. The motion carried unanimously.

**7. Jury instructions in capital cases.** The Chief Justice had requested the Oversight Committee's comments on the ABA's proposed model instructions for the penalty phase of a capital case. The Oversight Committee invited Maricopa County Superior Court Judge Paul McMurdie, chair of the State Bar Committee on Criminal Jury Instructions, to offer his views. Judge McMurdie advised that the State Bar committee reviews recommended Arizona capital case instructions annually to assure that they remain current with changes in the law. These instructions were updated in 2011. He explained that the Bar committee does not create criminal law policy, and it is strictly bound by existing law when preparing recommended instructions. He believes that the ABA's proposed model instructions may contain provisions that are inconsistent with Arizona law, and he therefore does not support Arizona's adoption of the model instructions. No member of the Oversight Committee expressed disagreement with his viewpoint, or had other comments or recommendations for him.

Judge McMurdie added that the Bar committee is receptive to making the capital instructions more "user friendly" for jurors, as proposed by the ABA, as long as the instructions are compliant with Arizona law. For example, he has received comments from jurors about a lack of clarity on instructions dealing with lesser included offenses and felony murder, but he added that the Arizona Supreme Court has required the giving of specific instructions in these circumstances, and although these instructions increase complexity, the Bar committee adheres to the Court's requirements. Other comments from jurors and judges for making instructions more comprehensible have been well taken by the Bar committee, and revisions have been made accordingly.

Judge McMurdie concluded with a comment that judges and attorneys occasionally have difficulty finding the current version of applicable instructions. The State Bar webpage and the Court's Wendell webpage may not have the most recent instructions. He is working with the State Bar to address this, and he suggested that anyone with a question about the latest version of instructions should contact Ted Campagnolo, an assistant Attorney General and a member of the State Bar Criminal Jury Instructions Committee.

**8. Call to the public; adjourn.** In response to a call to the public, a comment was made concerning the time at which an attorney may last visit with a condemned inmate on the day of execution, suggesting that a final meeting should be allowed that is closer to the hour the execution starts.

Paul Julien, Judicial Education Officer, expressed his appreciation to Oversight Committee members and others for their assistance with video training broadcasts concerning capital cases. Mr. Julien welcomed suggestions about topics for future broadcasts. The Chair commended a recent broadcast of Indiana University School of Law Professor Joseph Hoffman presented by the Education Services Division.

The meeting adjourned at 1:25 p.m.

*Meeting Minutes: February 29, 2012  
Capital Case Oversight Committee*

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September 24, 2012**

Members Present:

Hon. Ronald Reinstein, Chair  
Hon. Douglas Rayes  
Kent Cattani  
Donna Hallam  
Marty Lieberman  
James Logan  
William Montgomery, by proxy,  
    Anthony Novitsky  
Daniel Patterson

Guests:

Lori Ash  
Bob James  
John Todd  
Kristine Fox  
Dale Baich  
Jennifer Garcia  
Diane Alessi  
Carolyn Edlund  
Natman Schaye  
Theresa Barrett

Members Not Present:

Dan Levey

Staff:

Mark Meltzer  
Kymberly Lopez

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**1. Call to Order; approval of the meeting minutes.** The Chair called the meeting to order at 12:00 p.m. and introduced Kymberly Lopez, new staff for the Oversight Committee. The Chair then asked the members to review the draft minutes of the February 29, 2012 meeting.

**Motion:** A member moved to approve those minutes, and following a second, the members unanimously approved the February 29 meeting minutes.

**2a. Status reports: Maricopa County Superior Court.** The Chair invited members to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were currently sixty-four pending cases. Since January 1, 2012, eighteen capital cases have been filed, and eighteen cases have been resolved, two by the imposition of a death sentence. The court has eight capital trials scheduled before the end of the year. Mr. Novitsky commented that the number of pending cases has stabilized in the mid-60's during calendar year 2012. He noted that his office now has ten cases in which it will conduct initial reviews for filing a notice of intent to seek the death penalty. Mr. Logan reported that he is tracking seventy-five capital cases, but his list includes five cases where the State withdrew a notice, three cases where the parties have agreed to an extension of time for filing a notice, and four cases in which the State has not yet filed a notice, but a notice is probable. He agreed that the number of pending cases this year has been relatively static.

Mr. Logan assigned several cases during 2012 to private counsel because the staffed offices were temporarily full. He does not want to give a non-capital case to a capital team in a staffed office because he wants to reserve the capital case teams for new capital cases; if the capital teams are handling non-capital cases, they will be unavailable for capital ones and that would require the use of private counsel. He speaks regularly with Mr. Patterson about the availability of capital

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counsel in the Public Defenders Office. Mr. Patterson added that with the recent completion of two capital trials, his office could now assume responsibility for a few additional capital cases.

Mr. Logan added that three of the five cases assigned to the former State Capital Post-Conviction Public Defender transferred, along with most of that agency's staff, to the Maricopa County Public Advocate. The court assigned the remaining two cases to an attorney who was previously with the state agency. Lawyers in these cases are familiar with their files, and Judge Rayes noted that he has lifted the stays in all five cases. The Chair thanked Mr. Logan and Ms. Hallam for their assistance in the transition of these cases from the state agency to new counsel.

**2b. Status reports: appeals and PCRs.** (1) Appeals: Ms. Hallam advised that there are twenty pending capital appeals. The Court has received two notices of appeal in capital cases during 2012; both of these cases are from Maricopa County. She expects that the Court will receive a third notice of appeal shortly in a Pima County case.

(2) PCRs: There are seven defendants awaiting the appointment of counsel on petitions for post-conviction relief. This number does not include Hausner, who requested that the Court not appoint counsel for a PCR. Petitions for certiorari are pending in most of the seven cases.

(3) Federal: Mr. Baich advised that most of the cases assigned to his office are currently in the Ninth Circuit, and are pending oral argument or the issuance of an opinion.

**3. Screening of capital PCR counsel.** The discussion turned to the screening of counsel in capital PCR petitions. The Chair and Judge Rayes indicated that the committee established by Maricopa County Administrative Order 2012-118 (the "Maricopa committee") would likely assume the responsibility for screening PCR counsel; however, the committee has not yet formally made this decision. They noted that the committee might decide that it would not screen attorneys statewide, but only those from Maricopa County. Some of the Maricopa committee members believe that they may not be familiar with applicants from other counties, or from other states, and there are financial and political considerations if a Maricopa committee screened non-Maricopa applicants. Moreover, Pima County may want to screen lawyers appointed on capital PCRs in that county. Mr. Logan noted that the Maricopa committee is presently responsible for screening eighteen applicants for capital trials and appeals each year for the next three years. If the committee assumed an additional duty to screen capital PCR applicants, statewide or even only those from Maricopa County, this would significantly increase its duties and the time commitment of its members. If Maricopa and Pima establish separate committees to screen PCR applicants, the Supreme Court's staff attorneys may have responsibility to screen applicants from other counties or applicants who are out-of-state.

Several members expressed concerns about not having enough qualified applicants to satisfy the need for capital PCR appointments. There is a limited pool of attorneys now who will accept appointments, and a screening committee may exclude applicants, and reduce rather than increase the number of available PCR lawyers. Mr. Schaye observed that qualified attorneys may have inadequate time to take a capital PCR, or the hourly rate of compensation is a disincentive; and that young attorneys who may be interested in appointments do not qualify

under Rule 6.8. A solution is having young attorneys gain experience by working with qualified attorneys on PCRs, but the court usually does not appoint two attorneys on these cases.

Judge Rayes requested guidance, or an order, from the Arizona Supreme Court about the authority of the Maricopa County committee to screen capital PCR applicants. He would like to assure that the Supreme Court has clearly delineated the judicial function of the Maricopa committee, and the criteria that the Maricopa committee should use if it conducts reviews of PCR applicants. Presumably, the Supreme Court would continue to make the appointments, but it should clarify this, too. The Chair will follow-up on issues related to a screening committee by making further inquiries of the Court and of Pima County's Office of Court Appointed Counsel.

**4. Proposal for earlier appointment of PCR counsel.** Mr. Cattani introduced a proposed amendment to Rule 31.2 of the Arizona Rules of Criminal Procedure. The amendment would require the trial court clerk to file a notice of post-conviction relief simultaneously with a notice of appeal in a capital case. The proposed amendment would stay the appeal pending resolution of the PCR, and consolidate a subsequent petition for Supreme Court review of the PCR with the automatic appeal. Mr. Cattani advised that this rule would require a legislative amendment to A.R.S. § 13-4234. His proposed changes are in response to a finding in a recent U.S. Supreme Court opinion, *Martinez v Ryan*, about Arizona being unique because a defendant cannot raise a claim of ineffective assistance of trial counsel ("IAC") on appeal. He noted that Arizona law that disallows an IAC claim on appeal is decisional, not statutory; the Court imposed this requirement because it wanted counsel to raise IAC issues in a comprehensive PCR rather than piecemeal on appeal. Mr. Cattani believes that witnesses' memories would probably be fresher if the trial court conducted a PCR proceeding before rather than after an appeal. This change would also make Arizona's procedures consistent with those of most other death penalty states. The Chair then invited comments on the proposal.

Mr. Logan opposed it. He pointed to data showing that sixteen percent of death penalty convictions in Arizona since 2005 have been reversed on appeal. If the court had appointed PCR counsel upon conviction in every case since 2005, counsel would not have been required in sixteen percent of those cases. He estimates that the cost of PCR counsel in a single case typically is in the hundreds of thousands of dollars, and that Mr. Cattani's proposal could unnecessarily cost Maricopa County millions of extra dollars. (Note: Mr. Lieberman calculated the sixteen percent based on sixty-one cases decided by the Arizona Supreme Court from 2005 to the present. The Court affirmed fifty-one cases, or about eighty-four percent. The other sixteen percent included four sentences reduced to life, and six remands. He did not have data on the respective portions of the sixteen percent decided on the old standard of independent review, versus the new standard of fundamental error.) Mr. Logan postulated that under Mr. Cattani's proposal, the appeal could also be more expensive because two appeals attorneys would be required: one for the customary appellate issues, and the other for the IAC arguments.

Mr. Cattani responded that it would be less expensive in the end to conduct a proceeding under his proposal. He stressed the need for finality in state court proceedings, and submitted that the cost of subsequent habeas hearings in federal court on IAC issues exceeds the expense of PCR hearings in state court on that issue. A guest questioned which process would ultimately be more reliable and produce a just result. One guest commented that a screening committee should

reduce the number of IAC claims; another guest thought it was too early to know that. A committee member noted that an early PCR would result in a lesser likelihood of loss of a defendant's file. One member queried whether Mr. Cattani's proposal might result in a greater number of remands based on IAC. Mr. Logan suggested that delaying the appeal would result in having to re-try cases later rather than sooner. Mr. Cattani added that a delayed appeal would afford the defendant the benefit of changes in the law that may have occurred in the interval.

The members reached no consensus today on Mr. Cattani's proposal. The Chair requested that Mr. Cattani consider today's comments and "fine tune" his proposal, so that if he introduces a bill, legislators will have a fair and full understanding of the issues.

**5. Draft report.** The members proceeded to the recommendations in the draft of the committee's report to the Arizona Judicial Council.

The first recommendation was to support Judge Davis' proposal to amend A.R.S. § 13-4041. The proposal would allow a judge or judge's designee to approving billings; and increase the number of hours, from 200 to 500, that an attorney can expend in a capital PCR without seeking court approval. The members were generally supportive of the concept, because an attorney may spend more than 2,000 hours on a capital PCR. The members also agreed that the number of hours mentioned in the statute was a threshold for review rather than a limit on the total number of hours. However, the members questioned why the statute should refer to a number of hours at all. In practice, a judge or an administrator reviews every bill submitted by an attorney on a capital PCR, including any bill for less than 200 hours. An hourly reference may have mattered when the State paid a portion of the bill, but the State no longer pays these bills.

**Motion:** A member moved to approve the recommendation to support Judge Davis' proposal, as long as it remains a threshold rather than a limit; or in the alternative, and preferably, to support the removal of any hourly reference in this statute. The motion received a second and it passed, with five in favor and two abstentions.

The members also discussed whether to recommend an increase in the \$100 hourly rate for court-appointed PCR counsel as specified in A.R.S. § 13-4041. The members believe that increasing the rate to \$125 would not incentivize many new attorneys to undertake a capital PCR; the rate would need to be significantly more to have this effect. On the other hand, if the rate were significantly higher, court-appointed private counsel would be a greater expense for the counties, and that would encourage counties to shift this work to staffed defender offices. The statute allows the Court to set the rate within the legislature's limit ("not to exceed"), but the Court typically allows the maximum rate provided by statute. The federal hourly rate for comparable work is \$175.

**Motion:** A member moved to support an increase in the hourly rate provided by A.R.S. § 13-4041 from \$100 to \$125. The motion received a second and it passed, with five in favor and two abstentions.

The Chair encouraged stakeholders with an interest in this issue to find a unified approach prior to any legislative hearing.

Other suggested changes to the draft report included the following:

- The discussion following recommendation #2 should mention the Oversight Committee's consensus at the February 2012 meeting to support a screening advisory panel.
- The language in footnote 5 about the holding in *Martinez v Ryan* needs editing; Mr. Cattani should assist in the revision.
- In section II, the first sentence states, "Data supports many of the conclusions in this report." This is debatable and staff should delete the sentence.
- On recommendation #3, staff should add that APAAC provides capital case training.
- The discussion on PCR's should note that earlier this year, the number of capital defendants without court-appointed counsel was down to one. The conclusion should not characterize the appointments as "prompt" because it is too early to know; and it should refer to "more" rather than "most" defendants receiving counsel. The report's discussion should note that this issue is one of continuing concern. Ms. Hallam will assist in phrasing these points.
- In the discussion of capital cases in Maricopa County, the number of capital cases "has" trended down, but saying that the number "is" trending down makes a future forecast that could be erroneous.
- The members did not agree with recommendation #4, to disband the committee. The Court should not disband the committee because there are ongoing issues and there will be new ones, too. One member commented that as long as there is a death penalty in Arizona, issues would continue to arise. The members of the committee have a valuable historical perspective that has developed over the past several years, and this group should remain intact. The report should recommend that the Court extend the committee for a year; or suspend the committee until reactivation is necessary; or make this a permanent committee rather than a temporary one. Because the issues are statewide, the members also recommended the addition of a Pima County member.

Because there will be no further meetings prior to presenting the committee's report to the AJC, the Chair inquired if the members would permit him to finalize the report, after considering the comments made at today's meeting and any subsequent developments.

**Motion:** A member made a motion that the Chair has the authority to finalize the version of the report that the committee will submit to the AJC. That motion received a second, and it carried unanimously.

**8. Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:40 p.m.