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Justice rips shoddy work of private capital case lawyers*Current standards for post-conviction counsel are 'inadequate'*

By Jan Pudlow

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Privatizing post-conviction appeals in death penalty cases has resulted in "some of the worst lawyering I have seen" and some of the "worst briefs I have read," Florida Supreme Court Justice Raoul Cantero told the Commission on Capital Cases.

"I'm talking about minimum standards. I'm not talking about requiring Clarence Darrow-quality high standards. I'm talking about whether this person should be doing these cases at all," Cantero said.

A frank discussion of the quality — or lack thereof — of private attorneys who agree to represent death row inmates in post-conviction appeals has prompted commission members to find ways to fix the problem — including the idea of raising the minimum standards to qualify as registry counsel by statute.

The subject of Cantero's comments also came up at the Senate Committee on Justice Appropriations meeting February 16.

"We will look for guidance from the commission," Sen. Victor Crist, R-Tampa, chair, told Roger Maas, executive director of the Commission on Capital Cases.

"I have met personally with the last three chief justices. Each has stated the same thing: As long as we have quality capital collateral counsel, there is a level of comfort with the court in dealing with capital cases. But if that was to erode, we could have problems. Whether private or public, it needs to be quality representation, or we will lose that confidence, that ethos."

More private attorneys were needed to handle complicated death penalty appeals in 2003, after Brad Thomas, then Gov. Jeb Bush's policy advisor and now a First District Court of Appeal judge, lobbied to privatize all capital collateral counsel, with the rationale that death cases will move faster to their ultimate conclusion and private lawyers can do it cheaper.

"Brad Thomas is who brought it to us," Crist said. "In the astute wisdom of the Senate, we decided to slow it down and do a test and that's how this whole thing came about."

In the end, the legislature eliminated one of three state death penalty appeals offices, laying off 10 lawyers and 15 support staff in the CCRC Northern Regional Office, and calling for a three-year pilot project to study efficiencies.

Maas told both commissioners and senators that Bush is "not pushing for more privatization, but is not opposed to it. The governor would oppose reinstatement of CCRC North."

Crist appeared surprised.

"The governor was pushing privatization for the last two years and the Senate was holding the line. Change of heart?" Crist asked.

Crist continued that it was "pretty much a unanimous feeling" of the Senate Committee on Justice Appropriations to "leave the pilot project intact. . .

"At this juncture, it is premature to determine success or failure, and we really need 36 months to study it to get an accurate sampling to determine which direction to go," Crist said. "We want to make sure the Supreme Court is comfortable and confident. . . . Ultimately, we want to preserve the capital punishment system. We don't want to create an imbalance that would put it into jeopardy."

Earlier, at the Commission on Capital Cases meeting, Cantero said totally privatizing all three CCRCs would be a bad idea.

"The final area of concern I have is the idea of totally eliminating all CCRCs at this point," Cantero said. "I think we have finally gotten to the point where there is some organization in the death penalty process, and there is competent representation from the CCRC. The complaints of delays for delay's sake that were prevalent in years past with CCRC don't pertain any longer to that office. I haven't seen it, at least. . . . We will need a lot more registry counsel if we eliminate CCRCs at this point. I'm not sure there are enough quality registry lawyers to pick up the slack."

The current situation of lawyers with little understanding of death penalty appeals, as described by Cantero at the January 25 meeting, has created gross inefficiencies at the Supreme Court.

Cantero said that though death penalty appeals are only 3 to 5 percent of the number of cases at the high court, they consume 40 percent of court's case load and at least half of the oral argument calendar at any given time.

Though he has only been on the court two and a half years, Cantero said, the high volume of death penalty cases has given him expertise in comparing the preparedness of private registry lawyers versus CCRC.

"I will tell you the representation from the CCRC is consistently average or above average to excellent," Cantero said. "As far as the registry

counsel, those who were formerly CCRC counsel, some of them are some of the best ones that they had. I am very disappointed, however, by representation of many registry counsel that have practiced before the court.

"I think some of the worst lawyering I've seen is from some of registry counsel, unfortunately. If you look at some of the oral arguments, you will understand why. It seems to me some registry counsel have little or no experience in death penalty cases. They have not raised the right issues, from our review of the record. Sometimes, they raise too many issues and still they haven't raised the right ones. In arguments, they are unable to respond to questions or don't know what the record shows. They don't have a real good understanding of death penalty cases, I don't think."

Part of the problem is the low threshold of experience, Cantero said. The registry lawyers who are charged with finding mistakes made by trial counsel are not required to have as much experience as the trial counsel.

For example, the Supreme Court, in Rule 3.112, Rules of Criminal Procedure, requires five years in litigating criminal cases and nine trials, of which two the lawyer was lead or co-counsel in a death penalty case. Of those nine, the attorney should have been lead counsel in which three were murder trials or one was a murder trial and an additional five were felony trials.

Compare those requirements to standards set by statute, in Chapter 27, Part IV, for capital collateral lawyers: Three years in criminal law, and participating in five felony jury trials or five felony appeals or five capital evidentiary hearings or any combination of five of those.

"A felony can be a burglary," Cantero said. "Just because you've had five burglary trials by no means indicates you can handle a post-conviction death penalty case."

In a February 9 follow-up letter to Maas, Chief Justice Barbara Pariente wrote: "In the past several years, the court has observed a marked improvement in the representation provided by the regional CCRC offices. As for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.

"As you are aware, several years ago, the court adopted standards for private counsel assigned to death penalty appeals, but declined to adopt standards for post-conviction counsel that would vary from those passed from the legislature. However, we believe that the current standards of post-conviction counsel are inadequate."

At the commission meeting, Rep. Sandy Adams, R-Oviedo, asked Cantero: "If you find a lawyer is not truly competent to work on a capital case. . . have you thought of removing them from the case?"

And Cantero answered: "I've thought about it. I'm not sure we can. We have thought about whether this person should be a registry counsel at all. I think we are reluctant to go to that drastic a step."

Mike Reiter, who lost his job as head of CCRC North, is now a registry lawyer.

"It is not my intention to attack the registry in any way. First of all, I am on the registry," Reiter told the commission. But he said "there is no substitute for the experience and training you get working full-time at the CCRC," adding case strategies by all lawyers were supervised.

"I realize that the governor and others want a full three-year pilot project to continue before they have it analyzed. But if there is a flaw in the quality of services being provided by the registry attorneys, it will just get worse over time, not better," Reiter said.

"Now you're talking about going full circle, spending more for registry lawyers than CCRC working full-time. You may in time have better quality from CCRC counsel and less cost by the time it's all done."

Rep. Adams asked Reiter if there is no oversight of functions of registry lawyers.

"True," said Reiter.

"So we are handing out funding with no accountability?" she asked.

"That's correct," Reiter answered.

He added that if standards are raised for private attorneys who take post-conviction death penalty appeals, "the less number of lawyers will qualify and there will be a reduction of people on the registry. If you are saying raise the cost of the registry to increase the quality, you have just recreated the CCRCs in a smaller package. That's all you're doing."