

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

Order entered September 23, 2008.

(New material is underscored.)

Effective immediately, Supreme Court Rule 41 is amended and the Committee Comments to Supreme Court Rule 416 are revised, as follows.

Amended Rule 41

Rule 41. Judicial Conference

(a) Duties. There shall be a Judicial Conference to consider the work of the courts, to suggest improvements in the administration of justice, and to make recommendations for the improvement of the courts.

(b) Membership.

(1) The membership of the Judicial Conference shall consist of:

(A) The Chief Justice of the Supreme Court of Illinois who shall preside over the conference;

(B) The other members of the Supreme Court, who shall be *ex officio* members of the conference, and the Director of the Administrative Office of the Illinois Courts, who shall also be an *ex officio* member;

(C) The chairperson of the Executive Committee of the Appellate Court of the First Judicial District and the presiding judge of the appellate court in each judicial district other than the First Judicial District;

(D) Thirty judges from the First Judicial District;

(E) Ten judges from each judicial district other than the First Judicial District.

(2)(A) All members designated in subparagraphs (1)(D) and (E) shall be appointed by the Supreme Court; however, at least one chief circuit judge shall be appointed from each judicial district.

(B) At least 10 of the judges appointed from the First Judicial District shall be associate judges of the circuit court, and at least three of the judges appointed from each of the other judicial districts shall be associate judges of the circuit court.

(C) One-third of the initial members appointed by the court from the First Judicial District shall serve until January 1, 1994; one-third shall serve until January 1, 1995; and one-third shall serve until January 1, 1996, or until their successors are appointed. In each of the other judicial districts, four of the initial members appointed by the Court shall serve until January 1, 1994; three shall serve until January 1, 1995; and three shall serve until January 1, 1996, or until their successors are appointed. Each term thereafter shall be for three years, and no member may be appointed to more than three full consecutive terms.

(c) Executive Committee.

(1) The Supreme Court shall appoint six members of the conference from the First Judicial District and two members from each of the other districts to serve on the Executive Committee, which shall act on behalf of the conference when the conference is not in session.

(2) The Chief Justice shall serve as chairperson of the committee, and shall convene the committee as necessary to attend to the business of the conference.

(3) At least 60 days prior to the date on which the Judicial Conference is to be convened the committee shall submit to the Supreme Court a suggested agenda for the annual meeting.

(d) Other Committees. The Executive Committee, on behalf of the conference, shall recommend to the Supreme Court the appointment of such other committees as are necessary to further the work of the conference and shall annually receive from each committee a recommendation as to whether that committee should be maintained or abolished and make appropriate recommendations to the Supreme Court. Each recommendation shall be accompanied by a justification for the recommendation.

(e) Meetings of Conference. The conference shall meet at least once annually at a place and on a date to be designated by the Supreme Court.

(f) Secretary. The Administrative Office of the Illinois Courts shall be secretary of the conference.

Amended effective July 1, 1971; amended March 1, 1993, effective immediately; amended September 23, 2008, effective immediately.

Rule 416—Revised Committee Comments

Rule 416. Procedures in Capital Cases

(a) Scope of Rule. The procedures adopted herein shall be applicable in all cases wherein capital punishment may be imposed, unless the State has given notice of its intention not to seek the death penalty.

(b) Statement of Purpose. This rule is promulgated for the following purpose:

(i) To assure that capital defendants receive fair and impartial trials and sentencing hearings within the courts of this state; and

(ii) To minimize the occurrence of error to the maximum extent feasible and to identify and correct with due promptness any error that may occur.

(c) Notice of Intention to Seek or Decline Death Penalty. The State's Attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)) which the State intends to introduce during the death penalty sentencing hearing.

(d) Representation by Counsel. In all cases wherein the State has given notice of its intention to seek the death penalty, or has failed to provide any notice pursuant to paragraph (c), the trial judge shall appoint an indigent defendant two qualified counsel who have been certified as members of the Capital Litigation Trial Bar pursuant to Rule 714, or appoint the public defender, who shall assign two qualified counsel who have been certified as members of the Capital

Litigation Trial Bar. In the event the defendant is represented by private counsel, the trial judge shall likewise insure that counsel is a member of the Capital Litigation Trial Bar.

The trial judge shall likewise insure that counsel for the State, unless said counsel is the Attorney General or the duly elected or appointed State's Attorney of the county of venue, is a member of the Capital Litigation Trial Bar.

(e) Discovery Depositions in Capital Cases. In capital cases discovery depositions may be taken in accordance with the following provisions:

(i) A party may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of court upon a showing of good cause. In determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition. However, under no circumstances, may the defendant be deposed.

(ii) The taking of depositions shall be in accordance with rules providing for the taking of depositions in civil cases, and the order for the taking of a deposition may provide that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

(iii) Attendance of Defendant. A defendant shall have no right to be physically present at a discovery deposition.

(iv) Signing and Filing Depositions. Rule 207 shall apply to the signing and filing of depositions taken pursuant to this rule.

(v) Costs. If the defendant is indigent, all costs of taking depositions shall be paid by the county wherein the criminal charge is initiated. If the defendant is not indigent the costs shall be allocated as in civil cases.

(f) Case Management Conference. No later than 120 days after the defendant has been arraigned or no later than 60 days after the State has disclosed its intention to seek the death penalty, whichever date occurs earlier, the court shall hold a case management conference. Counsel who will conduct the trial personally shall attend such conference. At the conference, the court shall do the following:

(i) Confirm the certification of counsel under Supreme Court Rule 714 as a member in good standing of the Capital Litigation

Trial Bar.

(ii) Confirm that all disclosures by the State required under Supreme Court Rule 412 have been completed and that the certificate required by paragraph (g) below has been filed or establish a date by which the same shall be accomplished.

(iii) Confirm that all disclosures required by defense counsel under Supreme Court Rule 413 have been completed and that the certificate required by paragraph (h) below has been filed or establish a date by which the same shall be accomplished.

(iv) Confirm that the State has disclosed all statutory aggravating factors enumerated in section 9–1(b) of the Criminal Code of 1961 (720 ILCS 5/9–1(b)) which the State intends to introduce during the death penalty sentencing hearing or establish a date by which the same shall be accomplished.

(v) Confirm that all disclosures required by Supreme Court Rule 417 have been completed or establish a date by which the same shall be accomplished.

(vi) Enter any other orders and undertake any other steps necessary to implement this rule.

(vii) Schedule any further case management conferences which the trial court deems advisable.

(g) In all capital cases the State shall file with the court not less than 14 days before the date set for trial, or at such other time as the court may direct, a certificate stating that the State's Attorney or Attorney General has conferred with the individuals involved in the investigation and trial preparation of the case and represents that all material or information required to be disclosed pursuant to Rule 412 has been tendered to defense counsel. This certificate shall be filed in open court in the defendant's presence.

(h) In all capital cases the defense shall file with the court not less than 14 days before the date set for trial, or at such other time as the court may direct, a readiness certificate signed by both lead and co-counsel stating that they have met with the defendant and fully discussed the discovery, the State's case and possible defenses, and have reviewed the evidence and defenses which may mitigate the consequences for the defendant at trial and at sentencing. This certificate shall be filed in open court in the defendant's presence.

Adopted March 1, 2001. The provisions of paragraphs (d) and (f)(i) which require membership in the Capital Litigation Trial Bar shall be effective one year after adoption of this rule and shall apply in cases

filed by information or indictment on or after said effective date. The remaining provisions of the rule shall be effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the new rules in a particular case pending at the time the rule becomes effective would not be feasible or would work an injustice, in which case former procedures would apply.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

(Revised September 23, 2008)

Rule 416 is part of a series of measures designed to improve pretrial and trial procedures in capital cases. The purpose of Rule 416, as stated in paragraph (b), is to ensure that capital defendants receive fair and impartial trials and to minimize the occurrence of error in capital trials. See also Rule 43 (judicial seminars on capital cases), Rule 411 (applicability of discovery rules to capital sentencing hearings), Rule 412(c) (State identification of material that may be exculpatory or mitigating), Rule 417 (DNA evidence), and Rules 701(b) and 714 (Capital Litigation Trial Bar).

Paragraph (a) limits the application of Rule 416 to cases in which the death penalty may be imposed, *i.e.*, a case involving a first degree murder charge, where the defendant may be eligible for the death penalty and the State has not provided notice it will decline to seek the death penalty. The capital case procedures of Rule 416 are generally not intended to take effect until the State has had the opportunity to provide notice of its intent to seek or decline to seek the death penalty as provided in paragraph (c). All capital case procedures under Rule 416 take effect upon the earlier of: (1) notice that the State intends to seek the death penalty; or (2) expiration of the time for notice under paragraph (c) without notice of the State's intent to seek or not seek the death penalty. A case is presumed to be capital in the event the State does not provide notice in the time allowed by paragraph (c) in order to prevent unreasonable delay in the application of capital case procedures.

Paragraph (c) requires the State to provide pretrial notice of its intent to seek or decline to seek the death penalty as soon as practicable. Unless the court directs otherwise for good cause shown, notice must be given within 120 days after the defendant's

arraignment. If the State intends to seek the death penalty, the aggravating factors the State intends to introduce in the death penalty sentencing hearing must also be disclosed. The notice requirement is intended to improve trial administration by providing the defendant and the court with advance notice that a case is actually, rather than potentially, a capital case. The notice requirement is also intended to promote fairness in capital trials by ensuring the defendant is clearly advised of the State's intent to seek the death penalty and the basis upon which the death penalty will be sought, thereby allowing better preparation for trial. Early notice that the State will not seek the death penalty will also help to limit the use of capital case resources and procedures to actual capital cases.

The committee chose 120 days after arraignment as the benchmark for State notice so that State's Attorneys would have adequate time to decide whether to seek or not seek the death penalty. The committee found that by exercising careful and informed discretion in deciding whether to seek the death penalty, the State's Attorney provides an indispensable check against the possibility of injustice in capital cases. The committee sought to encourage the elected or appointed State's Attorney to personally review potential death penalty cases before making the decision to seek or not seek the death penalty. The committee found that for most capital cases statewide, and nearly all capital cases in Cook County, notice no more than 120 days after arraignment will be far enough in advance of the trial date to provide the defendant with meaningful notice of the nature of the case and to trigger capital case procedures early enough allow the defendant to receive the intended benefit of those procedures.

In some circumstances the State will be required to give notice of its intent to seek or decline to seek the death penalty before 120 days have elapsed. For example, if the State is ready to proceed to trial at an early date, notice of the State's intent should be given immediately. In such cases, the decision to seek or not seek the death penalty has been made, and paragraph (c) requires notice *as soon as practicable*. If the defendant intends to exercise the right to a speedy trial and insist on an early trial date, the defendant may move to accelerate the time for notice. The rule is also intended to permit the trial court to accelerate the time for notice *sua sponte*.

Paragraph (d) provides that two attorneys who are members of the Capital Litigation Trial Bar established by Rule 714 must be appointed to represent an indigent defendant in a capital case. In appointing counsel, the trial court may wish to consider whether the appointment will conflict with counsel's existing caseload. Paragraph

(d) also provides that the trial court must confirm that all attorneys appearing in a capital case (other than the Attorney General or the duly elected or appointed State's Attorney for the county of venue) are members of the Capital Litigation Trial Bar, whether they are public defenders, appointed counsel, retained defense counsel, or members of the prosecution. But see Rule 701(b) (nonmembers may participate in the capacity of third chair under the direct supervision of qualified lead or co-counsel).

The duty to verify the qualifications of counsel and appoint a second attorney to represent an indigent defendant does not take effect until the State gives notice of intent to seek the death penalty or until the time for notice under paragraph (c) expires without any notice from the State. However, while the State's decision to seek or decline to seek the death penalty is pending, the trial court should act to minimize potential harm to the defendant. If the defendant is indigent a member of the Capital Litigation Trial Bar, certified as lead counsel, should be appointed. Appointment of private counsel will be necessary in such cases when the public defender's office does not have qualified counsel available, when the public defender's office can only provide one qualified attorney for the case and has declined to provide representation in association with private appointed counsel (see discussion of mixed representation, below), or when the public defender is otherwise unavailable to provide representation.

In a small number of cases, the defendant may initially retain an attorney who is not member of the Capital Litigation Trial Bar or is not certified as lead counsel. See Rule 701(b) (private attorneys who are not members of the Capital Litigation Trial Bar should not agree to provide representation in a potentially capital case). When the defendant in a potentially capital case appears with retained counsel, the trial court should immediately determine whether the attorney is a member of the Capital Litigation Trial Bar and whether the attorney is certified as lead counsel or will serve as co-counsel with properly certified lead counsel. If it appears counsel is not a member of the Capital Litigation Trial Bar or does not have the proper certification, the court should explain the Capital Litigation Trial Bar membership requirements to the defendant and (unless the State indicates notice that the death penalty will not be sought will be filed *instanter*) advise the defendant to retain a properly certified member of Capital Litigation Trial Bar. Similarly, if a nonindigent defendant in a potentially capital case appears initially without counsel, the court should advise the defendant to retain a properly certified member of the Capital Litigation Trial Bar.

Paragraph (d) also provides that if appointed in a capital case, the

public defender shall assign two qualified attorneys to represent the defendant. As noted above, the appointment of private counsel may be necessary when the public defender's office is unable to provide two qualified attorneys. However, Rule 416(d) is not intended to prohibit the trial court from appointing a private attorney to serve with an attorney from the public defender's office if the public defender's office is able to provide one qualified attorney and both the public defender and private counsel consent.

The committee believes that in many cases the public defender will be willing and able to work with private appointed counsel. The advantages of mixed representation include the ability of the public defender's office to assist private appointed counsel in gaining access to capital case resources and to provide insight regarding local practices. Mixed representation could also provide the opportunity for qualified co-counsel in the public defender's office to obtain experience in capital cases. On the other hand, the risk of inconsistency and disharmony on the defense team, and potential liability issues for the public defender, suggest that the trial court should never make an appointment involving mixed representation without the express consent of the public defender and the private attorney. However, trial courts shall not appoint attorneys of the Office of the State Appellate Defender to serve as trial counsel in capital cases, nor shall attorneys of that agency serve in that capacity unless and until such time as they may be statutorily authorized to appear as trial counsel.

Concerns about potential conflicts between defense counsel also warrant caution when the court appoints two private attorneys for an indigent capital defendant. Lead counsel should be appointed first, and allowed to recommend co-counsel. Lead counsel's recommendation for co-counsel should be accepted, unless the attorney recommended is not a member of the Capital Litigation Trial Bar.

Paragraph (e) permits the parties to seek leave of court to depose persons who have been identified as potential witnesses pursuant to Rule 412 or Rule 413. The committee found that discovery depositions may enhance the truth-seeking process of capital trials by providing counsel with an additional method to discover relevant information and prepare to confront key witness testimony. The availability of discovery depositions may also aid the trial judge in ruling upon motions *in limine* and evidentiary objections at trial.

Although depositions are a necessary means of improving discovery in capital cases, the trial court must be aware of the impact

a deposition may have on a witness, and address any witness problems and concerns as they arise. For example, depositions should be scheduled to avoid conflicts with the work and family obligations of a witness. If there is any concern regarding witness safety, the court may require that the deposition be held in a place or manner that will ensure the security of the witness. The court may also issue protective orders to restrict the use and disclosure of information provided by a witness. Counsel should be prepared to advise the trial court of any special concerns regarding a witness, so the court may fashion an appropriate deposition order.

The decision to permit a deposition is committed to the sound discretion of the trial court. The rule does not limit the use of depositions to specific categories of witnesses, because the need to depose a potential witness will depend on the facts of each case. The committee found, however, that depositions are more likely to be necessary for certain types of witnesses. For example, complex trial issues are often raised by the testimony of jailhouse informants, witnesses who have criminal charges pending, witnesses who have not completed their sentence in a criminal case, and witnesses who testify for the State by agreement. Trial courts may also find depositions of eyewitnesses, and particularly sole eyewitnesses, are warranted to ensure full disclosure and adequate testing of crucial eyewitness testimony. In addition, the complex nature of expert testimony suggests that depositions of expert witnesses may often be justified.

The categories of witnesses mentioned above are illustrative only. Depositions of witnesses falling within these categories are not intended to be automatic. For example, the deposition of a pathologist who will testify regarding cause of death may not be necessary in a case involving the defense of insanity. Conversely, the categories of witnesses suggested above are not exclusive. The trial court's decision to grant or deny a request to depose must be made on a case-by-case basis, considering the facts and issues of the case and the factors listed in the Rule.

Paragraph (e)(iii) provides that a defendant has no right to be physically present at a discovery deposition. The rule is based on the determination that concerns about the risk of witness intimidation, as well as the cost and security issues related to a defendant's attendance at a deposition, far outweigh any potential benefits attendance may have for the defendant. The rule does not foreclose the possibility that the trial court may find sufficient cause to permit the attendance of the defendant at a discovery deposition and is not intended to restrict the discretion of the trial court in that regard.

Paragraph (f) requires the court to hold a case management conference no later than 120 days after the defendant has been arraigned or 60 days after the State provides notice of its intent to seek the death penalty, whichever is earlier. At the case management conference, the court will confirm that counsel are members in good standing of the Capital Litigation Trial Bar, and appoint qualified counsel, as necessary. The case management conference also provides the court with an opportunity to verify that the State has provided notice of those aggravating factors the State intends to introduce in the capital sentencing hearing. The court may also take any other steps necessary to ensure compliance with Rule 416. Scheduling of additional case management conferences is within the discretion of the trial court.

The case management conference provides an important tool for management of the discovery process. Subparagraphs (ii) and (iii) of paragraph (f) authorize the court to monitor compliance with discovery requirements and set deadlines for discovery under Rules 412 and 413, respectively. The provisions of subparagraph (vi) of paragraph (f) permit the court to establish deadlines for requesting and taking depositions. Specific deadlines for depositions should be established when needed to prevent undue delay in bringing a case to trial and to avoid speedy-trial issues.

Paragraph (f) does not limit the trial court's discretion with respect to procedures for case management conferences, and permits the trial court to expand the scope of the conferences as the circumstances require. For example, the trial court may wish to hold a conference pertaining to discovery deadlines in an informal setting, and confirm the results of the conference with a written discovery order. While the rule is intended to be flexible, the committee notes that in the context of a criminal proceeding the use of informal case management conference procedures must be approached with caution, and the need for a record should always be considered.

Paragraph (g) requires the State to certify that disclosures required by Rule 412 have been completed (subject to the continuing duty to disclose additional materials under Rule 415(b)). Paragraph (g) also requires certification that the State has contacted persons involved in the investigation and trial preparation of the case to determine the existence of material required to be disclosed under Rule 412. The duty to contact persons involved in the investigation under paragraph (g) supplements the duty to ensure a flow of information between prosecutors, investigators, and other law enforcement personnel established by Rule 412(f) and is intended to minimize the risk of nondisclosure of exculpatory or mitigating evidence. Prosecutors

should also verify that they have obtained and properly disclosed all relevant information from experts and laboratory personnel.

Making specific inquiries to determine the existence of material that must be disclosed is especially important with respect to information that must be disclosed under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). In *Strickler v. Greene*, 527 U.S. 263, 280-81, 144 L. Ed. 2d 286, 301-02, 119 S. Ct. 1936, 1948 (1999), the United States Supreme Court provided the following summary of its decisions regarding the duty to disclose:

“In *Brady*, this Court held ‘that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’ [Citation.] We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused [citation] and that the duty encompasses impeachment evidence as well as exculpatory evidence [citation]. Such evidence is material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ [Citations.] Moreover, the rule encompasses evidence ‘known only to police investigators and not to the prosecutor.’ [Citation.] In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.’ [Citation.]

These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’ ”

Under *Strickler*, there can be no question that the responsibility to disclose exculpatory or mitigating material extends beyond disclosure of information in the prosecutor’s file. Regardless of the good faith of the prosecutor, failure to disclose exculpatory or mitigating information in the possession of police or other law

enforcement personnel, laboratory personnel, and State experts may undermine confidence in the outcome of a trial. The committee recognizes that conferring with the oftentimes numerous persons involved in investigating and preparing a capital case for trial may be burdensome; however, the committee found that making the effort to do so is, in fact, the only prudent course in light of the scope of the duty to disclose and the magnitude of the proceedings.

The reference to the “State’s Attorney or Attorney General” in paragraph (g) of Rule 416 is intended to emphasize the importance of making proper pretrial disclosures to the defense, but includes all counsel acting on behalf of the State’s Attorney or the Attorney General. Consequently, paragraph (g) does not require the personal appearance or action of the State’s Attorney or the Attorney General, and certification may be provided by the attorney(s) prosecuting the case. Similarly, paragraph (c) is not intended to require that notice of intent to seek or not seek the death penalty must be provided personally by the State’s Attorney or the Attorney General, though the actual responsibility to decide whether to seek the death penalty will rarely, if ever, be delegated. On the other hand, “Attorney General or the duly elected or appointed State’s Attorney of the county of venue,” as used in the last sentence of paragraph (d), refers exclusively to the individuals who occupy the office of Attorney General and the office of State’s Attorney of the county of venue.

Paragraph (h) requires certification of defense readiness for trial. Like the State’s certification under paragraph (g), the defense certification of readiness for trial is to be filed in open court, in the presence of the defendant. At the time of filing the certificates required by paragraphs (g) and (h), the defendant should be allowed the opportunity to voice any objections regarding pretrial matters such as the lack of opportunity to speak to counsel, or other complaints, so these issues can be dealt with in advance of trial.