

Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

KATHERINE STOCKS
Director and State Court
Administrator



JOHN MCCORMICK
Assistant Court Administrator

MEETING SUMMARY
COMMITTEE TO STUDY & UPDATE SCR 250
VIDEOCONFERENCE

DATE AND TIME OF MEETING: July 31, 2024, 4 p.m.

PLACE OF MEETING: Remote Access via Zoom
Meeting ID: 867 1281 6778; Passcode: 623838

Members Present:		
Justice Linda Marie Bell	Justice Douglas Herndon	Judge Tierra Jones
Judge Connie Steinheimer	David Anthony	Scott Coffee
Kate Hickman	Jenny Noble	Chris Oram
Heather Procter	Marcie Ryba	Matt Stermitz
JoNell Thomas		
Guests Present:		
Nancy Lemcke	Randell Gilmer	

Call to Order, Welcome, and Announcements: Justice Bell called the meeting to order at 4:02 p.m. and thanked everyone for attending. The meeting plan was to approve the minutes from the last meeting, discuss where each subcommittee is, and figure out where to go from there to get to a final draft.

Roll Call and Determination of Quorum Status: Ms. Coates called the roll, and a quorum was present.

Approval of Minutes of May 1, 2024, meeting. Justice Herndon moved to approve the minutes from the May 1, 2024, meeting, Justice Steinheimer seconded, and the motion passed unanimously.

Discussion Items:

Subcommittee Reports

Qualifications and Training for Defense Counsel Subcommittee—Justice Linda Bell

Justice Bell advised that the document distributed shortly before the meeting is just a rough draft indicating where the subcommittee is at this point. The draft includes all of SCR 250, but the edits only apply to the qualifications and training section. A copy of the document is attached to this summary.

Justice Bell clarified that none of the existing qualifications were reduced.

Ms. Procter asked if there is enough CLE available either in Nevada or elsewhere in the U.S. to enable the attorneys to get ten credit hours of capital representation.

Justice Bell advised there are tons of CLE opportunities across the country and that DIDS would be the arbiter of determining if individual courses qualify or not, since not all CLE are created equal. The courses would have to be hands-on training rather than just listening to a lecture.

Mr. Coffee stated that *Making the Case for Life* is offered twice a year for that requirement and that there is a third session offered in Santa Clara, Utah, or Arizona. The Clark County Public Defender's office is co-sponsoring a murder specific CLE this year that would cover the ten credits.

Justice Herndon suggested editing the trial counsel section to say something similar to "acted as lead defense counsel in five felony high-stakes trials including Category A life sentence cases."

Timing and Appointment of Defense Counsel, Bill, and Advising Defendants who Hire Private Counsel Subcommittee—Judge Tierra Jones.

Judge Jones reported that the subcommittee's major discussion related to timing and appointments, which is handled differently in the various counties. Sometimes there is an indication during the first appearance in Justice Court that the State may seek the death penalty. The Clark County DA's office has a committee to review each potential death penalty case once it arrives at the District Court.

Judge Jones further reported the subcommittee would like to clarify the rule with regard to appointment in potential death penalty cases to avoid appointing an attorney in Justice Court that would not be death penalty qualified. The subcommittee will need further discussion regarding when that determination is made in the appointment process. Another idea discussed related to appointing "learned counsel" as a kind of advisor, which might go hand in hand with the qualification changes Justice Bell's subcommittee has proposed.

The subcommittee also discussed billing, different funding sources, and their sustainability. The subcommittee still needs to work on the billing section of Rule 250 and determine how it's handled in the various counties. In Clark County, billing is handled through the Office of Appointed Counsel.

Justice Bell inquired how much time the subcommittee will need to come up with a revision draft of their section of the rule. Judge Jones deferred to Ms. Thomas who responded that the subcommittee probably only needs a few hours. She advised she still needed to present to the subcommittee an initial draft admonishment that could be given when a defendant has retained their own attorney in a capital case. She agreed their subcommittee could certainly try to take on the issue regarding what point Rule 250 counsel is appointed, but that the process is different in each county. She said that the problem with appointing capital counsel prior to death penalty determination is that it can create an issue for the defendant who has already developed an attorney-client relationship. Ms. Thomas further stated she does not think the State can afford to appoint Rule 250 qualified counsel in every murder case where there is an aggravator, as that is a majority of the murder cases. She thinks there has to be some way of determining early which cases have the potential to become death penalty cases so that mitigation issues can be started early. The same is true for competency proceedings.

Judge Jones stated that the attorney appointment issue could possibly require Legislative changes regarding when the notice has to be filed. As the person who runs the homicide program in Clark County, Judge Jones said she sees every case and every case does not go to the committee. When she worked at the DA's office, every case with an aggravator had to go to a committee, even if it ended up being a no. About 10 or 15% of the cases don't go to committee.

Ms. Ryba shared that DIDS has a procedure in place with the rural public defenders to inform DIDS when a rural DA may be considering the death penalty in a case. DIDS immediately appoints a death penalty qualified counsel who is paid at a rate of \$220 per hour throughout the duration of the case, even if it gets negotiated into something less than the death penalty. The attorney can submit a form requesting mitigation experts and if the request is for less than \$2,500 it's automatically approved; if it's more than \$2,500 DIDS has to review it for approval.

Issues Related to Prosecutors and Judges Subcommittee—Justice Douglas Herndon

Justice Herndon advised that his subcommittee had not been able to meet yet. One of the issues that Mr. DiGiacomo previously suggested was qualifications for judges handling capital cases. Since judges are elected officials and expected to handle all cases assigned to them, addressing qualifications in Rule 250 could be problematic.

He has drafted some language he needs to revise before sending it out for review. It would be similar to attorney qualifications. In addition to five trials, which should include at least one murder trial, he thought it should have an aspect that the judge should have also tried a penalty phase in a non-capital case to completion before trying a penalty capital case. There would also need to be a CLE requirement, but he is not sure if judges can attend defense based capital homicide CLE. When the homicide team was started, all of the homicide judges had to attend a CLE course before they started taking on murder trials. Justice Herndon does not think that any current judges have done that.

Some of the death penalty CLE available to judges are *Making the Case for Life* program offered by the NACDL each year in Las Vegas; the annual conference held in February each year; and the NJC's three-day class for judges hearing death penalty cases, offered every other year. NJC Judges cannot attend attorney skills based programs. It may be possible to work with the NJC to provide particular programs if a guarantee of more than 20 attendees can be given.

Justice Herndon stated that one of the most foreign issues for new judges, unless they were former criminal defense attorneys, is how long it takes to do mitigation; i.e., why it's so difficult getting the county to fund certain things to investigate mitigation and understand the need for patience. Justice Herndon also said there was a really good program he and some other judges attended years ago related to handling capital cases and some of the pitfalls to look out for to avoid setting yourself up for reversal. Other possible revisions would be to add references to the guidelines for issuing executive orders and warrants under NRS 176.345 and automatic direct appeals in capital cases under 177.055.

Justice Herndon brought up a couple of other ideas not necessarily related to just judges and prosecutors but also defense attorneys.

- Some time ago there was a movement to do more waivers of the 30-day filing period to give the defense time to put together their presentation to the State before a decision was made. At the same time, there was a lot of discussion about whether those time periods were adequate, whether or not they needed to be tweaked, or if the rule needed to be tweaked in any other way.
- Under section 5 of the rule, *Procedure at trial and post-conviction proceedings*. Part (b) references court reporters and he realizes there are still judges who use court reporters and it reflects the need for daily transcripts, but part (c) of that is audio recordings and now that the courts use audio visual recording, discs are handed out at the end of the day in court reporting departments as opposed to waiting on transcripts. He would like to make some revisions to that section but would like some input from the attorneys on their preference

Justice Bell responded that the Supreme Court has made it clear that everything in a capital case has to be reported.

Justice Herndon agreed, but the Court still receives appeals every so often in which the bench conferences were not reported. It's not helpful that the rule says the lawyers and the judge can agree to go off the record.

Judge Steinheimer advised the Second Judicial District Court does not do any audio recordings. Every department is 100% court reporting.

Justice Herndon said he would definitely leave the court reporting part of the rule in place, but for the court recording departments, he is curious as to how the attorneys view receiving a disc versus a daily transcript. The consensus from the attorneys was they prefer receiving daily transcripts electronically because they are easier to search and review for references, notes, and for recalling witnesses.

Mitigation and Execution Subcommittee—Judge Connie Steinheimer

Supreme Court Building ♦ 201 South Carson Street, Suite 250 ♦ Carson City, Nevada 89701 ♦ (775) 684-1700 • Fax (775) 684-1723
Supreme Court Building ♦ 408 East Clark Avenue ♦ Las Vegas, Nevada 89101

Judge Steinheimer reported that the subcommittee has met twice. The revisions they have discussed are as follows:

- New section on mitigation responsibilities
- Need to have a mitigation specialist as part of the defense team
- References to other information/rules for attorneys to check that may change from time to time
- Special responsibilities related to representation of foreign nationals, retaining a cultural competency expert, as well as making sure the client timely receives a court appointed interpreter, if necessary
- Reference to the importance of following the 2008 Indigent Defense Standards of Performance for Capital Representation

Mr. Anthony elaborated on some of these matters. He said they borrowed templates and language from the Arizona Rules of Criminal Procedure as well as helpful language from Texas and Louisiana. With regard to representation of foreign nationals, it's important to promptly notify them of their consular rights and the need to notify their consular office of their arrest. He said the Vienna Convention places that obligation on state officials, like law enforcement, but also places that obligation on defense counsel as well.

Justice Herndon inquired about section 8 of the rule, *Miscellaneous procedures on appeal*. Subsection (a) *prebriefing conferences*, that does not really fit into any of the subcommittees. He said he does not recall this type of conference ever being held in a criminal matter. Justice Bell responded that she plans to go through that section to square it up with other rules and remove portions that are no longer necessary or make sense.

Judge Steinheimer suggested that the committee consider setting out some timelines in the rule with regard to prioritizing death penalty cases and how quickly they should move through the district court. She thinks it would be helpful to judicial officers, especially in the rural courts, to have realistic guidelines, i.e. do we anticipate that a death penalty case goes from initiation in district court to trial in X number of days, years, months?

Justice Bell said that it's unfortunate the rule makes it sound as if a capital proceeding is like a preliminary injunction and the court should be setting it for trial immediately. The reality is these cases take a lot of time. It takes a lot of time for the defendant to build an attorney/client relationship, it takes a lot of time to do mitigation investigations, and it takes a lot of time on the prosecution side to deal with everything they have to do. Making it a priority in terms of trial scheduling is one thing but that's really not the issue in her experience. It's doing the work that needs to be done to make sure the case is done right the first time.

Ms. Lemcke added that DIDS has adopted workload standards in the rural communities regarding the number of hours expected for a death penalty case. The defense attorneys can only have two death penalty cases at a time. If the committee is going to consider setting timelines for when the cases are expected to go to trial, she hopes the court will consider what the workload is for that public defender/defense attorney and how much time they have to meet the timelines. Many of the rural communities have to double the amount of public defenders because the workloads are just too high. She continued that the public defenders in the urban areas also feel their workloads are very high. She is concerned that unrealistic expectations may be put in place when the attorneys have to balance so many other things at the same time.

Mr. Coffee pointed out there was a Justice Department study done about 10 to 15 years ago that came up with a figure of 1800 hours of work involved for a defense attorney in a capital case. It's probably more now, but that should give you a general ballpark. He added that he does not know how you would get one together in less than a year. In Nevada, we are dealing with foreign nationals and have such an influx of people that doing out of state mitigation or foreign mitigation just doubles and quadruples that timeline. He offered to work with Justice Bell to attempt to come up with some kind of guideline.

Judge Steinheimer added that it will dovetail with their local rules that say how fast certain cases need to be tried. Once guidelines are set, it will be important to go back and modify the local rules and the funding

sources expectation for how quickly trials might be set. The Second Judicial District Court receives a lot of push back from the community when trials are set out 12 to 18 months. It would be good if we could say it's not anticipated that these cases will be able to go to trial in less than 12 to 18 months, it might take a lot of the pressure off the judicial officers, especially in those courts where you only have an occasional death penalty case, and you are trying to make sure it fits with everything else.

Upcoming Meetings: The next meeting was scheduled for October 2 at 4 p.m. Subcommittee reports and drafts are to be submitted by September 13 so that Justice Bell can review and compile them into one document for circulation to the full committee, so they have a couple of weeks to review them prior to the October 2 meeting. Justice Bell thanked everyone for their time and effort.

The meeting was adjourned at 5:08 p.m.