

Supreme Court of Nevada

ADMINISTRATIVE OFFICE OF THE COURTS

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Commission on Statewide Rules of Criminal Procedure

February 25, 2019

Noon

Summary prepared by: Jamie Gradick

Members Present

Justice James Hardesty, Chair
Justice Abbi Silver, Co-Chair
Justice Lidia Stiglich, Co-Chair
John Arrascada
Chief Judge Scott Freeman
Judge Douglas Herndon
Christopher Hicks
Darin Imlay
Mark Jackson
Lisa Rasmussen
Judge Jim Shirley
John Springgate
JoNell Thomas
Steve Wolfson

Guests Present

Sharon Dickinson
Chris Lalli
Robert O'Brien
Steve Owens
Luke Prengaman

AOC Staff Present

Jamie Gradick
John McCormick

- I. Call to Order
 - Justice Hardesty called the meeting to order at 12:03 pm.
 - Ms. Gradick called roll; a quorum was present.
 - Justice Hardesty explained that, while only Commission members may vote on Commission matters, others are still encouraged to participate and provide input as appropriate.
- II. Review and Approval of January 23, 2019 Meeting Summary
 - The January 23, 2019 meeting summary was approved pending a spelling correction,
- III. January 23, 2019 Meeting Follow-Ups
 - Life/Death Pretrial Practice Work Group Recommendations: Rule 250

- Mr. Lalli presented proposed language to amend SCR 250(4)(c). (*Please see meeting materials for additional information*)
 - Mr. Lalli explained that, oftentimes, the defense has not had time to complete mitigation; extending the filing time could provide the defense with more time to complete at least a portion of the mitigation process.
 - Mr. Lalli informed attendees that a group of capital litigators worked together to draft this proposed language.
 - Attendees discussed the process currently in place; concern was expressed regarding the role of the death penalty screening committee; Mr. Lalli explained that his office would not alter its current processes under this change.
 - A comment was made that the defense would still need to be notified when there is a potential death filing.
- Justice Stiglich asked for clarification regarding how the process would work if the 30 days period ran simultaneously.
 - Mr. Lalli explained the death penalty assessment committee process and commented that there would need to be coordination between the state and the defense during/following the assessment committee meeting.
 - If there is a possible mitigating circumstance, the committee meets to assess whether death will be sought.
 - Mr. Wolfson explained that some cases are clear in terms of whether notice of intent will or will not be filed; however, on the tougher cases, fewer notices will be filed if the defense has more mitigation time.
- Concern was expressed regarding notice to defense counsel; potentially, the time could run before the defense has time to file the waiver.
 - Mr. Hicks and Mr. Jackson explained that Washoe County and Douglas County both involve defense counsel in the process as soon as possible; this change could be workable in their counties.
- A suggestion was made that language be added to clarify that in a district in which there is not a death penalty committee, that DA must provide notice to defense counsel prior to filing notice of intent.
 - Concern was expressed regarding cases in which the DA knows they are going to file; would the DA still be required to notify the defense in these cases? This adds another “hurdle” to the Rule 250 requirements.
- Justice Hardesty asked whether the notice should be filed 180 after the indictment, rather than requiring the “back-and –forth” notices/waivers.
 - Judge Herndon expressed concern regarding how this would affect the right to a speedy trial.
 - Ms. Thomas explained that this would place a burden on defense because every murder cases would be treated as a potential death case.
 - Attendees discussed the notification to defense counsel; currently it is an informal process. Requiring it as part of the rule takes away a degree of flexibility and make notice a litigable issue.
- Attendees discussed the extent of the problem; the process works fine as is but making these changes could save county resources. Mr. Wolfson explained that the state is going to “lean towards filing” on the “cases in the middle” because of a lack of mitigation information.

- Judge Herndon suggested the judge make the inquiry (as to whether the case is going before the death review committee) during the arraignment; this would provide notice to ten defense.
- Justice Stiglich expressed concern regarding how this affects deployment of defense resources.
 - A comment was made that the entire mitigation process does not have to be completed; the 180 period is only to allow the defense enough time to obtain information on mental health issues, etc.
 - Ms. Rasmussen commented that she has seen this process work in other jurisdictions.
- Justice Stiglich asked for clarification regarding how many murder cases go into death review.
 - Mr. Lalli commented that it is every case where there is an arguable aggravating circumstance. This is about 70-80% of cases.
- Attendees discussed whether there is harm in filing a waiver and death notice of intent at the same time. Each side expresses its intention; a death notice can be withdrawn later if necessary.
 - Ms. Thomas commented on the rigidity of the 30-day rule and suggested, “tweaking” the timing to give the defense 25 days and the state 30; this would create a buffer.
- Justice Hardesty asked Commission members for a motion to accept the proposal as tendered.
 - Mr. Wolfson made the motion.
 - Ms. Thomas seconded the motion.
 - A roll-call vote was taken; all attending members voted “yes” with the exception of a “no” vote from Justice Stiglich.
 - The motion passed.
- Life/Death Pretrial Practice Work Group Recommendations: Settlement Conferences
 - Attendees briefly discussed the law review article provided by Judge Herndon (*Please see meeting materials for additional information*)
 - Justice Hardesty suggested the work group research settlement conference rules in other jurisdictions.
 - Mr. Lalli commented that the work group has been looking at settlement conferences rules in other jurisdictions and has been working on drafting language but has not had an opportunity to put anything formal together; it’s a complicated area that requires additional time.
 - Justice Hardesty asked Mr. Gradick and Mr. McCormick to work with the work group to research settlement conference rules/statutes from other jurisdictions.
- Judicial Training Report
 - Mr. McCormick provided attendees with a brief overview of judicial trainings available in this area. (*Please see meeting materials for additional information*)
 - A suggestion was made that the group research what training is available to attorneys in this area; it is important that judges be aware of what attorneys are doing and what is required of attorneys.
 - Judge Herndon commented that jury selection and ineffective assistance of counsel seem to be two areas where issues arise on appeal.

- Justice Hardesty informed attendees that the Nevada Supreme Court has seen appeal issues that could possibly be addressed through training at the judicial level.
- Attendees discussed whether judges outside the eighth judicial district have received training in this area.
 - Ms. Gradick will survey the rural district court judges to see what education they have received in this area.

IV. Eighth Judicial District Court's Homicide Case Program Update (*Please see meeting materials for additional information*)

- Judge Herndon provided an overview of the latest program statistics.

V. Proposed Statewide Rules: Structure/Outline Discussion

- Justice Hardesty asked attendees for input regarding the best method to approach the revision/development process and explained the intent is to adopt rules that help fill in gap areas in our existing statutes; we do not want to “regurgitate” the statutes we already have.
 - Mr. Jackson provided a brief background on how the Motions Practice Work Group arrived at the draft rules document.
 - There are procedural issues with the rules that are in place, particularly in the rural jurisdictions. Each jurisdiction is applying different rules, or applying rules differently.
 - Mr. Jackson cautioned against developing procedural rules without addressing the underlying issues of how rules are applied.
 - Attendees expressed concern regarding adopting rules that conflict with statute and how to proceed.
 - A comment was made that there's no point in only “fixing” or “drafting” what rules we can; the statewide issues won't be addressed unless the Commission is willing to make comprehensive changes (due to conflicts within the statutes, incompatibilities in the federal rules, etc.).
 - Judge Shirley commented on inconsistencies within the statutes that need to be addressed; there is a “home field” advantage for prosecutors in the rural counties because they know how their jurisdiction applies the rules and the defense attorney may not.
 - Justice Stiglich suggested the Commission use the federal rules as a framework and organizational guideline of which to compare Nevada rules. This would help illuminate gaps and areas where our rules need work.
 - Local practice rules could be used to fill gaps.
 - Attendees discussed the need for statutory modifications, particularly in the area of timeframes.
 - A comment was made that this was the purpose behind SB 5; at this point, any statutory changes could be another session away.
 - Mr. McCormick informed attendees that the LCB had significant concerns regarding SB 5; in its current form, the bill is not going to move. The Nevada Supreme Court needs to approach the legislature with something more collaborative in order to be successful.
 - Attendees briefly discussed the UNLV Boyd Law School White Paper; Ms. Gradick will distribute this to the group.

- Mr. Prengaman suggested that the group “zero in” on areas of concern rather than go through rule-by-rule and addressing rules that already overlap.
- Attendees discussed local rules; the rural jurisdiction have very little in the way of local criminal procedure rules.
- Justice Hardesty commented that there are problem areas within existing statutes, there are issues in local rules, and there is a question as to whether any of these approaches qualify as best practices.
- Mr. Prengaman commented that the many of the issues are procedural; it is a policy decision: is it better to have uniformity or should jurisdictions be allowed to develop procedures fitting their individual needs, requiring practitioners to know the differences in each jurisdiction in which they practice?
 - Justice Hardesty commented that the Nevada Supreme Court would like to see a uniform set of rules/procedures statewide.
- Mr. Prengaman suggested that the Commission consider developing rules of practice instead of procedure.
 - Justice Hardesty asked for feedback regarding feasibility of developing practice norms around the state and commented that this needs to be accomplished on a full-Commission basis, rather than in work groups.
 - Justice Silver reiterated the need for a standard set of rules and pointed out that this has been accomplished in the civil arena; it should be possible to do the same in criminal.
- Justice Hardesty suggested that the Commission move forward by first developing a uniform set of practice areas not in conflict with statute, and then identifying statutes that need updating and/or amending.
 - Those practices not requiring legislative involvement would be presented to the Nevada Supreme Court; legislative changes to the statutes would be addressed during the 2021 Legislative Session.
 - The most productive approach would be to start by identifying and filling in gaps.

VI. Other Items/Discussion

- Attendees briefly discussed possible areas, beyond the four topics the work groups have been working on, that the Commission should consider reviewing.
 - Mr. O’Brien suggested the Commission revisit discovery and look at rules governing appearances before a magistrate following arrest or initial appearance.
 - Justice Hardesty suggested the addition of post-conviction procedures/rules.
 - Justice Hardesty asked attendees to review post-conviction practice rules and Rule 16 in the Federal Rules of Criminal Procedure in preparation for the next meeting.

VII. Next Meeting

- Justice Hardesty requested that Ms. Gradick, survey the Commission membership for availability and schedule a meeting for next month.

VIII. Adjournment

- The meeting was adjourned at 2:00 p.m.