

M.R. 3140

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

Order entered March 1, 2001.

(Deleted material is struck through and new material is underscored.)

Effective March 1, 2001, Rule 3.8 of the Illinois Rules of Professional Conduct and Rules 411, 412 and 701 are amended and Rules 43, 416, 417 and 714 are adopted as follows:

Amended Rule 3.8 of the Illinois Rules of Professional Conduct

Rule 3.8. Special Responsibilities of a Prosecutor

(a) The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.

~~(a)~~ (b) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when such prosecutor or lawyer knows or reasonably should know that the charges are not supported by probable cause.

~~(b)~~ (c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.

~~(c)~~ (d) In addition to his or her obligations under Rule 3.6, a public prosecutor or other government lawyer in criminal litigation shall exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that

the public prosecutor or other government lawyer would be forbidden from making under Rule 3.6.

~~(d)~~ (e) The prosecutor in a criminal case shall refrain from making extrajudicial comments that would pose a serious and imminent threat of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose.

Adopted February 8, 1990, effective August 1, 1990; amended November 20, 1991, effective immediately; amended October 30, 1992, effective immediately; amended October 22, 1999, effective December 1, 1999; stayed November 23, 1999, stay lifted March 16, 2000, effective immediately; amended March 1, 2001, effective immediately.

Committee Comments
Special Supreme Court Committee on Capital Cases
March 1, 2001

Paragraph (a) of Rule 3.8 is substantially similar to Standard 3–1.2(c) of the American Bar Association (ABA) Standards for Criminal Justice (3d ed. 1993); however, paragraph (a) of Rule 3.8 restates a principle that is far older than the ABA standard. In 1924, the Illinois Supreme Court reversed a conviction for murder, noting that:

“The State’s attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.” *People v. Cochran*, 313 Ill. 508, 526 (1924).

In 1935, the United States Supreme Court described the duty of a federal prosecutor in the following passage:

“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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629, 633 (1935).

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. Paragraph (a) of Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably.

New Rule 43

Rule 43. Seminars on Capital Cases

(a) In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing Capital Litigation Seminars approved by the Supreme Court shall be established for judges that may as part of their designated duties preside over capital litigation. The Capital Litigation Seminars should include, but not be limited to, the judge’s role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year.

(b) Any circuit court judge or associate judge who in his current assignment may be called upon to preside over a capital case shall attend a Capital Litigation Seminar at least once every two years.

Adopted March 1, 2001, paragraph (a) effective immediately, paragraph (b) effective one year after adoption of the rule.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

The committee's proposal to require judicial training follows from the finding that reliability and fairness in a capital trial depend upon the skill and knowledge of the trial judge, the prosecutor, and counsel for the defense. The training requirement for judges complements rules establishing minimum qualifications for defense counsel and prosecutors in capital cases. See Rules 416(d), 701 and 714. Rule 43 establishes a regular series of Capital Litigation Seminars, and provides that judges who may preside over capital cases in the course of their regular assignment must attend a seminar at least once every two years. Aside from the direct benefits of the training seminars, Rule 43 will also insure that continuously updated training and reference materials are available to judges who hear capital cases.

Rule 43 is intended to increase judicial training and access to information and should not be viewed as a limitation on the kind or amount of training judges receive. For example, in requiring attendance at seminars, Rule 43 is not intended to foreclose the use of video conferencing, Internet access, or other technological means to participate in training from remote locations. Trial judges are encouraged to participate in additional training whenever possible.

It is contemplated that any judge who presides over a capital case on or after the effective date of paragraph (b) of the rule will have prior thereto attended a Capital Litigation Seminar.

Amended Rule 411

Rule 411. Applicability of Discovery Rules

These rules shall be applied in all criminal cases wherein the accused is charged with an offense for which, upon conviction, he might be imprisoned in the penitentiary. If the accused is charged with an offense for which, upon conviction, he might be sentenced to death, these rules shall be applied to the separate sentencing hearing provided for in section 9-1(d) of the Criminal Code of 1961 (720 ILCS 5/9-1(d)). They shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing.

Effective October 1, 1971; amended March 1, 2001, effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the amended provisions in a particular case pending at the time the amendment 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

Rule 411, as amended, makes criminal discovery rules applicable to the sentencing hearing in a capital case. A capital sentencing hearing is a unique and complex proceeding, which often takes place immediately following trial on the merits. Allowing pretrial discovery for capital sentencing will assist counsel in preparing for this critical stage of a capital trial and prevent delay and disruption of the sentencing hearing. See also Rule 416(c) (pretrial notice of aggravating factors the State will rely upon in sentencing).

The amendment to Rule 411 does not create new forms of discovery. Instead, the amendment extends the application of existing discovery methods to capital sentencing hearings. The committee notes that any discovery rule that requires disclosure by the defense is subject to constitutional limitations and limitations based on attorney-client or other privilege. Existing discovery rules expressly mention constitutional limitations on defense disclosures (see, e.g., Rule 413) and provide that attorney work product is not subject to disclosure by the State or the defense (Rule 412(j)).

The committee found that the existing discovery rules and associated case law would adequately address constitutional and privilege-based objections to pretrial disclosure of sentencing information by the defense. However, constitutional and privilege-based limitations on discovery do not preclude the possibility that pretrial disclosure of defense sentencing information could directly or indirectly aid the State's case on the merits. The extension of discovery procedures to capital sentencing is not intended to provide such an advantage to the State.

In the event the defense objects to disclosure of specific sentencing information on the ground that disclosure would harm the defense case

on the merits, the trial court should take any action necessary to prevent that harm. Options available to the trial court include excision of objectionable material pursuant to Rule 415(e) and the use of protective orders to defer disclosure or restrict the use of information disclosed (Rule 415(d)). *In camera* review of a claim of potential harm from disclosure of sentencing information (Rule 415(f)) may be appropriate to prevent disclosure of defense theories or strategy, or where the identity of a defense sentencing witness is unknown to the State.

Amended Rule 412

Rule 412. Disclosure to Accused

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing

or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

If the State has obtained from the defendant, pursuant to Rule 413(d), information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the State intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii), and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

(b) The State shall inform defense counsel if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party, or of his premises.

(c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor. The State shall make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense. At trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State's identification of any material or information as tending to negate the guilt of the accused or reduce his punishment.

(d) The State shall perform its obligations under this rule as soon as practicable following the filing of a motion by defense counsel.

(e) The State may perform these obligations in any manner mutually agreeable to itself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed, during specified reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(f) The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to

place within its possession or control all material and information relevant to the accused and the offense charged.

(g) Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the State, and which is in the possession or control of other governmental personnel, the State shall use diligent good-faith efforts to cause such material to be made available to defense counsel; and if the State's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

(h) **Discretionary Disclosures.** Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court, in its discretion, may require disclosure to defense counsel of relevant material and information not covered by this rule.

(i) **Denial of Disclosure.** The court may deny disclosure authorized by this rule and Rule 413 if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to counsel.

(j) Matters Not Subject to Disclosure.

(i) *Work Product.* Disclosure under this rule and Rule 413 shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff.

(ii) *Informants.* Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(iii) *National Security.* Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

Effective October 1, 1971; amended October 1, 1976, effective November 15, 1976; amended June 15, 1982, effective July 1, 1982; amended March 1, 2001, effective immediately, except when in the

opinion of the trial, Appellate, or Supreme Court the application of the amended provisions in a particular case pending at the time the amendment 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

In developing the specific-identification proposal, the committee was concerned with the possibility that information that clearly tends to be exculpatory or mitigating would not be disclosed or would be lost among other information. Examples of information that clearly tends to be exculpatory or mitigating include: a statement that a person other than the defendant committed the crime, a statement that the act that caused death was committed by an accomplice, or a preliminary scientific test result that is not inculpatory, and some types of impeachment evidence, such as certain prior convictions of State witnesses, information concerning promises or expectations of leniency for a State witness, or prior inaccurate or unsuccessful attempts at identification of the perpetrator by an occurrence witness. The purpose of the specific-identification requirement is to reinforce the duty to disclose and reduce the chance of pretrial or trial error with respect to this type of evidence.

The amendment to paragraph (c) requires a “good-faith” effort to specifically identify exculpatory and mitigating materials “based on information available to the State at the time the material is disclosed to the defense.” Thus, the duty to specifically identify is not as broad as the duty to disclose under Rule 412(c). See Rule 416(g), committee comments. The good-faith standard is intended to avoid creating an impossible burden for the prosecution. A “good-faith” effort by prosecutors would include the specific identification of information that clearly tends to be exculpatory or mitigating. The amended rule is not intended to require that prosecutors specifically identify materials with remote or speculative exculpatory or mitigating value. The need to specifically identify materials falling between the extremes will depend upon the facts of the case.

The language stating that the duty to identify exculpatory or mitigating information must be viewed in light of the information available to the State when the material is disclosed to the defense is

significant for several reasons. First, the information available to the State when disclosure is made will guide the determination of whether the State has made a good-faith effort to specifically identify exculpatory or mitigating information. Failure to identify information that can be characterized as exculpatory or mitigating only when viewed in light of the defense's theory of the case cannot be seen as evidence of failure to comply with the rule when the State was not aware of the defense theory. Second, placing the focus of the inquiry regarding compliance with the rule on information available at the time of disclosure to the defense is intended to avoid a standard based on hindsight evaluation of the exculpatory or mitigating value of information. Thus, a prosecutor's failure to identify information should not be second-guessed based on defense theories revealed after the information has been disclosed, unexpected events at trial, or new theories suggested after the trial.

The committee notes that in light of new evidence received or events at trial, materials that had no exculpatory value when initially disclosed could be viewed as exculpatory later in the trial process. The committee did not intend that the duty to specifically identify exculpatory or mitigating information would be subject to continuous updating.

The specific identification of potentially exculpatory or mitigating material by the prosecution pursuant to paragraph (c) is not an admission by the State for any purpose. Neither the terms or manner of the specific identification by the prosecution nor the fact that the prosecution has made the specific identification are relevant or admissible for the purposes of trial on the merits or sentencing. In addition, specific identification of materials pursuant to paragraph (c) does not imply that the material will be admissible as evidence.

New Rule 416

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

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.

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.

New Rule 417

Rule 417. DNA Evidence

(a) Statement of Purpose. This rule is promulgated to produce uniformly sufficient information to allow a proper, well-informed determination of the admissibility of DNA evidence and to insure that such evidence is presented competently and intelligibly. The rule is designed to provide a minimum standard for compliance concerning DNA evidence, and is not intended to limit the production and discovery of material information.

(b) Obligation to Produce. In all felony prosecutions, post-trial and post-conviction proceedings, the proponent of the DNA evidence, whether prosecution or defense, shall provide or otherwise make available to the adverse party all relevant materials, including, but not limited to the following:

(i) Copies of the case file including all reports, memoranda, notes, phone logs, contamination records, and data relating to the testing performed in the case.

(ii) Copies of any autoradiographs, lumigraphs, DQ Alpha Polymarker strips, PCR gel photographs and electropherograms, tabular data, electronic files and other data needed for full evaluation of DNA profiles produced and an opportunity to examine the originals, if requested.

(iii) Copies of any records reflecting compliance with quality control guidelines or standards employed during the testing process utilized in the case.

(iv) Copies of DNA laboratory procedure manuals, DNA testing protocols, DNA quality assurance guidelines or standards, and DNA validation studies.

(v) Proficiency testing results, proof of continuing professional education, current curriculum vitae and job description for examiners, or analysts and technicians involved in the testing and analysis of DNA evidence in the case.

(vi) Reports explaining any discrepancies in the testing, observed defects or laboratory errors in the particular case, as well as the reasons for those and the effects thereof.

(vii) Copies of all chain of custody documents for each item of evidence subjected to DNA testing.

(viii) A statement by the testing laboratory setting forth the method used to calculate the statistical probabilities in the case.

(ix) Copies of the allele frequencies or database for each locus examined.

(x) A list of all commercial or in-house software programs used in the DNA testing, including the name of the software program, manufacturer and version used in the case.

(xi) Copies of all DNA laboratory audits relating to the laboratory performing the particular tests.

Adopted March 1, 2001, effective immediately, except when in the opinion of the trial, Appellate, or Supreme Court the application of the new rule 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

The standardized disclosures required by Rule 417 are intended to provide the information necessary for a full understanding of DNA test results, and to aid litigants and the courts in determining the admissibility of those results. The rule requires disclosure of information that is, or should be, readily available from any laboratory performing DNA testing. Standardized disclosure requirements should also make responses to disclosure requests less burdensome for laboratory personnel.

In drafting the rule, the committee considered court opinions from

several jurisdictions that established guidelines for pretrial disclosures regarding DNA evidence. See, e.g., *People v. Castro*, 144 Misc. 2d 956, 978-9, 545 N.Y.S.2d 985, 999 (1989); *People v. Perry*, 586 So. 2d 242, 255 (Ala. 1991); *Polk v. State*, 612 So. 2d 381, 394 (Miss. 1992). Rule 417 draws from those opinions, but also reflects the committee's examination of current practices in forensic science.

The disclosures required by the rule can be crucial in any trial in which the discovery rules for criminal cases apply, and also in related post-trial and post-conviction proceedings (including a proceeding on a motion for DNA testing not available at the time of trial to establish actual innocence (725 ILCS 5/116-3)). Therefore, the rule requires production of information regarding DNA testing by the proponent of DNA evidence in any felony trial, and in all related post-trial or post-conviction proceedings. While the disclosures required under the rule encompass the technologies presently utilized (restriction fragment length polymorphism, polymerase chain reaction, short tandem repeats, etc.), production is not limited to those techniques. Because the rule provides no limitation upon the specific information or materials to be provided, it is designed to encompass future techniques that may be developed in the testing of DNA evidence.**Amended Rule 701**

Rule 701. General Qualifications

(a) Subject to the requirements contained in these rules, persons may be admitted to practice law in this State by the Supreme Court if they are at least 21 years of age, of good moral character and general fitness to practice law, and have satisfactorily completed examinations on academic qualification and professional responsibility as prescribed by the Board of Admissions to the Bar or have been licensed to practice law in another jurisdiction and have met the requirements of Rule 705.

(b) Any person admitted to practice law in this State is privileged to practice in every court in Illinois. No court shall by rule or by practice abridge or deny this privilege by requiring the retaining of local counsel or the maintaining of a local office for the service of notices. However, no person, except the Attorney General or the duly appointed or elected State's Attorney of the county of venue, may appear as lead or co-counsel for either the State or defense in a capital case unless he or she is a member of the Capital Litigation Trial Bar provided for in Rule 714.

Amended effective October 2, 1972; amended April 8, 1980,

effective May 15, 1980; amended June 12, 1992, effective July 1, 1992; amended March 1, 2001. The amendment to paragraph (b) shall be effective one year after its adoption, and shall apply in capital cases filed by information or indictment on or after its effective date.

Committee Comments
Special Supreme Court Committee on Capital Cases
March 1, 2001

The requirement that all defense counsel and assistant prosecutors appearing as lead or co-counsel in capital cases must be members of the Capital Litigation Trial Bar was adopted to improve the fairness and reliability of capital trials. The minimum qualifications for membership in the Capital Litigation Trial Bar are intended to insure that capital cases are tried by experienced, well-trained attorneys. See Rule 714. The amendment to Rule 701(b) provides the means for enforcement of the qualification standards by prohibiting an attorney who is not a member of the Capital Litigation Trial Bar from appearing as lead or co-counsel in a capital case. See also Rule 416(d). The Capital Litigation Trial Bar membership requirement does not apply to the elected or appointed State's Attorney of the county of venue or the Attorney General. In addition, Rule 701(b) does not prohibit nonmembers from participating in a capital trial in the capacity of "third chair," provided such participation by a third attorney for the prosecution or defense is under the direct supervision of qualified lead or co-counsel.

For the purposes of Rule 701(b), the definition of a "capital" case is supplied by paragraphs (c) and (d) of Rule 416. Rule 416(c) provides that the State must give notice of its intent to seek or decline to seek the death penalty as soon as practicable, and in no event later than 120 days after arraignment, unless the court directs otherwise. Rule 416(d) provides that if the State provides notice of intent to seek the death penalty or fails to provide any notice in the time allowed by Rule 416(c), the trial court must confirm that attorneys appearing in the case are properly certified members of the Capital Litigation Trial Bar. Thus, the Capital Litigation Trial Bar membership requirement of Rule 701(b) is effective upon notification that the State will seek the death penalty or expiration of the time allowed for notice under Rule 416(c) without any notice from the State, whichever occurs first.

Though the trial court will not enforce the counsel qualification standards of this rule and Rule 714 until the State provides notice of intent to seek the death penalty or the time for notice expires, in any case where the defendant may be eligible for the death penalty, defense counsel must presume the case will be capital unless the State has provided notice to the contrary. Attorneys who are not members of the Capital Litigation Trial Bar should not agree to provide representation for a defendant in a potentially capital case (i.e., a case in which the defendant may be eligible for the death penalty, where the time for State notice has not expired and the State has not provided any notice with respect to its intent to seek or decline to seek the death penalty). Attorneys should also decline to provide representation as sole counsel for a defendant in a potentially capital case, unless they are properly certified as lead counsel. See Rule 714. An attorney who is not properly certified under Rule 714 should never agree to provide representation for a defendant in a potentially capital case on the assumption that the State will not seek the death penalty, or that admission to the Capital Litigation Trial Bar or proper certification will be obtained after accepting the engagement.

When considering representation of a defendant charged with first degree murder, an attorney who is not a member of the Capital Litigation Trial Bar (or does not have proper certification) should immediately determine whether the defendant may be subject to the death penalty. The attorney should ascertain, for example, whether the defendant has been denied bail because the offense is capital, or whether the charges filed or information available through reasonable investigation suggest that one of the statutory aggravating factors of section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)) may apply. If any information available to the attorney suggests the case is potentially capital, the attorney should decline to provide representation for the defendant. An agreement to provide limited representation in a potentially capital case should be entered into only after careful consideration of the complex practical, legal, and ethical issues involved, and full disclosure of the attorney's inability to provide representation in a capital case.

Adherence to the principles described above with respect to defense counsel in a potentially capital case will ensure fairness to the defendant, compliance with ethical responsibilities, and the proper administration of justice. Consistent with these principles, an attorney appointed for an indigent defendant in a potentially capital case should be a member of the Capital Litigation Trial Bar, certified as lead counsel.

In addition, State's Attorneys are encouraged to assign assistant prosecutors who are members of the Capital Litigation Trial Bar in all potentially capital cases.

New Rule 714

Rule 714. Capital Litigation Trial Bar

(a) Statement of Purpose. This rule is promulgated to insure that counsel who participate in capital cases possess the ability, knowledge and experience to do so in a competent and professional manner. To this end, the Supreme Court shall certify duly licensed attorneys to serve as members of the Capital Litigation Trial Bar.

(b) Qualifications of Members of the Capital Litigation Trial Bar. Unless exempt under paragraph (c), or the Supreme Court determines that an attorney otherwise has the competence and ability to participate in a capital case pursuant to paragraph (d), trial counsel must meet the following minimum requirements:

Lead Counsel—Qualifications

(1) Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*.

(2) Be an experienced and active trial practitioner with at least five years of criminal litigation experience.

(3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois.

(4) Have prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either

(i) have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or

(ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

Co-Counsel—Qualifications

(1) Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*.

(2) Be an experienced and active trial practitioner with at least three years of criminal litigation experience.

(3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois.

(4) Have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion; and either

(i) have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or

(ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

(c) The Attorney General or duly elected or appointed State's Attorney of each county of this state shall not be disqualified from prosecuting a capital case because he or she is not a member of the Capital Litigation Trial Bar.

(d) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Supreme Court may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, appellate or post-conviction experience or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in capital cases.

(e) Application for Admission to the Capital Litigation Trial Bar. In support of an application, an attorney shall submit to the Illinois Supreme Court a form approved by the Administrative Office of the Illinois Courts. It shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement that he or she requests be waived and shall set forth in detail such criminal or civil litigation, appellate or post-conviction experience or other exceptional qualifications that justify waiver. Applications for certification as lead counsel by attorneys previously certified as co-counsel shall be handled in the same manner as

original applications for admission to the Capital Litigation Trial Bar.

(f) Creation of Capital Litigation Trial Bar Roster. The Administrative Office of the Illinois Courts shall review each application to determine that it is complete. All completed applications shall be delivered, within 30 days of their receipt, to the screening panel designated by the Supreme Court to consider such applications. Within 30 days of receipt of the application the screening panel shall designate those attorneys deemed qualified to represent parties in capital cases and shall report those findings to the Supreme Court. Upon concurrence by the Supreme Court, the court shall direct the Administrative Office to maintain and promulgate a roster of attorneys designated as members of the Capital Litigation Trial Bar. The roster shall indicate whether the attorney is certified as lead counsel or co-counsel.

(g) Removal of Eligibility. The Supreme Court may remove from the roster of the Capital Litigation Trial Bar any attorney who, in the court's judgment, has not provided ethical, competent, and thorough representation.

Adopted March 1, 2001, effective immediately.

Committee Comments

Special Supreme Court Committee on Capital Cases

March 1, 2001

The most important safeguard of the fairness and accuracy of capital trials is the competence, professionalism, and integrity of the attorneys who try those cases. Upon comparing the roles of the prosecution and the defense (including public defenders, appointed counsel, and retained counsel), the committee concluded that no group could be singled out as the source of the "problem" in capital trials, or the sole object of a "solution." Fair and accurate results in a capital trial are the result of quality advocacy by both the prosecution and the defense. Rule 714 is based on the committee's unanimous finding that reasonable, minimum standards for training and experience, consistently applied as a condition of trial bar admission, are the only way to ensure significant, systemwide improvement in the quality of advocacy in capital trials.

Rule 714 draws on a rule adopted by the Nevada Supreme Court in 1990, which establishes minimum qualifications for appointed and

retained defense counsel in capital cases. The committee also considered the Illinois State Bar Association's recommended qualifications for appointed and retained defense counsel in capital cases. In addition, the use of trial bar membership requirements as a means of improving the quality of trial advocacy finds precedent in the trial bar rules of the United States District Court for the Northern District of Illinois. Rule 714 incorporates ideas from each of these sources, but is designed to achieve uniform application of qualification standards throughout the state by placing Capital Litigation Trial Bar membership matters under the exclusive jurisdiction of the Supreme Court.

All defense counsel and assistant prosecutors appearing as lead or co-counsel in a capital case must be members of the Capital Litigation Trial Bar. See Rule 416(d), and Rule 701(b). The trial bar requirement does not apply to an elected or appointed State's Attorney of the county of venue or to the Attorney General. Defense counsel must be aware that they should not agree to provide representation in a potentially capital case unless they are properly certified members of the Capital Litigation Trial Bar. See Rule 416(d) and Rule 701(b), committee comments.

Counsel may only serve in the capacity (lead or co-counsel) in which they are admitted to the Capital Litigation Trial Bar. Sole counsel in a capital case must be qualified as lead counsel. The distinction between lead and co-counsel is not intended to imply that lead counsel must be present for every pretrial matter in a capital case. Co-counsel may participate in any manner approved by the lead attorney; however, lead counsel must, at a minimum, be present at the initial case management conference (Rule 416(f)) and at all stages of the trial of the case.

Paragraph (e) provides that an application for certification as lead counsel by an attorney previously admitted to the Capital Litigation Trial Bar as co-counsel is handled in the same manner as an original application for admission. The separate application process in such cases is not intended to imply that certification as lead counsel requires training in addition to that required for admission. However, all Capital Litigation Trial Bar members are encouraged to view the training required for admission as a minimum standard, and participate in additional training whenever possible.

Attorneys who are not members of the Capital Litigation Trial Bar may participate in capital trials in the capacity of "third chair," provided such participation by a third attorney for the prosecution or defense is under the direct supervision of lead or co-counsel. Although participation in a capital trial as third chair will not satisfy the experience

requirements of Rule 714, the experience gained may be considered for the purposes of a request for waiver under paragraph (d).