

**ARIZONA SUPREME COURT  
CAPITAL CASE TASK FORCE**

**MINUTES**

September 7, 2007

Supreme Court Building, Phoenix, AZ

**MEMBERS PRESENT:**

Hon. Anna Baca  
James Beene  
Jim Belanger  
Kent Cattani  
Donna Hallam  
Hon. James Keppel  
Dan Levey  
Martin Lieberman  
Jim Logan  
Paul Prato  
Hon. Ron Reinstein  
Hon. Michael Ryan, Chair  
Bob Shutts  
Ann Scott Timmer  
STAFF: Jennifer Greene and Lorraine Nevarez

**MEMBERS ABSENT:**

Hon. Stephen McNamee

**GUESTS:**

Michele Balmer  
Denise Sanders Couvaras  
Chris Dupont  
Jessica Funkhouser  
Jerry Landau  
Elva Cruz-Lauer  
Cindy Lineburg  
Salm Matha  
Diane Meyers  
Bill Montgomery  
Katy Proctor

**I. Call to Order**

Justice Ryan called the meeting to order at 10:08 AM.

**II. Update on Court-County Efforts to Address the Backlog**

The Maricopa County Trial Court Commission is taking applications for the new judicial division the county has requested the Governor to appoint.

The superior court is advertising for the new Capital Case Manager position. Judge Baca provided copies of the position description. She also provided copies of the materials presented to County OMB by court administration earlier this year to seek additional judgeships. She pointed out that the assumptions used by the county in its projections diverge significantly from the court's assumptions in several respects.

The newly-instituted resolution conferences appear to be improving the rate of case dispositions, but without a concomitant reduction in the overall list of pending cases. The number of pending cases has not changed significantly in the last six months. Given the current trend, it does not appear likely that the county's projections will be realized. The county predicted a few months ago that the case inventory would be reduced to 75 by March, 2008.

The county's plan to employ retired judges to conduct capital case trials has run afoul of the compensation issue. The constitutional and statutory limit on how much a retired judge can be paid translates to \$13/hour. At this rate, it may be possible to enlist retired judges to handle pre-trial matters in capital cases, but not for a long-term, full-time commitment to a lengthy trial. The county has provided some money for retired judges' pay, and the court is now seeking to use these funds to pay commissioners so the court can move some judges to a special assignment calendar to handle capital trials.

The members discussed the possibility of paying experienced former prosecutors or defense attorneys to conduct capital trials as pro tem judges. They could receive the same pay as an active duty judge. Commissioners are not qualified for this duty. There is some question whether such pro tem judges would be vulnerable to a notice of change of judge for cause under Rule 10.1, in other words former public defenders and county prosecutors may have substantial conflicts that would prevent them from hearing criminal cases.

### **III. Determination of Final Recommendations**

#### **Proposed A.R.S. §13-4435.01**

It was determined to take no action at this time on this proposal. Justice Ryan stated that the planned Supreme Court oversight committee could revisit the proposal if the new case management practices instituted by the superior court prove ineffective. The case resolution conferences, mitigation discovery masters, determination of motions to continue by the Presiding Criminal Judge, and the new Capital Case Manager all should be given time to determine if they have an impact before deciding whether a need exists that the proposed statute would remedy.

#### **Extending the 18-month presumptive trial deadline in Rule 8 to 30 months**

A motion to reject this proposal was approved unanimously. The reasons for the proposal include:

- The 18 month presumptive standard was set before *Ring II*; those involved in proposing that standard were "guessing" it would be achievable.
- The proposal would adapt the rule to reflect current realities.
- According an in-depth study reported in the ABA Guidelines, total defense attorney hours in capital cases that proceed through trial average 1,889. Compressing this number of hours into an 18-month timeframe severely limits the number of cases an attorney can handle at one time.
- Given current resources, the criminal justice system in Maricopa County cannot meet this standard.
- The standard is misleading for victims, they need to be informed that it will take longer than 18 months to get their cases to trial.

Nevertheless, the proposal runs contrary to the mission of the Task Force. Extending the deadline might encourage more delay. Accordingly, the Task Force decided to reject the proposal.

### **Mitigation cooperation advisement proposal – Rule 16.2 amendment**

The proposal is intended to shorten the time required to enlist a defendant's cooperation in the mitigation investigation. Concerns were expressed about the portion of the proposal that would require a defendant who does not want to cooperate to waive that defendant's assistance on the record. Judges should not encourage defendants to not cooperate, and the waiver might have that effect. Other concerns were expressed about the timing of the proposed hearing; it may come too early before a need for such an advisement could be identified. Also a mandatory advisement is unnecessary because a defense lawyer is already obligated to ask for this type of assistance from the court if and when the need arises.

A motion to reject the proposal as an amendment to Rule 16.2 passed unopposed.

A motion passed, with two members opposing, to recommend that the first two sentences of the proposal, describing the advisement but without the proposed waiver:

The court shall personally address the defendant and explain the purpose of presenting mitigating evidence in a capital proceeding and the need for the defendant to cooperate with his counsel in developing mitigation. Additionally, the court shall inform the defendant of the limited time in which counsel has to develop and notice information developed from the investigation.

be incorporated into the Mitigation Discovery Master's duties as established in the superior court's recent Administrative Order No. 2007-050, and that the advisement be made at the first scheduling conference the Mitigation Master holds.

### **Removing limits on retired judges compensation.**

The members reviewed the constitutional and statutory provisions limiting retired judges to the amount a regular judge is paid minus what their pensions, which is currently \$13/hour. Given the county's plan to fill the need for more judges by recruiting retired judges, this limitation needs to be overcome.

The members unanimously approved the following motion: Recommend that the judicial branch support efforts to amend Article 6, §20 of the Arizona Constitution and A.R.S. §38-813 to permit retired judges to be called back to active duty for reasonable compensation.

### **Proposed administrative order governing court reporting in capital cases.**

Several court reporters assisted the Task Force with suggestions for identifying how reporters' notes can be stored that will allow someone other than the original reporters to prepare a transcript, if need be. As amended during the meeting (see attached Exhibit A), the motion to recommend that the Supreme Court issue the proposed administrative order passed unanimously.

#### **Per page and copy rate increase for transcripts provided by A.R.S. §12-224**

Ms. Michele Balmer, President of the Arizona Court Reporters Association, provided the Task Force with a compilation of per page rates from other states indicating Arizona's rates are below the national averages. ACRA is considering whether to seek a statutory amendment in the 2008 legislative session. The statutory rate has not been changed for 20 years. At the current level, reporters have little incentive to subcontract transcript preparation to proofreaders, which can lead to delays in transcript production. Also, transcript fees represent a significant portion of any official reporter's pay, and the current level is an obstacle to hiring official reporters. The cost of transcripts for criminal cases is normally a county expense.

The Task Force unanimously approved a motion to recommend that the judicial branch actively support a legislative proposal to increase the rate to at least \$3.25 per page for the original and 0.50¢ per page for a copy.

#### **Recommendations on staffing increases**

Based on caseload projections previously reviewed by the Task Force, a motion was approved to recommend the addition of two staff attorneys and one deputy clerk at the Supreme Court to handle the expected increase in direct appeals from Maricopa County. At least one attorney at the Attorney General's Capital Appeals Unit and one appellate attorney in the Maricopa County Public Defense Services will also be required to process appeals in a timely fashion.

Mr. Cattani reported that his office recently requested two new positions as part of their annual budget proposal.

#### **Amendment to A.R.S. §13-4041 establishing rates for PCR attorneys**

There are fourteen PCR capital cases waiting for assignment of an attorney. The new State Capital Postconviction Defender Office will not have enough staff to handle all of these assignments in a reasonable time frame, so the private bar needs more incentives to take on these cases. The federal rate is \$150/hour; the current statutory rate is \$100/hour.

A motion to recommend the judicial branch support a legislative proposal that would increase the hourly rate these lawyers are paid to \$125 per hour and that the 200 hour cap be removed from the statute was unanimously approved (Exhibit B).

## **Amendment to A.R.S. §41-4301(F) establishing the State Capital Postconviction Defender Office**

Mr. Lieberman explained the intent of the amendment is to increase the number of cases this office can handle. At the current staffing level, he can take only a handful of assignments. The other change permits the office to confer with other attorneys handling PCRs, which would offer the opportunity to share research and expertise.

Mr. MacDonnell stated that the county attorney opposes removing any restrictions from the statute out of concern that members of the office might engaging in activities that fall outside the legislative mandate of this office such as lobbying against the death penalty. Also the office is new, and any change is premature.

Justice Ryan stated he would welcome training or consulting by the PCR office that would improve the professionalism of contract PCR attorneys, because issues that are missed at the PCR stage lead to delays in federal court. The proposal would not change the existing prohibitions against lobbying and against entering appearances in outside cases. The statute also limits the cases the office can take to those assigned to it by the Supreme Court.

To further specify the restriction on whom the office can represent, language was proposed for subsection (F)(4) that the office not “represent individuals other than those assigned by the Supreme Court.”

Mr. Lieberman reported that contrary to the intent of the original drafters of this program, the money counties are supposed to contribute to support the office is going to the general fund, not to the office.

The proposal was moved and approved, as amended, with two members voting in opposition, to recommend that the judicial branch support legislative efforts to increase the budget for this office and to amend the statute as suggested in Exhibit C.

## **Proposed Rule 32.8 establishing discovery timeframes in PCR proceedings**

The Task Force made no recommendation on this proposal. Mr. Beene indicated his office may file a rule change petition on this topic. Mr. Lieberman stated this proposal does not directly address delay.

## **Proposed Rule 32.4 case management conference for PCR proceedings**

Mr. Beene explained this proposal is intended to emulate the process used in federal courts in habeas proceedings.

The Task Force voted to approve in concept the adoption of a policy for case management conferences in Rule 32 proceedings. Mr. Lieberman, Mr. Cattani, and Mr. Beene will refine the proposal, and the issue will be revisited by the on-going workgroup that will succeed the Task Force.

### **Proposed policy requiring disclosure of prosecutors' files**

Mr. Lieberman noted that the *Walton* case out of Tucson raised the issue of an inadvertent failure to disclose notes of a witness interview, and led to a Ninth Circuit ruling sending the case back for an evidentiary hearing. This is the kind of situation the proposal is intended to prevent.

Mr. Beene reported the North Carolina policy has led to hearings over handwritten notes, and has had a chilling effect on witnesses and victims willingness to cooperate. Mr. Cattani stated that in his ten years of representing the state in PCR matters, he is not aware of any *Brady* issues. He suggested the proposal would lead to more delay. The county attorney bates-stamps its files to avoid the type of omissions that arose in *Walton*. The Attorney General already has open file policy. In North Carolina there have been issues raised about the scope of the required disclosure, for example FBI or out-of-state agencies' files. In Mississippi, the court reviews the materials in camera, and the policy has reportedly worked well there.

Mr. Montgomery pointed out that the North Carolina and Mississippi policies do not appear to comply with recent Arizona legislation protecting disclosure of victim contact information.

A motion to recommend adoption of a rule similar to the Mississippi or North Carolina statute was defeated, with two members voting to approve.

### **Proposed Rule 6.9 or 32.4(g) addressing defense file repository**

Mr. Lieberman withdrew both proposals; logistical challenges relating to the technological aspects of the Rule 6.9 proposal appeared to go beyond the limits of office's budget. Mr. Logan expressed concern about ethical implications of handling privileged materials. Mr. Belanger pointed out that the defense lawyer is already under an obligation to provide access, which makes the proposed 32.4(g) redundant.

### **Proposed clarification to Rule 32.1(h) and judicial training on Rule 32**

Justice Ryan read a letter from Judge McNamee indicating his preference not to propose any amendments to the "actual innocence" provision of the rule. It was agreed that the Task Force members would not reach consensus on language for a substantive change to the Rule, and it should be left to the Attorney General's Office or another prosecution office to propose a rule change in the future.

Judge Baca reported that the superior court plans to develop training on Rule 32 and settlement. Mr. Cattani reported that his office sees a need for statewide training on this topic. The Task Force unanimously approved a recommendation that the Judicial College to develop statewide training on PCRs.

Judge Reinstein suggested retired judges could be enlisted to handle PCRs in those cases they heard before retirement. Judge Baca indicated the court was doing that in some cases.

### **Recommendation for a new Supreme Court workgroup**

Justice Ryan explained the concept is to create an on-going workgroup consisting of some or all of the original Task Force members to monitor the capital caseload in Maricopa County and address any other issues that may arise relating to the Task Force's mission. This workgroup would meet quarterly, barring some sort of emergency. Members were asked to let staff know of their willingness to serve.

The Task Force unanimously approved this recommendation.

### **IV. Approval of the Minutes.**

The August 10<sup>th</sup> meeting minutes were approved as proposed.

### **V. Call to the public**

No response

### **VI. Adjournment**

The meeting was adjourned at 2:00 PM.

PROPOSED  
IN THE SUPREME COURT OF THE STATE OF ARIZONA

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(changes approved 9/7/07 indicated by ~~strike through~~ or underlining)

In the Matter of:	)	
	)	
ESTABLISHING STANDARDS FOR	)	Administrative Order
VERBATIM REPORTING IN	)	No. 2007 - _____
CAPITAL CASE PROCEEDINGS	)	
	)	
_____	)	

In capital cases, all pre-trial and trial proceedings shall be transcribed within 45 days after the filing of the notice of appeal pursuant to Rule 31.8(b)(3) and (d)(3), Arizona Rules of Criminal Procedure. Appellate briefing is substantially delayed when transcripts are not promptly prepared.

More reporters are moving to computer-assisted technology for note-taking and no longer produce paper notes. Business practices are needed to ensure these records are refreshed and continue to be readable despite changes in the technology required to read and retrieve such records, as required by ACJA §1-602(D)(6). Recently-enacted timelines for preserving reporters' notes appearing in ACJA §3-402(C)(2)(b)(1) require courts to maintain readable notes for 50 years after sentencing in capital cases.

NOW THEREFORE, IT IS ORDERED THAT superior courts establish standards to ensure reporters' notes in capital cases are available and can be transcribed by another party should the original reporter become unavailable. The standards shall provide at a minimum the following:

**1. Providing for substitute records.** In the event a court reporter's original notes are unavailable for transcription, an electronic audio or audio/video recording, if made by the court, may be used to reconstruct the verbatim record of the hearing. Accordingly, where practicable, courts shall schedule capital case hearings and trials in courtrooms equipped with an electronic recording system as a backup to the live court reporter.

**2. Managing court reporter assignments.** Courts shall assign reporters to capital case trials in a manner that will promote timely transcript preparation for capital case appeals, giving consideration to the volume of transcript orders outstanding for a particular reporter. Suggested methods for encouraging timely transcription of capital case hearings include:

- a. Assign two or more reporters to cover capital case trial proceedings, one in the morning and the other in the afternoon, and rotate these reporters to other types of hearings less likely to generate transcript orders for the remainder of the reporters' work day when possible, to reduce the likelihood that the reporters will be faced with competing transcript deadlines.
- b. Promote reporters' use of subcontractors ~~as permitted by A.R.S. §12-225(A)~~.
- c. Require per diem reporters to file transcripts of any pretrial proceedings they report in capital cases within a specified time after the hearing or within a specified time after the notice of intent to seek the death penalty has been filed.
- d. Avoid assigning any reporter to cover a capital case hearing who routinely seeks more than one extension of time to file appeal transcripts.

**3. Record management considerations.** Courts shall ensure that reporters who report capital case proceedings comply with the note storage standards as provided herein and as established by ACJA §1-602(D)(6)(a)&(b) (Digital Recording of Court Proceedings) and ensure that capital case notes are preserved in such a way as to permit the 50-year retention requirement set forth in ACJA §3-402 (C)(2)(b)(1)(Superior Court Records Retention and Disposition). These notes shall be segregated and stored so as to facilitate retrieval by case number.

(a). Labeling. Whether paper or electronic, the reporter shall label capital case notes with the reporter's name, the case number, the case name, and the date of the proceeding.

(b). Segregation and storage format for original notes. Reporters shall provide the court with a copy of the reporter's dictionary not less than once a year. Reporters shall ensure the notes of any capital case hearing are filed with the court clerk or designee in a timely fashion, but not later than ten days after the date of the proceeding reported. Paper notes shall be stored in a manner approved by the court separate from the reporter's notes in other case types. ~~Electronic notes~~ All Computer Aided Transcription software and files shall be stored along with the reporter's translated version of the proceeding on approved storage media or saved to an approved server.

(c). Notice to court reporter. When the prosecutor files a notice of intent to pursue the death penalty, the court shall provide notice within ten days to any reporter who has reported any proceeding in the capital case prior to or after the filing of the prosecutor's notice. When a notice of appeal has been filed in a capital case, the clerk shall provide notice within ten days to all court reporters who have reported proceedings in the capital case.

(d). Per diem reporters. Reporters working in courts on a contract basis who report capital case proceedings shall deposit a "translated" or real-time version of their capital case notes in their original format and in Adobe PDF format and a copy of their dictionaries and all associated computer aided transcription files for that case with the clerk or a designee in the manner required by subsection (3)(b), not later than ten business days following the proceeding.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2007.

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RUTH V. MCGREGOR  
Chief Justice

**PROPOSED A.R.S. §13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in postconviction relief proceedings; reimbursement.**

A. through E [no changes]

F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred TWENTY-FIVE dollars per hour ~~for up to two hundred hours of work~~, whether or not a petition is filed. Monies shall not be paid to court appointed counsel unless either:

1. A petition is timely filed.
2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

G. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection F of this section by paying an hourly rate in an amount that does not exceed one hundred TWENTY-FIVE dollars per hour. ~~The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings.~~ The court shall review and approve ~~additional~~ reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent ~~over the two hundred hour threshold~~ are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in successive postconviction relief proceedings, compensation shall be paid pursuant to section 13-4013, subsection A.

H and I [no changes]

**PROPOSED A.R.S. §41-4301. State capital postconviction public defender; office; appointment; qualifications; powers and duties**

A. through E. [no changes]

F. The state capital postconviction public defender shall:

1. Represent any person who is not financially able to employ counsel in postconviction relief proceedings in state court after a judgment of death has been rendered. Notwithstanding section 11-584, subsection A, paragraph 1, subdivision (g), after a judgment of death has been rendered, a county employed indigent defense counsel shall not handle postconviction relief proceedings in state court unless a conflict exists with the state capital postconviction public defender and a county employed indigent defense counsel is appointed.
2. Supervise the operation, activities, policies and procedures of the state capital postconviction public defender office.
3. Beginning in fiscal year 2007-2008, submit an annual budget for the operation of the office to the legislature.
4. Not engage in the private practice of law ~~or provide outside counsel to any other attorney outside of the state capital postconviction public defender office~~ OR REPRESENT INDIVIDUALS OTHER THAN THOSE ASSIGNED BY THE SUPREME COURT.
- ~~5. Not sponsor or fund training for any other attorney outside of the state capital postconviction public defender office.~~
- 6 5. Not provide trial or direct appeal assistance to attorneys outside of the state capital postconviction public defender office OTHER THAN GENERAL TRAINING.
- ~~7. 6~~. Not lobby, during working hours, the state legislature or the Congress of the United States, except as provided by paragraph 3 of this subsection.
- ~~8. 7~~. Allocate personnel and resources to postconviction relief proceedings so long as there are no conflicts of interest in representation and all state capital postconviction public defender attorneys are appointed to postconviction relief cases that are eligible for appointment of counsel under section 13-4041.

G. The state capital postconviction public defender may:

1. Accept and spend public and private gifts and grants for use in improving and enhancing the ability to perform the responsibilities of the state capital postconviction public defender office pursuant to this chapter.
2. Employ ~~not more than three deputies and not more than four other employees~~ SUFFICIENT DEPUTIES AND EMPLOYEES and establish and operate any offices as needed for the proper performance of the duties of the office.

H. [no changes]