

**Capital Case Oversight Committee
State Courts Building, Phoenix
Meeting Minutes: October 31, 2018**

Members attending: Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard, Donna Hallam, Hon. Kellie Johnson, Michele Lawson, Marty Lieberman, William Montgomery by his proxy Jon Eliason, Hon. Sam Myers, Daniel Patterson, Christina Phillis, David Rodriguez, Natman Schaye

Members absent: Dan Levey

Guests: Rosemarie Peña Lynch, Ellie Hoecker, Carolyn Edlund, Rebecca Huerta, Jon Canby, Jeff Kirchler, Chris Bleuenstein, Tim Geiger, Susan Corey, Jeff Sparks, Jennifer Garcia, Jennifer Rock, Steve Koestner

Staff: Mark Meltzer, Theresa Barrett, Angela Pennington

1. Call to order, introductory remarks, and approval of meeting minutes. The Chair called the meeting to order at 12:01 p.m. The Chair asked if there were any corrections to the August 13, 2018 draft meeting minutes. Those minutes should reflect Mr. Levey's presence on August 13.

Motion: A member then moved to approve those minutes with this correction, the motion received a second, and it passed unanimously.

2. Status reports. The Chair then asked members for brief status reports. Judge Myers reported that the number of pending capital cases in Maricopa County increased from 47, as reported at the August meeting, to 52 cases. One of the new cases was a remand for resentencing. There are 25 pending capital petitions for post-conviction relief; 16 are in the pleading stage, 8 are fully briefed and are now before the assigned judge, and counsel was recently appointed in one case. Mr. Eliason concurred with Judge Myers' report. Ms. Phillis has 72 staffed cases, which includes potential capital cases.

3. Discussion of a draft report to the Arizona Judicial Council. The Chair will present the Oversight Committee's report to the Arizona Judicial Council ("AJC") on December 13, 2018. A draft report was included in the meeting materials.

The first recommendation in the draft report (to "establish a committee to study jury issues in capital cases"), was premised on materials and a presentation provided by Mr. Schaye and discussed by members at the August meeting. The Chair noted that one component of the recommendation – concerning the content of jury instructions – fell within the ambit of the State Bar of Arizona rather than the Court. Other components involved judicial education and should be addressed by the AOC's Education Services

Capital Case Oversight Committee: Minutes
October 31, 2018

Division or by superior court educational programs, rather than by a new committee. The Chair observed that the Maricopa County bench, in conjunction with the AOC, conducts capital case training for judges statewide on a two-year cycle, with the next program scheduled for 2019. The Chair then opened this recommendation for further discussion.

A prosecutor representative discussed this recommendation with colleagues, and they oppose it. They are satisfied with the State Bar's role in drafting jury instructions. A judge member expressed concerns that the new committee might unduly constrain judicial independence when conducting trials. Judges do not have uniform practices for jury selection and the member had concerns that uniform jury selection practices would be an objective of the new committee. The member added that judicial education on capital cases regularly includes information concerning jury selection. Mr. Schaye, who noted the possibility that his article would not be published in the *Arizona Attorney* magazine, emphasized that the purpose of the new committee would be to study and make recommendations on a broad range of issues involving the trial of a capital case. It would obtain input from a variety of disciplines and seek common ground on areas of universal interest.

The Chair noted that most members continued to support Mr. Schaye's proposal and that the Oversight Committee's report would include this recommendation.

The second recommendation was to support a statutory increase in the compensation rate for appointed counsel in capital post-conviction proceedings. Maricopa's Office of Public Defense Services indicated that private attorneys annually submit bills on capital PCRs for about 25,000 hours. At an hourly rate of \$100, this equates to about \$2.5 million per year. A \$50 increase in the hourly rate would be an aggregate annual increase of \$1.25 million. However, the Oversight Committee's recommendation was not for a specific dollar increase, but rather it would set a floor of \$100 and allow each county to authorize payment of a higher hourly rate. The Chair then invited further discussion.

Although one member supported an increase in the rate instead of a floor, other members believed that the floor would provide counties with greater flexibility. A floor would allow an increase when budgetary circumstances permitted a higher rate; the decision would be left to local boards of supervisors rather than be fixed by statute. Members noted that over the past few years, the Legislature has shown minimal interest in amending this statutory provision and have even limited State funding to counties under A.R.S. § 13-4041(H).

Considering all these circumstances, members agreed to leave intact the draft recommendation to amend the statute to set a floor for the hourly rate, which would allow increases in the rate on a local level.

A new recommendation from Mr. Lieberman, as shown in the meeting materials, would amend Criminal Rule 6.8(e). This rule allows the appointment of counsel in capital cases in “exceptional circumstances” when counsel does not meet the other required qualifications. The current provision requires counsel appointed in exceptional circumstances to associate with a qualified counsel. Mr. Lieberman’s proposed one-word amendment would require counsel to “meaningfully” associate with a qualified lawyer. He based his proposed amendment on anecdotal information that some associated attorneys do very little in a case. He acknowledged that “meaningfully” could be hard to define, but it could be determined by the court on a case-by-case basis. He noted that other terms such as “substantial procedural right” in Rule 12.9, are also amorphous and undefined.

A member thought that counsel’s relationships by necessity must be meaningful, even without including that adjective in the rule. One member observed that a one-word addition to the rule might not change the practices of some attorneys. Another member proposed an alternative of adding the “meaningful” requirement as a comment to the rule, with an explanation of its meaning. Mr. Lieberman rejected as too vague a suggestion that a comment provide specific criteria for a meaningful association. The Chair then called for a vote on Mr. Lieberman’s proposal. The Committee was evenly split: 6 members in favor, and 6 members opposed. The Chair broke the tie by voting in favor. The report will note the split and will request the AJC’s support for filing a rule petition seeking an amendment to Rule 6.8(e).

The third recommendation would modify the way counsel are appointed in capital appeals and PCRs, so that appellate counsel would be appointed by the Supreme Court, and PCR counsel would be appointed, with the Supreme Court’s grant of authority, by the presiding judge of the county. Maricopa County envisions that its existing review committee would evaluate PCR counsel for every county, provided that the attorneys are on a list that the Supreme Court is required by statute to maintain. See A.R.S. § 13-4041(C). The proposal does not contemplate a change to that statute. The Chair opened the matter for discussion.

One member suggested that the Court’s grant of authority to a presiding judge not be a blanket authority by administrative order. Rather, it should be on a case-by-case basis, at least pending an opportunity to consider whether this method works well. The member added that the Supreme Court would still need to evaluate the qualifications of attorneys on the Court’s list before any evaluation by Maricopa’s review committee. Members discussed the hypothetical situation of a non-Maricopa presiding judge appointing on a capital PCR an attorney who had not been approved by Maricopa’s review committee, but who was nonetheless on the Supreme Court’s list. One member

Capital Case Oversight Committee: Minutes
October 31, 2018

thought this might be contrary to Arizona's ongoing effort to "opt-in" under the AEDPA; the member asked the Oversight Committee to defer this recommendation for another year pending resolution of the opt-in request. But another member responded that the purpose of the review committee's evaluations is to improve the process, and that few concerns have been raised regarding the qualifications of attorneys who have come before the committee during recent years.

After further discussion, members refined the recommendation to allow a presiding judge to request the Supreme Court's permission to make an appointment in a given capital case from the list maintained by the Supreme Court. Maricopa's Office of Public Defense Services has seven attorneys currently available for appointment on capital appeals; members had no objections to the Supreme Court appointing appellate counsel. Members accordingly approved both components of this recommendation. A member asked that the recommendation not refer to "reversing" the current structure, because the current structure was historically rational, and the Chair agreed.

The fourth recommendation requested the AJC to decide whether to disband or to extend the term of the Oversight Committee. One member suggested the recommendation be stronger, i.e., to extend the term. The member observed that the Oversight Committee brings a group of stakeholders together like no other group; unanticipated issues arise in the capital case area, and it is helpful to have the Committee intact and available when that happens. Another member noted that even when the Oversight Committee does not have much to discuss, there is value in having regular meetings and conversations so that issues do not go unnoticed and unaddressed. A member then made this motion:

Motion: To recommend extending the Oversight Committee for another three-year term. The motion received a second and carried, nine in favor, one opposed, with one member (Mr. Lieberman) abstaining.

The Chair then requested the members' authority to finalize the Committee's report to the AJC, which was followed by a motion:

Motion: To authorize the Chair to finalize the Committee's report to the AJC, in his discretion and consistently with today's discussion, and to make additional revisions as appropriate. The motion was seconded and passed unanimously.

The Chair directed staff to distribute the final version of the report to the members before he presents it to the AJC on December 13.

4. A proposal regarding death penalty prosecutions. Judge Cattani briefly presented a proposal, which is still being explored, regarding the manner of bringing

*Capital Case Oversight Committee: Minutes
October 31, 2018*

death penalty prosecutions in Arizona. He noted that there currently is a disconnection between who initiates the death penalty case and brings it to trial, i.e., a county attorney, and who has responsibility for the case thereafter, through the appeal and state and federal post-conviction proceedings, i.e., the Attorney General. As a result, the State bears the appellate and post-conviction costs of the county attorney's decision to charge the case, which puts strain on the State's finite resources. Judge Cattani proposed that the State, i.e., the Attorney General, should make capital decisions statewide, and the State should assume financial responsibility for those decisions.

Under this proposal, a county attorney would recommend filing a death notice to the Attorney General. If the Attorney General agreed to file, it would pay the cost. If it declined the filing, the county attorney could still prosecute, but it would do so at county expense until the case concludes. This structure would facilitate the Attorney General filing a death notice in a county that currently could not afford the financial burden. A premise of this proposal was that if the State of Arizona elected to have a death penalty, it should recognize the cost and be willing to appropriate the expense. Judge Cattani concluded his presentation by asking, if Arizona was going to adopt the death penalty today, would it do so with a different and better structure? Members discussed Judge Cattani's proposal but took no action.

5. Call to the public; adjourn. There was no response to a call to the public. For the good of the order, Judge Myers announced that in December, Michele Lawson would assume the position created by Carolyn Edlund's retirement. (See the August 17, 2018 meeting minutes, page 1.)

The meeting adjourned at 1:55 p.m.