

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE

Minutes of meeting January 23, 2006

The ninth meeting of the Committee was held at 120 S. Riverside Plaza, Chicago, from 2 to 4 P.M.

Those present

Leigh B. Bienen

James R. Coldren, Jr. (conference phone)

James B. Durkin (conference phone)

Theodore A. Gottfried

Jeffrey M. Howard

Boyd J. Ingemunson (conference phone)

Thomas P. Needham (conference phone)

Gerald E. Nora (conference phone)

Edwin R. Parkinson (conference phone)

Richard D. Schwind

Randolph N. Stone

Thomas P. Sullivan

Not present

Kirk W. Dillard

Geoffrey R. Stone

Arthur L. Turner

Michael J. Waller

Also present: Linda Hui, Northwestern University Law School; Patrick McAnany, IL Coalition to Abolish the Death Penalty; Hank Anthony, CJIA (part of meeting).

The minutes of the meeting of December 12, 2005 were approved as written.

1. *Retention of Reporter/Special Counsel.*

Hank Anthony of CJIA reported that the Request for Proposals has been posted on Purchase Point for two weeks, but no applicants have responded. The RFP may be found at www.purchase.state.il.us/illinoisbid.22009536. The essential qualification are set out in Paragraph 4 on pages 6 to 8. Applications are due by February 6, but if necessary this date may be extended.

Mr. Anthony explained the process we must follow when we receive applications:

(1) We review the applications and rank them according to a predetermined point system. Hank's suggested evaluation criteria are attached to these minutes. It was unanimously agreed that the initial evaluations based on the applications will be made by a subcommittee consisting of Ms. Bienen and Messrs. Coldren, Gottfried, Schwind and Sullivan. The applicants are to be ranked on a scale of 1 to 1,000, with 1,000 as the best, without regard to the vendors' proposed costs.

(2) The Committee chair will submit to members of the Committee the applications of applicants who score 750 or more points. The Committee members

as a group will then interview each applicant in person, presumably at the next full Committee meeting. The Committee is to have a list of pre-arranged questions to be asked to each applicant. Ms. Bienen volunteered to draft and distribute the questions to the Committee members.

(3) Following the interviews, the person who obtains a majority vote of a quorum of the Committee will be retained as Reporter/Special Counsel.

All Committee members were encouraged to publicize the existence of the RFP, and to urge qualified candidates to apply. Mr. Sullivan agreed to contact Bernard Judge and request that the Law Bulletin print an article concerning the Committee's Request for Proposals.

2. *Second Annual Report to the IL General Assembly.*

Mr. Sullivan pointed out that our first annual report was sent to representatives of the IL General Assembly on April 27, 2005, but that the second and following reports should be sent soon after the first of each year. Mr. Sullivan stated he will draft the report and submit it for comment to Mr. Schwind as Co-Chair. Messrs. Sullivan and Schwind will then distribute the draft report to the members of the Committee for their review and comment at the Committee's next meeting.

3. *Committee's appropriation for fiscal year 2006-2007.*

Mr. Durkin reported that the General Assembly has planned a short session this year, with adjournment on April 7. He will discuss the House appropriation bill with Rep. Arthur Turner. Mr. Sullivan said he will speak with Messrs. Dillard, Durkin and Turner about the inclusion of the appropriation of \$150,000 for the Committee for the coming fiscal year. It was suggested that Mr. Sullivan send a formal statement about the Committee's appropriation to the Governor and General Assembly leadership, or their respective directors of appropriations. Mr. Sullivan said he will do so after consultation with Messrs. Dillard, Durkin and Turner.

4. *Report of Subcommittee 1 - Police and investigations.*

Mr. Coldren reported that the subcommittee has not met since the last full Committee meeting. The subcommittee has scheduled a meeting at the University of Chicago Law School on February 6.

Mr. Howard suggested that the Committee consider legislation requiring the presence of an interpreter at police stations in neighborhoods populated by persons who do not speak fluent English. Mr. Schwind observed that this Committee's charter relates to capital cases, and that in Illinois officers are now required to record custodial interrogations in murder investigations, so that the questioning is all to be tape recorded by audio, video or both, rendering the need for interpreters

unnecessary except in unusual situations. Mr. Howard agreed to send to Mr. Coldren a list of the other states that have legislation concerning mandatory presence of interpreters at police stations.

Mr. Sullivan suggested that we invite CPD General Counsel Sheri Mecklenburg to speak with either subcommittee 1 or the full Committee, to discuss police procedures and investigations, and the changes that have been made in murder investigations since the issuance of the report of the Illinois Governor's Commission on Capital Punishment in April 2002. He proposed that we wait to do so until after the release of the ISP report to the IL General Assembly on the double blind, sequential lineup-photo spread pilot project, and after the conference on eyewitnesses to be held at Loyola Law School on April 21.

5. *Report of Subcommittee 2 - Eligibility for capital punishment, DNA, and proportionality.*

Ms. Bienen reported that the subcommittee has not met since the last full Committee meeting. She reported that she has received responses from 57 State's Attorneys to her letter sent to all Illinois State's Attorneys re capital prosecutions since January 1, 2003. She stated that she has also contacted other agencies in order to obtain information about Illinois murder prosecutions since January 1, 2003.

There was a discussion with regard to the protocols containing suggested procedures to be followed by State's Attorneys in selecting cases in which capital

punishment will be sought. Mr. Parkinson said he will ask Mr. Waller whether the text of the protocols was approved at the December 2005 ISAA meeting, and if it was, he will ask Mr. Waller to send it to Mr. Sullivan for distribution to the members of the Committee.

6. *Report of Subcommittee 3 - Trial court proceedings.*

Mr. Howard reported that the subcommittee has not met since the last Committee meeting. He said that on February 3 at 2 PM, at the CJIA office, the subcommittee is scheduled to meet with Judge Michael P. Toomin, Chair of the Illinois Supreme Court Special Committee on Capital Cases. Mr. Sullivan distributed an article written by Judge Toomin in the December 2004 issue of the IL Bar Journal, 92 IL B J 642, attached, regarding the reforms in capital cases implemented by the Illinois Supreme Court. Mr. Sullivan said he believed most of the Court's reforms were adopted before the issuance of the Illinois Governor's Commission on Capital Punishment in April 2002.

Mr. Sullivan stated that the Illinois Pattern Jury Instruction Committee is still considering his proposal, based on the Governor's Commission recommendations 56, 57 and 58, to include pattern jury instructions regarding testimony of eyewitnesses, in-custody informants, and unrecorded statements attributed to the defendant.

Mr. Howard reported that the office of the Cook County Public defender had received the balance of the 75% of the amount allocated to it in the budget of the Capital Litigation Trust Fund.

7. *Report of Subcommittee 4 - Post-conviction proceedings, and general topics.*

Mr. Gottfried reported that the subcommittee has not met since the last Committee meeting. He said members of Subcommittee 4 intend to attend the meeting of subcommittee 3 with Judge Toomin on February 3.

8. *Illinois Governor's Commission recommendations.*

Mr. Sullivan stated that he will distribute to Committee members a summary of the 85 recommendations of the Governor's Commission on Capital Punishment, and the subcommittee to which each recommendation is applicable.

9. *Next meeting - February 27, 2006, 2 P.M.*

It was agreed that the next meeting of the full Committee will be held on February 27 at 2 at the CJIA office, 120 S. Riverside Plaza, Chicago.

Thomas P. Sullivan
Chair
February 3, 2006

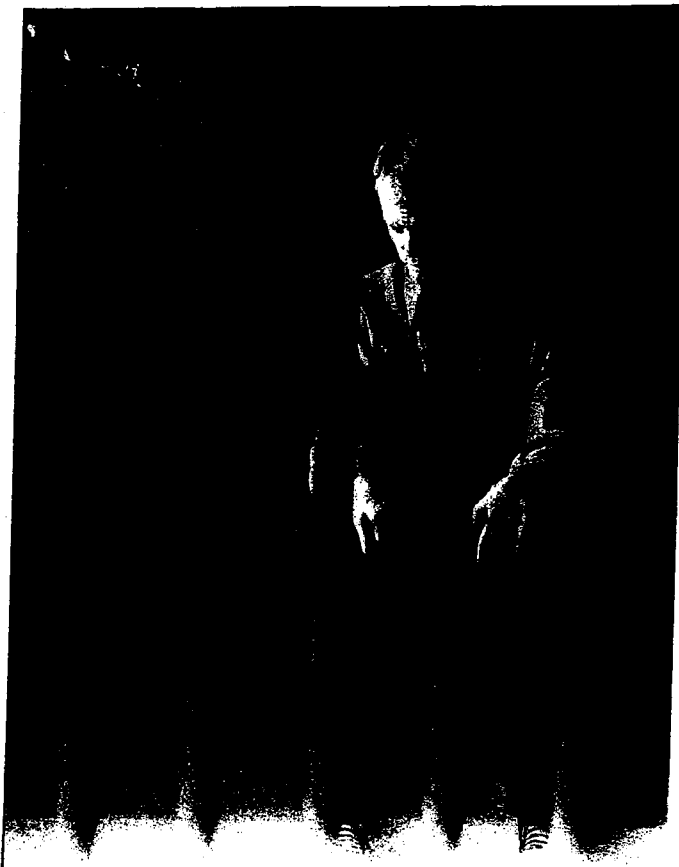
Attachments

Evaluator Name _____

Reporter/Special Counsel RFP P&A

Vendor	(1)Qualifications of the vendor (300)						(2) Experience with IL Gen Assembly/Law Enforcement community (200)						(3) Data collection/management experience – legal research (200)						(4) Responsiveness & Availability of Vendor to Committee Chair and other members of Committee (300)							
	EXC 300- 275	V.G. 275- 250	Good 250- 225	Fair 225- 200	Poor 200- 0		EXC 200- 175	V.G. 175- 150	Good 150- 125	Fair 125- 75	Poor 75-0		EXC 200- 175	V.G. 175- 150	Good 150- 125	Fair 125- 75	Poor 75-0		EXC 300- 275	V.G. 275- 250	Good 250- 225	Fair 225- 200	Poor 200-0			

- (1) Includes vendor's qualifications, i.e. education, degrees, licenses, certificates and previous experience with projects of similar scope & size.
- (2) Includes vendor's previous experience with in interacting with Illinois General Assembly and the Illinois law enforcement community.
- (3) Includes vendor's experience with data collection and data management techniques.
- (4) Includes vendor's availability, commitment, resources and experience with state government and law enforcement operations.



By Judge Michael P. Toomin

The chair of the Illinois Supreme Court's Special Committee on Capital Cases notes that death-penalty reforms implemented by the court in 2001 already encompassed some of the changes later recommended by Governor Ryan's Commission on Capital Punishment.

Capital Punishment Reform and the Illinois Supreme Court: at the Forefront of Change

Much attention has been focused on ways to improve the administration of the death penalty in Illinois, and in January 2004 the legislature implemented some of the proposals recommended by Governor George Ryan's Commission on Capital Punishment ("the commission"). They deservedly received high praise.¹

However, some of the biggest improvements to the system, those promulgated by the judiciary, have received relatively little attention even though they began to be implemented well before issuance of the report by the Governor's commission. Those changes include creating the Capital Trial Litigation Bar, which established standards of training and experience for both defense counsel and prosecutors appearing in capital litigation,² and requiring capital litigation seminars for judges who preside over death penalty cases.

This article describes these and other improvements and specifically addresses recommendations of the Governor's commission, noting that the called-for changes were already in existence or underway.

The Illinois Supreme Court's Special Committee on Capital Punishment

The Capital Trial Litigation Bar and the judicial-seminar requirement were not the only changes wrought by the supreme court under the authority

1. Sullivan, Thomas P., *Capital Punishment Reform: What's Been Done and What Remains To Be Done*, 92 Ill B J 200 (Apr 2004).

2. ILCS 5 Ct Rule 714.

Michael P. Toomin <Toomin400@aol.com> is a supervising judge in the criminal division of the Cook County Circuit Court. He chairs the Special Supreme Court Committee on Capital Cases.

conferred by the Illinois Constitution to administer the civil and criminal justice system. Clearly, the court was in the forefront of improving the Illinois death penalty system before calls for reform hit their peak.

Background. On March 1, 1999, more than a year before the establishment of the Governor's commission, the high court announced the creation of its Special Committee on Capital Punishment ("the committee"). The court's appointment order directed the committee to study the trial and sentencing processes in capital cases in Illinois, including the respective functions of the prosecution, defense counsel, and the judiciary. The committee was directed to report its findings and recommendations to the court at its earliest opportunity.³

The committee was initially chaired by Justice Thomas R. Fitzgerald, then the presiding judge of the criminal division of the Circuit Court of Cook County. It comprised 17 jurists from throughout the state with considerable experience in capital and criminal case litigation.⁴ Under his stewardship, the committee went about its business with a serious and efficient sense of purpose, and engaged itself in an in-depth study of death penalty litigation – both substantively and procedurally, in Illinois and other states.

Within seven months of its creation, the committee forwarded to the court a complex series of proposals in a substantial two-volume report.⁵ While recognizing that the court's constitutional rule-making authority had limitations and that some changes were more properly within the legislative domain, the committee formulated a number of fundamental modifications to four existing Illinois Supreme Court Rules and adoption of four new rules.⁶

Some of the highlights of these proposals were reported in the *Chicago Daily Law Bulletin* and the *Chicago Tribune* in November 1999.⁷ These published reports came out prior to the creation of the Governor's Commission on Capital Punishment and even before publication of the *Tribune's* series on the death penalty, which Governor Ryan said moved him to impose a moratorium on execution of capital offenders.⁸

In January 2000, the committee's proposals were the subject of public hearings in Chicago and in Springfield. Following minor revisions, the proposals were officially submitted to the high court, and approved March 1, 2001.⁹ The new rules were designed to insure the highest de-

gree of judicial and attorney competency and experience in the trial of death penalty cases.

The committee found that one of the most important and effective means of bringing about positive improvement in capital trials would be the establishment of minimum training and experience standards for the attorneys who try these cases. In establishing those standards, the committee considered the ISBA's recommended qualification for appointed and retained counsel, which mirrored recommendations set forth in guidelines promulgated by the ABA.¹⁰

Prosecutor's obligations. Another rule took note of the vast power and prestige reposing in the Office of the Public Prosecutor. Accordingly, the court amended section 3.8(a) of the Illinois Rules of Professional Conduct to provide that the duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.¹¹ This amendment was intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably.¹²

Likewise, Illinois Supreme Court Rule 412(c) broadened the prosecutor's obligation to insure that *Brady* tenders of exculpatory evidence are both comprehensive and meaningful.¹³ The amendment requires a "good faith" effort to specifically identify exculpatory and mitigating materials based on information available to the state when the *Brady* tenders are made.¹⁴

Procedures in capital cases. Supreme Court Rule 416, establishing procedures in capital cases, is new in its entirety. The rule was promulgated to assure that capital defendants receive fair and impartial trials and sentencing hearings.¹⁵ Its application is limited to death penalty cases and requires the state to provide timely notice of intention to seek the death penalty, including all statutory aggravating factors it will rely on.¹⁶ In turn, trial judges are directed to insure that counsel appearing for both parties are duly qualified members of the Capital Litigation Trial Bar.¹⁷

The rule also authorizes discovery depositions, with leave of court upon a showing of good cause and sets forth the factors a judge should consider in making that determination.¹⁸ Case management conferences are mandated to insure

that all reciprocal disclosures are being tendered and to establish appropriate deadlines for completion of discovery.¹⁹ The judge must also insure that the state's certificate of disclosure and the defense's certification of readiness for trial are timely filed.²⁰

Disclosure of DNA evidence. Rule 417 is also entirely new and requires standardized disclosures by the proponent of DNA evidence, whether prosecu-

The judiciary's improvements to the capital litigation system have gotten little attention even though they began well before the Governor's commission report was issued.

tion or defense. The rule, which was informed by the collective input of prosecutors, defense counsel, and crime lab personnel, requires disclosure of information routinely available from any lab-

3. Illinois Supreme Court Order MR 15833.

4. In addition to Chairman Fitzgerald, the Special Committee was comprised of members from the First District: Judges William Cousins, Jr., Thomas R. Hett, Themis N. Karnezis, Bertina E. Lampkin, Daniel M. Locallo, Fred G. Suria, Michael P. Toomin and Joseph J. Urso; from the Second District: Judges Thomas E. Callum, Phillip L. DiMarzio, William A. Kelly and Christopher C. Starck; from the Fourth District: Judges John R. DeLaMar and Robert L. Welch; and from the Fifth District: Judges A. Andreas Matoesian and Charles V. Romani.

5. Special Committee on Capital Cases: Findings and Recommendations (Oct 1999). Available at Supreme Court Library, Cat. No. KF11765.C2145.

6. *Id.*

7. Possely, Maurice and Ken Armstrong, *Revamp Urged in Handling of Capital Cases: Study Seeks Higher Attorney Standards*, Chi Trib 1 (Nov 4, 1999).

8. Armstrong, Ken and Steve Mills, Ryan, "Until I Can Be Sure": Illinois is First State to Suspend Death Penalty, Chi Trib 1 (Feb 1, 2000).

9. ILCS 5 Ct Rules 43, 411, 412, 416, 417, 701 and 714; also ILCS 5 Ct Rules of Prof Conduct, RPC Rule 3.8.

10. American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev ed, February 2003), available online at <<http://www.abanet.org/deathpenalty/guidelines.pdf>>.

11. ILCS 5 Ct Rules of Prof Conduct, RPC Rule 3.8.

12. *Id.*, Committee Comments.

13. ILCS 5 Ct Rule 412(c).

14. *Id.*, Committee Comments.

15. ILCS 5 Ct Rule 416(b)(i).

16. ILCS 5 Ct Rule 416(a), (c).

17. ILCS 5 Ct Rule 416(d).

18. ILCS 5 Ct Rule 416(e).

19. ILCS 5 Ct Rule 416(f).

20. ILCS 5 Ct Rule 416(g), (h).

oratory performing DNA testing.²¹ Rule 417 is not limited to capital cases; rather, its requirements extend to all felony trials and to related post-trial or post-conviction proceedings.²² Although the rule speaks to current technologies, it is expressly designed to accommodate future techniques as well.²³

Remarkably, this rule has been self-executing, with little if any input by the courts. In adherence to the rule, the Illinois State Police Crime Laboratory routinely gives the parties so-called "417 packets" containing all disclosures mandated by the rule. In the absence of any complaints, this innovative procedure appears to be working well.

Expanded discovery. Finally, Supreme

state's attorney – may appear in a capital case unless that attorney is a member of the Capital Litigation Trial Bar.²⁷ The committee was delegated the responsibility to oversee the creation of this highly specialized bar, a job which was to be completed within a calendar year.

Efforts first were directed to preparing comprehensive applications and drafting protocols designed to insure fair and uniform selection procedures throughout the state. In turn, a total of 23 panels comprised of prosecutors, defense counsel, and former judges were selected in the state's five judicial districts to screen attorneys seeking membership in this capital-qualified bar. The protocols were also designed to assist the panels in determining the applicant's qualifications for appointment as lead or co-counsel. Generally, the panel members have performed their duties diligently and professionally.

As of October 15, 2004, 714 attorneys statewide have been certified as members of the Capital Litigation Trial Bar after under-

going an exhaustive review of their trial and criminal law experience.²⁸ They are part of a special group, numbering less than 1 percent of the state's 79,000 licensed attorneys. The role of certified attorneys in capital litigation seeks to assure that never again in Illinois will a defendant be represented by counsel or co-counsel lacking substantial experience and training in the trial of criminal cases. It also seeks to assure that the state will be represented by counsel imbued with a high degree of professionalism and ethical responsibilities.

Capital Litigation Seminars. The special committee also was given the primary responsibility of establishing the judicial seminars mandated by Supreme Court Rule 43. Under the rule, judicial seminars are required to be held twice a year covering designated subjects routinely encountered in capital trials and sentencing hearings.²⁹ Any judge who anticipates being called upon to preside over a death penalty case is required to attend a capital litigation seminar at least once every two years.³⁰

In adherence to that mandate the first series of seminars was presented in 2001–02, with some 320 of the state's 900 judges attending. The second series of seminars was made up of four presentations in 2003 and 2004, attended by a

like number of judges. Committee members who serve as faculty have prepared manuals consisting of reference materials covering substantive and procedural aspects of death penalty litigation. Moreover, each judge also received a copy of "Death Penalty Decisions," along with updates prepared by one of our faculty members.³¹

Capital case management. The impact of the new rules is further evident once trial judges are apprised of the state's intent to seek the death penalty. Case management conferences are regularly scheduled pursuant to Rule 416³² to supervise and superintend the orderly and timely flow of *Brady* material and other discovery and also to approve appointed counsels' requests to engage the services of experts and investigators.

Another aspect of the management conference concerns requests for depositions. Over the past three years, judges throughout the state have been called upon to determine whether the requisite good-faith showing has been made for deposing a particular witness. Moreover, trial courts have also insured that the required certificates of disclosure and readiness are respectively filed by the prosecution and defense prior to trial.

Although Governor Blagojevich has continued the moratorium instituted by his predecessor, the implementation of other aspects of the court's package of reforms demonstrates that our death penalty system can remain viable. This observation derives support from the many facets of capital case litigation, commencing with the decision to seek the death penalty. In Cook County, for example, the state's attorney chairs a committee of experienced and highly regarded supervisors who review all requests to invoke the death penalty and insure that all of the statutory aggravating factors intended to be relied upon at sentencing are identified.

By adopting innovative procedural rules, the court took the lead in implementing measures to ensure fairness and integrity in capital litigation.

Court Rule 411 expanded the scope of discovery in capital cases. Now, the criminal discovery rules are to be applied to the separate sentencing hearing required by law.²⁴ This amendment does not create new forms of discovery, but simply extends all required disclosures to the capital sentencing hearing. Here, the court wisely recognized that the amendment would assist counsel in preparation for this critical stage of a capital trial and prevent delay and disruption of the sentencing hearing.²⁵

Capital Litigation Trial Bar. As noted, the order creating the Special Committee on Capital Cases did not envision that the committee would simply dissolve or remain dormant after reporting its findings and recommendations to the court.²⁶ Thus, following adoption of the recommended reforms, the committee was delegated the responsibility of assisting the court in implementing two of the most significant improvements, creating the Capital Litigation Trial Bar and establishing capital litigation seminars for judges.

In amending Rule 701, the supreme court placed an unprecedented restriction upon the privilege to practice law in Illinois by mandating that no attorney – except those who serve in the popularly elected posts of attorney general or

21. ILCS 5 Ct Rule 417, Committee Comments.

22. ILCS 5 Ct Rule 417(b).

23. ILCS 5 Ct Rule 417, Committee Comments.

24. ILCS 5 Ct Rule 411.

25. *Id.*, Committee Comments.

26. Illinois Supreme Court Order MR 15833.

27. ILCS 5 Ct Rule 701.

28. *Capital Litigation Trial Bar Roster*, Transmitted by the Administrative Office of the Illinois Courts to the Clerk of the Illinois Court on October 15, 2004. Copy available online at http://www.state.il.us/court/SupremeCourt/Trial_Bar_Rosters/TrialBarRosters.pdf

29. ILCS 5 Ct Rule 43(a).

30. ILCS 5 Ct Rule 43(b).

31. Locallo, Daniel M., *Death Penalty Decisions*, Illinois State Bar Association (2001 ed).

32. ILCS 5 Ct Rule 416(f).

Addressing proposals of the Governor's commission

Governor Ryan's Commission on Capital Punishment offered a number of recommendations in April 2002 designed to insure reforms in our state's capital punishment system.³³ The General Assembly has enacted some of those proposals; others were adopted by the Illinois Supreme Court well prior to the commission's announcement of its package of reforms.³⁴

Judicial training. A number of the commission's proposals were directed to the judiciary. Recommendation 32 provides that judicial seminars should include specific training about the capital crimes litigation act and funding sources available for the defense of capital cases.³⁵ Those subjects indeed have been included. The first series of seminars conducted in 2001-02 included a presentation by Nadine Jakobowski, Program Coordinator of the Capital Litigation Trust Fund. Additionally, the most recent series of judicial seminars addressed issues inuring from the Capital Crimes Litigation Act.³⁶

While supportive of Rule 43, the commission has urged the Illinois Supreme Court to "go one step further and specifically require that judges who are going to hear capital cases undertake this training prior to hearing capital cases."³⁷ Recommendation 38 goes even further in providing that trial court judges be certified to hear capital cases based on their experience or training and that only such certified judges should hear capital cases.³⁸

However, these requirements are implicit in Rule 43, which mandates that any judge who may be called upon to preside over a capital case shall attend such a seminar at least once every two years.³⁹ The rule also contemplates that any judge who presides over a capital case on or after March 1, 2002, will have attended a Capital Litigation Seminar.⁴⁰ Attendance at the seminars is tracked by the chief circuit judges throughout the state and by the Administrative Office of the Illinois Courts, and certificates of completion are awarded for satisfactory attendance. Thus, Rule 43(b) effectively certifies trained trial judges as qualified to hear capital cases.

Recommendation 34 proposed that the court consider ways to insure that judges are trained in how to implement the new rules governing capital litigation, especially managing the discovery

process.⁴¹ Yet training at the first series of judicial seminars encompassed the newly mandated death penalty procedures, motion practice under the new rules, and issues concerning discovery compliance.

The commission also proposed that all judges who try capital cases should receive periodic training in eight enumerated topics and that experts should be retained to conduct training and prepare training manuals on those topics.⁴² Note that such training has been and continues to be provided to trial judges who try capital cases through the capital litigation seminars or the Advanced Judicial Academy, which is available to judges with more than five years experience.

Five of the eight enumerated subjects already have been covered at either the judicial seminars or the academy: (1) the risks of false testimony by in-custody informants; (2) the dangers of tunnel vision or confirmatory bias; (3) police investigative and interrogation methods; (4) forensic evidence; and (5) the risks of false confessions. Faculty who have addressed these topics include Professor Gary L. Wells, a leading researcher on eyewitness identification, and Drs. Cecilia A. Crouse and Moses Schanfield, experts on DNA evidence and technology.

The commission further urged the court and IOAC to consider developing statewide materials to train judges in capital cases and additional staff to provide research support.⁴³ The special com-

mittee has undertaken such a project, the creation of a capital cases benchbook for all trial judges who preside over death penalty cases.

The benchbook is a work-in-progress, building and drawing upon the combined efforts of the committee's membership. Trial judges throughout the state also have access to computerized legal research through Lexis or Westlaw. Additionally, in the Circuit Court of Cook County, Criminal Division, judicial law clerks assist judges in research and preliminary drafts of orders.

Recommendation 39 proposed that the Supreme Court consider appointing a "standing committee" of judges familiar with capital case management to provide resources to trial judges who try capital cases.⁴⁴ Under the supreme court's appointment order, the creation of the special committee, coupled with its contin-

33. *Report of the Governor's Commission on Capital Punishment*, George Ryan, Governor (Apr 15, 2002), available online at <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/>, ("Report").

34. ILCS 5 Ct Rules 43, 411, 412, 416, 417, 701 and 714; also ILCS 5 Ct Rules of Prof Conduct, RPC Rule 3.8.

35. *Report* at Rec 32 (cited in note 33).

36. 725 ILCS 124/1 et seq.

37. *Report* at Rec 33 (cited in note 33).

38. *Id* at Rec 38.

39. ILCS 5 Ct Rule 43(a).

40. *Id*, Committee Comments.

41. *Report* at Rec 34 (cited in note 33).

42. *Id* at Rec 35.

43. *Id* at Rec 36.

44. *Id* at Rec 39.



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ued contributions, has implicitly resulted in the appointment of the sort of "standing committee" envisioned by the commission. The committee continues to be comprised of jurists with considerable experience in capital litigation.⁴⁵ Committee members who serve as judicial faculty provide resources in the form of oral presentations, written training manuals, and checklists. The group also continues to study the capital litigation process in Illinois, meets periodically, and maintains close contact with Justice Fitzgerald, who serves as the court's liaison to the committee.

Exculpatory evidence. Other commission reforms embraced evidentiary considerations and jury instructions. Recommendation 49 urged the court to adopt a rule that defines "exculpatory evidence" as articulated by the commission.⁴⁶ Yet the necessity for such a definition is not compelling. Rule 412(c) addresses the disclosure of exculpatory evidence to the defense. Although the rule does not expressly define "exculpatory evidence," the committee comments identify the type of information that qualifies.⁴⁷ Additionally, authoritative decisions, both federal and state, provide further insight into the nature of exculpatory evidence.⁴⁸

Prosecutors. The commission also recommended that the court amend the Illinois Rules of Professional Conduct by requiring that after conviction, prosecutors have a continuing obligation to disclose exculpatory evidence.⁴⁹ This proposal, however, is likewise unnecessary. Rule 3.8(c) provides that prosecutors or other government lawyers in criminal litigation shall make timely *Brady* disclosures to the defendant or defense counsel.⁵⁰ The committee believes that the term "criminal litigation" is sufficiently broad to encompass not only the trial and sentencing process, but appellate and post-conviction proceedings as well. If further clarification is deemed appropriate, the committee earlier suggested to the supreme court that the committee comments to Rule 3.8 could be amended to provide as follows:

Paragraph (a) of Rule 3.8 does not set an exact standard, but one good prosecutors will readily recognize and have always adhered to in the discharge of their duties. Specific standards, such as those in Rules 3.3, 3.4, 3.5, 3.6, the remaining paragraphs of Rule 3.8 and other applicable rules provide guidance for specific situations in trial, appellate and post-conviction proceedings.⁵¹

Involuntary confessions. Recommen-

ation 53 provides that in capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence or the likelihood of guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession.⁵² Again, it would appear that statutory and case law amply address these concerns.

Section 114-11 of the Code of Criminal Procedure of 1963 provides the mechanism for suppressing involuntary confessions.⁵³ In assessing the voluntariness of a confession, trial judges are guided by the controlling principles espoused in countless decisions of federal and state courts of review. The Illinois Compiled Statutes Annotated describe the factors warranting consideration.⁵⁴ Additionally, the nuances of motions to suppress confessions have been addressed in the current series of judicial capital seminars. Existing measures speak to the evils perceived by the commission.

Reliability of testimony. The commission also proposed jury instructions that warn of the fallibility of eyewitness testimony,⁵⁵ the dubious reliability of the testimony of in-custody informants,⁵⁶ and the greater reliability of electronically recorded statements compared to non-recorded summaries.⁵⁷ As the commission correctly recognized, the initial responsibility for consideration and formulating pattern instructions is reposed in the Supreme Court Committee on Jury Instructions in Criminal Cases (IPI Criminal Committee).

Because instructions follow existing statutes or case law, it is understandable why IPI Criminal has failed to adopt at least two of the commission's proposals. Recommendation 56, which seeks to broaden the identification instruction to include factors such as the difficulty in making cross-racial identifications,⁵⁸ is not based upon any legislative pronouncement or court decision. While the problems of cross-racial identification have been the subject of social scientists' inquiries, their findings have not acquired such acceptance as to be recognized by the courts.

The same conclusion may be drawn regarding Recommendation 58, which says that recorded statements are more reliable than oral summaries.⁵⁹ Thus far, Illinois law recognizes no higher reliability for one than the other. Additionally, IPI Crim No. 3.06 and 3.07, which the commission seeks to supplement, provides

that jurors should consider the circumstances under which a statement was made when determining what weight to give it.⁶⁰

Ensuring fairness and integrity

One could hardly take issue with the commission's position in urging consideration of ways to improve the criminal justice system.⁶¹ That objective is one with which all of the system's components agree. Moreover, it is one that the Illinois Supreme Court clearly embraced in forming the special committee. In his concurring opinion to the appointment order, Chief Justice Charles Freeman observed as follows:

[O]ur faith in our criminal justice system, as evinced by our decision in *Bull*, should not be viewed as an endorsement of the *status quo*. Even the best system can be improved upon. But improvements cannot be made without the dissemination of constructive and critical comment. The Committee formed today provides a forum for such debate and, ultimately, may present this court with meritorious suggestions as to how we can further improve upon the trial process which leads to capital convictions.⁶²

By adopting innovative procedural rules, the court became the harbinger in identifying and implementing measures designed to ensure fairness and integrity in capital litigation. Moreover, through the efforts of the supreme court and its special committee, the judiciary remains in the forefront in improving the criminal justice system as a whole. ■

45. As a result of retirements, the following judges have been appointed to the Special Committee: from the First District: Justice Leslie E. South, Judges Paul P. Biebel, Colleen McSweeney Moore, Stuart E. Palmer and Dennis J. Porter; from the Third District: Judges Rodney B. Lechwar, Robert L. Carter and Jeffrey W. O'Connor; and from the Fourth District: Judges Harold J. Frobish and Leo J. Zappa, Jr.

46. Report at Rec 49 (cited in note 33).

47. ILCS S Cr Rule 412, Committee Comments.

48. See, for example, *Kyles v Whitley*, 514 US 419 (1995); *U. S. v Bagley*, 473 US 667 (1985); *Brady v Maryland*, 373 US 83 (1963); and *People v Barrow*, 195 Ill 2d 506, 749 NE2d 892 (2001).

49. ILCS S Cr Rules of Prof Conduct, RPC Rule 3.8(c).

50. *Id.*

51. Report of the Special Committee on Capital Cases to the Illinois Supreme Court, March 8, 2004.

52. Report at Rec 53 (cited in note 33).

53. 725 ILCS 5/114-11.

54. 725 ILCS Annot 5/114-11.

55. Report at Rec 56 (cited in note 33).

56. *Id.* at Rec 57.

57. *Id.* at Rec 58.

58. *Id.* at Rec 56.

59. *Id.* at Rec 58.

60. IPI Crim No 3.06-3.07 (4th ed 2000).

61. Report at Rec 83 (cited in note 33).

62. Illinois Supreme Court Order MR 15833.