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IN THE ARIZONA SUPREME COURT

PETITION TO AMEND RULE 6.3,) Supreme Court No.
ARIZONA RULES OF CRIMINAL) R- 08- _____
PROCEDURE)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, the Capital Case Oversight Committee petitions this Court to amend Rule 6.3 of the Arizona Rules of Criminal Procedure as set forth in the attached Appendix.

In December 2007, the Chief Justice issued Administrative Order No. 2007-92, establishing the Capital Case Oversight Committee. The order directed the Oversight Committee, among other things, to develop recommendations for any formal policies deemed necessary for the timely processing of capital appeals. In November 2008, the Oversight Committee submitted a report to the Arizona Judicial Council, which approved the Committee's recommendations. This petition seeks adoption of one of the recommendations in that report regarding the preservation and transfer of defense counsel's file in a capital case.

Rule 6.3 of the Arizona Rules of Criminal Procedure deals with the duties of counsel. The proposed amendment would add paragraph (d) to the existing rule. This paragraph would confirm the duty of defense counsel in a capital case not only to preserve the file, but to assure that the file is complete and that the file contains all information regarding every aspect of the representation.

The Oversight Committee found that a recurrent problem for defense counsel in capital cases was acquiring the complete file of prior counsel. Concerns have been raised in specific cases that successor counsel may never get the entire file. The Oversight Committee was advised that co-counsel, mitigation specialists, or investigators may work on a capital case, yet they may not place their entire work product in the lead counsel's file. The Oversight Committee was also informed that electronic information, including e-mails, of individuals who worked on the case may not always be saved or made available to successor counsel. While this is a problem in all cases, it is more of a problem with private counsel than it is with public agency counsel.

The Oversight Committee proposes an amendment to Rule 6.3 in order to place a continuing duty on defense counsel in a capital case to keep the file complete. The proposed amendment is modeled on Guideline 10.13 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The comment to the proposed rule expressly states that the

complete file includes electronic files, as well as the work product produced by investigators and mitigation specialists. The proposed amendment would entail no costs for file storage or electronic backup beyond what should already be present with good office management. The objective of the amendment is to assure that a full and properly maintained record can be expeditiously provided to successor counsel, thereby promoting the timely processing of appeals and other proceedings in a capital case.

For the foregoing reasons, the Oversight Committee respectfully requests that the Supreme Court amend Rule 6.3, Arizona Rules of Criminal Procedure, as set forth in the attached Appendix.

Respectfully submitted this 31st day of December, 2008.

Capital Case Oversight Committee:

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APPENDIX

PROPOSED AMENDED RULE 6.3(d), ARIZONA RULES OF CRIMINAL PROCEDURE

(New language is underlined.)

Rule 6.3. Duties of Counsel; Withdrawal

- a) **Notice of Appearance.** [No change.]
- b) **Duty of Continuing Representation.** [No change.]
- c) **Duty Upon Withdrawal.** [No change.]
- d) [New] **Duty of Defense Counsel to Preserve the File in a Capital Case.** Defendant's counsel shall maintain the records of a capital case in a manner that will inform successor counsel of all significant developments relevant to the litigation, and provide the client's complete records and files, as well as all information regarding every aspect of the representation, to successor counsel.

COMMENT

Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with a complete copy of the records and file consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.13 (2003). The purpose of this rule is to ensure that files are maintained in accordance with the *ABA Guidelines* and to reduce the delay that sometimes occurs in preparing the file for transfer. A file should be properly maintained during the representation and properly stored so it can be expeditiously provided to successor counsel.

The entirety of the attorney's files, including, but not limited to notes, electronic files and correspondence, investigator produced product and mitigation specialist produced product, shall be included.