

New Rules on Indigent Representation: A Step in the Right Direction or an Invitation that an Ethical Attorney should Reject?

by Larry A. Hammond and John A. Stookey

In the authors' October *Arizona Attorney* article on indigent representation we concluded by noting that the legislature had just passed and the Governor signed Senate Bill 1003 (now A.R.S. Section 13-4041), which provides a funding mechanism for indigent representation in capital post-conviction relief (PCR) proceedings. The statute was a direct response to the federal Antiterrorism and Effective Death Penalty Act of 1996, which is designed to significantly shorten the length of federal habeas corpus proceedings. However, in order to opt-in to these shortened proceedings, a state must have in place statutes funding PCR representation in capital cases and establishing standards of competency for lawyers in such cases.

In an attempt to meet these twin requirements, A.R.S. 13-4041: (1) establishes minimal standards for competency for lawyers in PCR representation; (2) sets \$7,500 as the presumptive fee for each PCR case, with the money coming from the state's general fund, rather than the counties' or court's budget; and (3) provides for the possibility of additional attorneys' fees coming from the county's budget upon a finding of good cause by the court.

The statute left to the Arizona Supreme Court two important implementing tasks: (1) set any additional and stricter standards for those who accept PCR representation in capital cases; and (2) compile and administer a list of qualified attorneys by January 1997, from which PCR attorneys will be appointed to particular cases. Chief Justice Feldman appointed an Indigent Defense Standards Committee to address these mandates and to make recommendations to the Supreme Court. This article summarizes the work of that Committee and the resulting new Rule 6.8 of the Rules of Criminal Procedure. Also discussed are recommendations just made by the Committee, but not as yet acted upon by the Supreme Court. Finally, we consider whether Rule 6.8 is a step in the right direction, a temptation to unethical attorney behavior, or both.

New Criminal Rule of Procedure 6.8

The Indigent Representation Committee recommended to the Supreme Court a new rule of criminal procedure that attempted to respond to the mandate of A.R.S. 13-4041, and at the same time lay a foundation "to establish standards for appointment of counsel for indigent defendants in all stages of capital litigation." Committee Comment to Rule 6.8 of the Arizona Rules of Criminal Procedure. The Rule as proposed and as approved on an emergency basis by the Supreme Court first set minimum standards for representation at *any stage* of capital litigation. Those standards include:

- 1) good standing in the State Bar for at least five years immediately preceding the appointment;
- 2) practice in the area of state criminal defense litigation for three years immediately preceding the appointment; and
- 3) demonstrated proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

For appointment as Appellate or Post-Conviction counsel, an attorney must meet two additional criteria:

- 1) within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death

sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings; and

2) have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.¹

The Indigent Representation Committee deferred consideration of standards for trial attorneys in capital cases because of the time pressures engendered by A.R.S. 13-4041's mandate that standards and a system of appointment for PCR cases be in place by January 1997. Even with this deferral, however, the Supreme Court's adoption of Rule 6.8 marks a fundamental change in capital indigent representation in Arizona. For the first time the Court has endorsed the idea that the attorney skills necessary for a capital case are different than those necessary for other types of criminal cases. Additionally, by implementing A.R.S. 13-4041 and its provision for state funding of PCR indigent representation, the Court has facilitated a initial shift away from the traditional model that all indigent representation should be funded by the counties.

As discussed in our October article, we believe that increased state involvement is a necessary component of any plan to guarantee quality indigent representation.

Additional Proposed Rule Changes

Since the Supreme Court's acceptance of Rule 6.8, the Indigent Representation Committee has again met and is formalizing recommendations to fill the gap left as to trial court representation in capital cases. In order to fill that gap, the Committee is recommending changes to Rule 6.2, as well as to Rule 6.8.

Under the proposed changes to 6.2, in all capital cases the presiding judge must appoint two attorneys: lead counsel and co-counsel. Rule 6.8(b) is then amended to provide the qualifications for these two types of counsel. To be eligible to be lead counsel, an attorney must meet the general requirements for any capital attorney as already specified in 6.8 and additionally:

1) have practiced in the area of state criminal litigation for five years immediately preceding the appointment;

2) have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;

3) shall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases; and

4) shall have attended and successfully completed, within one year of appointment, at least 12 hours of relevant training or educational programs in the area of capital defense.

To be eligible as co-counsel, the attorney must be a member in good standing of the State Bar Association and shall have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense. Within these limits, the selection of second counsel would be determined largely by lead counsel's choice.

The implications of these recommendations again are potentially profound. Again for the first time, there would be a rule-based requirement that two attorneys must be appointed to all capital cases. If adopted, the standards would also require that attorneys accepting capital representation be familiar with ABA Performance Guidelines for Capital Attorneys. These guidelines, which carefully and fully outline the tasks that an attorney should be able and willing to take on in a capital case, not only alert attorneys to what is to be expected of them if they

take on a capital case, but also provide a standard against which such representation can be evaluated.

Where Do We Go From Here?

Rule 6.8, as adopted, combined with the additional proposals made by the Indigent Representation Committee, if adopted, would constitute a fundamental step in the direction of insuring adequate indigent capital representation in Arizona. Not resolved, however, are the twin issues of who will pay for these additional guarantees and how much will be paid to accomplish them?

If the proposed changes are adopted as is, we would have a system with significant statewide appointment and performance standards for capital indigent representation, but a system which is still fundamentally funded by the counties. The only state funding role would be the "presumed" \$7,500 fee for PCR representation. For example, the requirement of two trial lawyers for every capital case would be in essence an unfunded mandate placed upon the counties by the state. We can assume that County Supervisors would fight such requirements vigorously.

This means that any such steps will necessarily have to be premised upon a political commitment by the state to explore ways of funding these mandates. Such a funding mechanism might be a direct subsidy, or could be a more fundamental shift of function, as well as funding, to the state level. For example, last term the state legislature passed Senate Bill 1349, which would have established a State Capital Appellate Public Defender, thereby relieving the counties of the both the function and funding of appeals and PCR's in capital cases.

The governor's veto of this legislation apparently had more to do with political control of the Defender office than it did objection to the idea. This is an idea worth pursuing again. Indeed, there are some indications that the County Supervisors' Association is apparently considering supporting such legislation this term. Whatever the solution, it is clear that any serious attempt to standardize capital representation in Arizona must be associated with a commitment to state-level participation. We believe that when the issue of funding fairness is combined with the difficulties the rural counties will inevitably have even staffing the types of changes that are proposed, a shift in function to the state is appropriate and desirable.

How Much Will be Paid: An Ethical Dilemma for Attorneys

Even if the issue of who (state or county) will pay is resolved, there remains the question of how much will be paid for representation at the various levels of the capital process. This is not only a political issue of how much money is needed, but an ethical issue for every attorney considering representation of a indigent defendant in a capital case. The funding provided in A.R.S. 13-4041 with regard to PCR counsel demonstrates the potential silent ethical dangers that can be hidden in otherwise well-intentioned systems of indigent representation.

A majority of the Indigent Representation Committee believes, for example, that the presumption in A.R.S. 13-4041 that \$7,500 will normally be an adequate fee for PCR representation in a capital case is clearly incorrect. As explained in the committee's report to the court, for counsel to represent adequately a defendant sentenced to death in a first post-conviction proceeding, counsel must review every document, item of evidence, transcript and order in the case, beginning with the earliest police report and ending with the last order entered by the Arizona Supreme Court. Counsel must carefully investigate every possible issue, including the possibility of ineffective assistance of counsel at both guilt and penalty phases of the trial, as well as on direct appeal. It is unimaginable that the presumed "flat fee of \$7,500" will ever adequately compensate defense who takes seriously these responsibilities.

We strongly believe that this fact places a substantial ethical burden on an attorney either not to take such cases or to obtain an "up front" agreement from the judge that additional funds will be made available to cover adequate pursuit of

the representation. This principle logically and necessarily follows from the State Supreme Court rulings in *Zarabia v. Bradshaw*, and *State v. Joe U. Smith*, (140 Ariz. 355 (1984)). Under these cases every attorney has an ethical duty to reject taking on any criminal case when that attorney believes that his/her workload (*Joe U. Smith*) or competency (*Zarabia*) will prevent him/her from providing adequate representation. We believe that an attorney has a similar ethical duty to reject a case when the compensation for that case will prevent him/her from having the time and/or resources to represent the defendant adequately and competently.

The goal of A.R.S. 13-4041 is to assure that those convicted and sentenced to death are properly represented at the first post-conviction stage. The presumption underlying the "opt-in" provision of the recent federal enactment is dependent on the truth of this assumption: federal habeas review can only be accelerated and the scope of review narrowed if the indigent defendant was properly represented at this first state PCR. A lawyer who accepts the PCR appointment, and then does only that work that can be accomplished for \$7,500, will be assuming his/her client that if unsuccessful in state court there will be no forum that is likely to serve as a failsafe for unaddressed, undiscovered or improperly directed questions of fact or law. The stakes are high, but the responsibility placed on court-appointed counsel should make this an easy decision. If no funds were available, counsel would either decline appointment or undertake to do the task as a *pro bono* undertaking. In substance, the choice is no different if a patently inadequate fee is all that is available. If we are right that the \$7,500 is not a fee for which any serious PCR representative can be realized, the responsibility of counsel will be clear.

Larry Hammond is an attorney with Osborn Maledon, P.A. and a member of the Indigent Representation Committee. The views expressed in this article, however, are those of the authors and do not necessarily reflect the views of the other members of the Committee nor the Supreme Court.

John A. Stookey is an attorney with Osborn Maledon, P.A.

ENDNOTE

1. The rule also provides that in exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet these qualifications, providing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in the rule.