

It is no exaggeration to say that the Maricopa County Superior Court is both a large court, and a well-regarded one. It serves a growing and diverse population, and it often is at the forefront of court and jury administration.

One of those groundbreaking programs was the institution of criminal settlement conferences.

## ***Settlement Conferences in Criminal Court***

BY HON. ROBERT L. GOTTSFIELD AND MITCH MICHKOWSKI, Ph.D.

**Hon. Robert L. Gottsfield** is a retired but called-back full-time judge of the Superior Court, Maricopa County, who currently conducts 40 to 60 settlement conferences a month.

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## ***A Busy Court***

The Superior Court of Arizona in Maricopa County is the fifth-largest trial court in the United States, consisting of 94 judges and 52 commissioners, of which 28 judges and 29 commissioners are assigned a criminal calendar. In fiscal year 2006, ending June 30, there were 40,928 criminal cases filed, in addition to 36,691 civil cases and 50,878 family court cases. This added up to a docket of 157,956 total case filings. With respect to criminal cases, the court typically disposes of almost 92 percent of such cases over a 12-month period.

The court has a nationwide reputation as an innovative court.<sup>1</sup> Many of the jury reforms of the last 10 years were instituted here, including jurors asking questions of witnesses in both civil and criminal trials, and letting civil jurors (but not criminal jurors) discuss a case before final deliberations as long as all jurors are present in the jury room.<sup>2</sup>

Although this court is not the first to conduct criminal settlement conferences, it is certainly among the very first courts to do so on a large scale.<sup>3</sup>

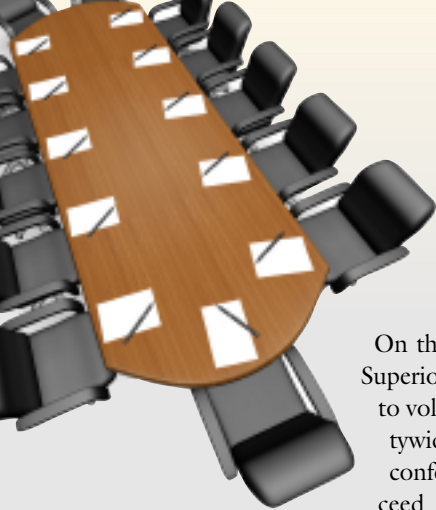
As in most jurisdictions, criminal cases take precedence for trial purposes over civil cases, and at times criminal cases are ready for trial without a sufficient number of criminal judges to handle them. When that occurs, civil judges are assigned criminal trials.

## ***History and Present Procedure***

In 1996, certain judges<sup>4</sup> on the criminal bench began to do settlement conferences in criminal cases with the consent of both parties; those judges included the then presiding and associate presiding judges. They took this dramatic step after noting that many criminal cases that should have resulted in pleas were instead going to trial. In addition, there was a backlog of criminal cases waiting for trial that had to be assigned to civil judges.

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## **Settlement Conferences in Criminal Court**

On the civil side in Maricopa County Superior Court, most cases are assigned to volunteer civil attorneys on a county-wide basis to conduct a settlement conference before a case may proceed to trial. The assigned attorney

reports back to the judge whether the case resulted in a settlement and whether the parties negotiated in good faith. More settlements have been concluded in civil cases than would have been the case without such conferences.

With the history of civil settlement conferences in mind and realizing that only judges should be doing such conferences in criminal cases, these pioneering criminal judges petitioned<sup>5</sup> the Arizona Supreme Court for a rule formally authorizing such conferences.

In 1997, the Arizona Supreme Court responded favorably, adopting Rule 17.4 (a), for a two-year experimental period. The Court Comment stated, "In adopting a statewide experimental amendment permitting judges to participate in plea negotiations, the court expects that all lawyers—prosecutors and defense counsel alike—will cooperate in the experimental use of this rule, and that judges will avoid coercive behavior of any kind." In 1999, using similar language in its Comment, the court adopted Rule 17.4 (a) as a permanent program and procedure, which provides as follows:

**Plea Negotiations.** The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.

Alleged victims, pursuant to the Rule, are advised by the prosecutor of any plea the state intends to offer, and their advice is solicited. If the victims have a contrary position, the court and defense counsel are to be advised at the time of the conference,

and the victims may be present for the settlement conference. In practice, it is rare for a prosecutor to advise that alleged victims disagree with the state's offer, and they are not usually present at the conference. As noted, trial judges do not conduct settlement conferences in their own cases unless the parties consent to it. Usually, judges not assigned to a case handle such conferences. Under the Rule, either party can request the conference, or a judge can set it on her own.

Judges soon realized that the number of requests for settlement conferences were more than could be handled by regularly assigned judges with typical criminal calendars. Four mornings a week, from 8:00 a.m. until 10:30 a.m., such judges hear status and trial management conferences, requests for mental evaluations, motions that can be done expeditiously, pleas, sentencing and probation violation dispositions. Jury trials begin after these hearings. One day a week, most often on a Friday, there is usually no trial, and criminal judges hear motions requiring longer periods for argument, and conduct evidentiary hearings. The typical criminal department judge with a full criminal caseload can typically do only two or three settlement conferences a week, if any at all.

To meet the need for more judges to do settlement conferences, there are five criminal judges designated special assignment judges, including the presiding and associate presiding criminal judges. On Monday through Thursday, they handle trials that regularly assigned divisions cannot do. Most important, because they do not have a regularly assigned caseload, they do settlement conferences five days a week, usually from 8:00 a.m. until 10:30 a.m. before jury trials commence, as well as all day Friday. These five judges each typically handle 30 to 70 conferences a month, or about one-third of the 610 average monthly conference volume.

This demonstrates that many judges are conducting criminal settlement conferences, including some judges on civil assignment. This enables all judges to develop an expertise in this area.

### **How Conferences Operate**

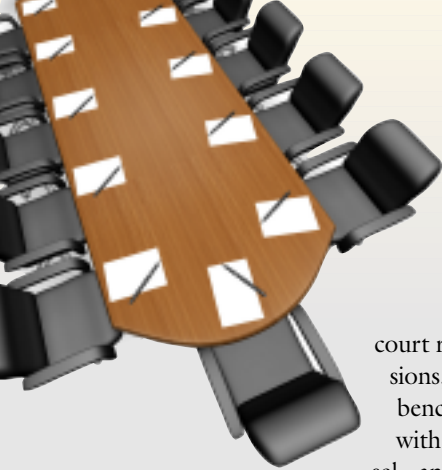
To be sure, not all judges are comfortable conducting criminal settlement conferences, and they are not asked to do them. The majority of criminal judges do participate in them when they have the time. Although the personality of the individual judge will affect how such conferences are conducted, there are common elements that judges use.

#### **Personal Greeting/Informal Atmosphere**

First and foremost is the informal setting.

There is always a personal greeting given to the defendant, who is called by his or her surname, and some judges shake hands with the defendant. Though judges are most often robed and a

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court reporter is present for all discussions, judges are not usually on the bench. Rather, they sit at a table with the defendant, his or her counsel, and the prosecutor or stand in

front of the table using a flip chart. Some

judges prefer to meet with both counsel first in chambers to establish ground rules and to get a better grasp of the case. Some would rather hold the settlement conference itself in chambers or the jury room rather than the courtroom.

Those judges who use a chart have written on it in advance of the conference the charges, the sentencing ranges if convicted, prior convictions and any plea offer (if known prior to the conference). In that regard, some judges require one or both attorneys to file a settlement memorandum prior to the conference, whereas others do not. The plea offer will be written on the chart and reviewed with the defendant during the conference, which usually last 30 to 45 minutes.

### **Imparting Information/State's Evidence/State's Offer**

The judge explains that the purpose of a settlement conference is threefold:

1. to give information to the defendant about what he or she is charged with and the sentencing range of each charge, should the jury determine the defendant is guilty beyond a reasonable doubt of any charge;
2. to advise defendant of the evidence the state will introduce at the trial. Typically, the judge asks the prosecutor to do this, as the judge is usually not that familiar with the case; and
3. to examine the plea offered by the state, its pros and cons and ramifications to the defendant, contrasting it to the sentencing range of the charge if there is no plea and he is found guilty by a jury.

### **Absence of Coercion/Jury Role/Statistics**

Settlement judges stress to the defendant that the purpose of a conference is not to force the defendant to enter into a plea, which would be highly improper. Instead, the purpose is to give the defendant information. Given that fact, he or she will not be told anything different than what their counsel has undoubtedly told them. The judge also indicates to the defendant that:

- Defendant has an absolute right to a trial, but that this is a chance to talk to a judge who has no stake in their case.
- Defendant is free to ask any questions he or she wants.
- Both the prosecutor and defense counsel are experienced in these types of trials (assuming this is true).
- Defendant's counsel will do all that is required to properly protect the rights of the client.

- Jurors are highly sophisticated, usually very fair and reasonable.
- A jury is instructed that if it is "firmly convinced"<sup>6</sup> that a defendant is guilty of a particular charge beyond a reasonable doubt, it has a duty to convict. If not, the jury has a duty to acquit (some judges will discuss what happens at the trial and trial procedure).
- Of 10 individuals who appear before a settlement judge, one to four will enter into pleas that day or set a date before the settlement judge or the trial judge to take the plea.
- An additional one to four will enter into pleas later in the process, often as a result of the settlement conference.
- One to two proceed to trial.<sup>7</sup>

Judges advise the defendant that they are there to answer any questions that the defendant may have. Some judges will, if asked, give their opinion whether it is a tough case to defend.

A judge's typical statement is that though defense counsel are committed to protecting defendant's rights, they are not magicians and may not get the result the defendant would like, if in a given case the evidence is overwhelming. Usually, judges will discuss with defendants who have priors whether their credibility can be impeached if they take the stand.

### **Why Do Settlement Conferences**

The use of settlement conferences has grown over the years.

In 1999 when the Supreme Court adopted a permanent procedure governing their use, the Maricopa County Superior Court was averaging 165 conferences a month,<sup>8</sup> whereas the criminal division averaged 610 monthly settlement conferences in the first nine months of 2006. Settlement rates during 1997–1999 were between 64 percent and 78 percent.<sup>9</sup> Those involved in the process—defense lawyers, prosecutors and judges—believe the settlement rates are within that range today, notwithstanding the increased volume of cases using the settlement process.<sup>10</sup>

In 2006, the Maricopa County Attorney's Office instituted a policy that no further pleas will be offered after 30 days from the



trial date. The effect of this policy puts pressure on the parties to get something done. Moreover, it is often the case that the state will advise at the settlement conference that it is the last day the state will offer a particular plea. Defense counsel and their clients realize that if a plea is offered in the future, after the 30-day cut-off, it is likely to be more harsh. This provides an incentive to

In that case, the plea will be restaffed and reconsidered. From judges' experience with this process, it can be stated that this restaffing is usually done in good faith, and deviations are granted by the County Attorney in appropriate cases.

This latter assumption, in some respects, may not reflect the experience of the defense bar. James J. Haas, Maricopa County Public Defender, has this to say with respect to the efficacy of settlement conferences:

Settlement conferences under Arizona's Rule 17.4 have proven useful in two situations.

The first is where the defendant, for whatever reason, does not trust the advice of his attorney when the attorney recommends acceptance of a plea agreement. In that instance, it can be very helpful to have a judge advise the defendant of the consequences of going to trial or taking the plea, essentially echoing the advisement given the client by his attorney.

The second situation is where the plea offer is disproportionately harsh, and the settlement conference judge can exert some influence on the offer by contacting the higher levels of management in the prosecutor's office.

Unfortunately, in Maricopa County, the second of these situations is becoming more and more rare because of the unwillingness of the prosecution to consider alternatives to its plea offers. Settlement conferences are a waste of time and should be abandoned if only one side is willing to make good faith attempts to resolve cases.

On the other hand, Andrew P. Thomas, Maricopa County Attorney, comments:

Settlement conferences can be useful tools in appropriate circumstances. They are useful in bringing the parties together early in the proceedings so that they can gauge which cases are likely to go to trial or be resolved by plea agreement. They can also be used to resolve cases with a "difficult defendant." Any cases resolved at settlement conferences that are set early in the process and within the plea cutoff dates required by the Maricopa County Attorney's Office (MCAO) save resources for MCAO, the courts and the defense.

Settlement conferences are significantly less useful when they are set late in the proceedings, such as on the eve of trial. At this point MCAO has invested significant resources in preparation for trial. Therefore, the benefits to the State in attending a settlement conference are greatly diminished. In fact, at many of these settlement conferences judges attempt to pressure young prosecutors into re-extending offers in violation of MCAO'S plea cutoff policy.

Another downside to settlement conferences occurs when too many conferences are set on a court calendar. In these instances, prosecutors and defense attorneys waste significant



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examine a plea offer realistically.

The Maricopa County Attorney also retains a policy whereby if defense counsel or a settlement judge believe a plea is too harsh given the circumstances, a request (usually asked to be put in writing) for a deviation from policy can be sent to the prosecutor.



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blocks of time waiting for their cases to be called.

Finally, the advent of settlement conferences in criminal cases has had another negative impact.

Because settlement conferences are so readily available, some attorneys within the defense community rely unduly on the courts to do their job for them. In some instances, defense attorneys request settlement conferences merely to meet with their in-custody clients. At some of these conferences defense attorneys convey plea offers to defendants for the first time. The pleas are either entered without a settlement conference being held or the conferences are continued so that defendants can consider plea offers. Yet court time was set aside for these “settlement conferences,” and prosecutors were required to be present.

Larry A. Hammond, a private defense counsel in Phoenix and President of the American Judicature Society during 2003–2005, offered the following observation:

Have settlement conferences proven to be valuable? Absolutely. Every criminal defense lawyer and, I would suppose, every good prosecutor can cite the cases in which the constructive intervention of a judge has helped to achieve a result fair to all sides. There is reason to question, however, whether one can expect settlement conferences to continue to be useful in the future, at least in this county.

Obviously, the settlement of any case—whether civil or criminal—requires good faith cooperation and open-mindedness on both sides. One important element must be a respect for, and willingness to listen to, what the settlement judge may have to say. If the defendant is unwilling to listen, the time may well have been wasted. Likewise, when the prosecutor, relying on an inflexible plea policy, refuses to consider the court’s views, the process becomes equally frustrating. The process does not work well when those who supervise the prosecutor’s office assume that the settlement judge’s motive is to “pressure young prosecutors,” or when the prosecution believes that defense counsel has some motive other than attempting appropriately to resolve the case.

It remains to be seen whether this very good innovation will continue to enjoy vitality. I certainly cannot speak for all criminal defense lawyers, but I believe that most hope that judges do continue to make themselves available to assist in the settlement process and that the line prosecutors assigned to these cases are allowed by their supervisors to exercise the level of judgment necessary for these conversations to prove useful.

Although not all lawyers and judges participating in settlement conferences will agree with the foregoing criticisms, any jurisdiction contemplating use of the settlement conference should know the perceived downside. However, the authors feel that such criticisms do not detract from the benefits obtained in most cases by conducting such conferences.

### Conclusion

There is no rule in Arizona requiring all criminal cases to have a settlement conference before they can go to trial. Still, as it now stands, approximately 65 percent of criminal cases go to such conferences. The other 35 percent represent those cases:

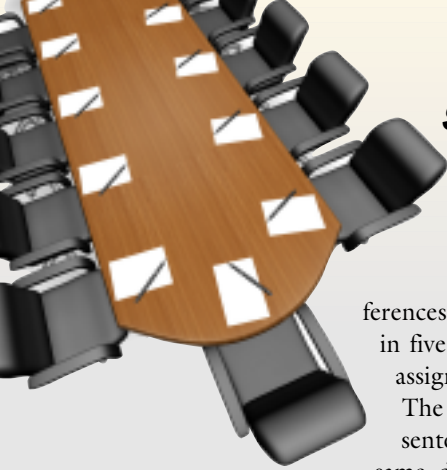
- disposed of by plea, diversion or dismissed very early in the process before a case is officially assigned to a criminal trial division;
- the defendant has been advised of a plea offer and does not want a settlement conference;
- both sides agree a settlement conference would be unproductive; or
- no plea offer will be made.

Settlement rates of those holding conferences continue to average 64 percent to 78 percent, with most participants estimating it is on the higher side of this range. Implementation of such a procedure was enhanced because the judiciary took the lead and lawyers, including those dissenting,<sup>11</sup> had a voice in the planning process. Moreover, the Arizona Supreme Court has “a long and successful history of innovation in general and of rule making in particular.”<sup>12</sup>

The reasons given in 1997 to the Arizona Supreme Court in the Petition of then-Presiding Criminal Judge Ronald S. Reinstein, urging the court to adopt a criminal settlement conference procedure, sums up why we do them and, because nothing has really changed, why we continue to do so:

Criminal caseloads in all courts of the state have reached record numbers. Because of inadequate resources in our courts, prosecution agencies, indigent defense agencies, and court appointment counsel budgets, we are being asked to do more with less. Court time and attorney time should be treated as scarce resources. Many of the attorneys prosecuting and defending criminal cases have limited experience. When the issue of mandatory sentencing is added to this mixture, what we often see are cases that are tried to a jury that could have been settled with the assistance of the court.

Most participants agree that the criminal settlement conference is one of the most useful interventions proposed and adopted by a court. The benefits include reducing the time needed to resolve cases, especially the delays occasioned by going to trial. Judges are available on short notice to do con-



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ferences, as they can often be set within five days of a request in a special assignment or settlement division.

The conference, a plea and even a sentencing can be done on the same day in a proper case where a presentence report is not needed.

By judges often pointing out weaknesses and strengths of cases, a balanced outcome hopefully can be achieved. Such con-

ferences avoid a future evidentiary hearing in which a convicted defendant claims inadequate representation because counsel did not advise him or her of terms of an offer from the state.

Most important, even if the conference does not end in a plea then or later, cases are processed on a professional, cooperative and respectful basis, causing the parties to work together for a period of time instead of doing battle in court.<sup>13</sup> This last benefit alone would appear to make the process worthwhile for adoption by a court in any jurisdiction. **AZ**

### endnotes

1. *E.g.*, 2003 The Center for Digital Government's "Best of Breed" award for the court's online jury system; 2002 and 1998 Computerworld's Honors Program and Smithsonian Awards for visionary use of information technology; 1997 Howell Heflin Award (State Justice Institute) for the court's Self-Service Center for pro se litigants (similar awards from American Bar Association and National Association for Court Management); 1997 American Judicature Society Justice Award for innovations in public service, a nationwide court education center, reforms in civil justice procedures and the jury system (first time in 22-year history of the award that it was presented to a court); WILLIAM E. HEWITT, GEOFF GALLAS, & BARRY MAHONEY, SIX PROFILES OF SUCCESSFUL COURTS 87-102 (National Center for State Courts, Williamsburg, Va., 1990) (highlighting the Phoenix program known as fast-track as a delay prevention tool and an example of excellence in civil case management). *See also*, B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996); B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993). Judge Dann, a Superior Court, Maricopa County, trial judge for 20 years, was Presiding Judge of the Court during 1985-1990. He and his committee were responsible for implementing with the Arizona Supreme Court approval of many of the jury reforms for which this Court and Arizona are noted. *See also* B. Michael Dann & Valerie Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 COURT REV. 12 (2004); Tim Eigo, *O Pioneer: Michael Dann Shapes Jury Reform for a New Century*, ARIZ. ATT'Y, Feb. 2001, at 18.
2. The Dann articles, *supra* note 1.
3. Exhaustive research on the issue was not conducted, but Dade County (Miami) must be one of the earliest. Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV'W 349 (1979) (discussing a yearlong test of settlement conferences in criminal cases in Dade County; all negotiations took place before a judge, victim and defendant and usually resulted in at least an outline of a settlement). *See also* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006) (analyzing Germany, Florida and Connecticut systems); Hon. J. Richardson Johnson, *Implementing A Circuit Court Trial Division*, 78 MICH. B.J. 688 (1999) (discussing settlement conferences in the criminal trial division); *Court Authorizes Settlement Conferences in Criminal Cases*, MONT. L. 16 (Mar. 19, 1994) (conducting settlement conferences in complex criminal cases (more than 16 days) in U.S. District Court for the District of Montana); Kings County (Hansford-Local Rule 522); INYO County (Independence-Local Rule 10.1) and Imperial County (El Centro-Local Rule 12.05) have Local Rules providing for settlement conferences in criminal cases which appear to be mandatory; Marureen E. Laflin, *Remarks On Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571 (2004) (judges using mediation skills to conduct mediation of criminal cases in Idaho). It has been confirmed that at this time the National Center for State Courts does not statistically track criminal (or civil) settlement conference statistics on the nation's state and local courts.
4. Then-Presiding Criminal Department Judge Ronald S. Reinstein was instrumental in advocating to the Arizona Supreme Court the adoption of Rule 17.4 (a) providing for settlement conferences in criminal cases. He was joined in doing such conferences by Associate Presiding Criminal Department Judge Greg Martin and Judges Michael Wilkinson and Thomas O'Toole.
5. Superior Court, Maricopa County, Petition to Amend Rule 17.4 (a), Arizona Rules of Criminal Procedure, prepared by Judge Reinstein, filed Sept. 6, 1996, at 2. Interestingly, prosecutors, citing, *inter alia*, separation of powers concerns, were unanimously against the proposal. *See* Comment of Richard M. Romley, then-Maricopa County Attorney, filed Nov. 8, 1996; Comment of Kerry G. Wangberg, City of Phoenix Prosecutor, filed Nov. 6, 1996.
6. Arizona defines "beyond a reasonable doubt" to jurors as "proof that leaves you firmly convinced of the defendant's guilt." *State v. Portillo*, 898 P.2d 970, 974 (Ariz. 1995).
7. Court statistics show the initial 40 percent settlement rate within three days of a settlement conference. The court does not keep records of settlements occurring after three days. The other figures represent a fairly well-founded educated guess by attorneys and judges who participate in such conferences and court administrators who track cases. For other statistics cited in the article, see [www.superiorcourt.maricopa.gov](http://www.superiorcourt.maricopa.gov) by referencing the public information site.
8. Comment of Judge Reinstein filed with the Arizona Supreme Court April 2, 1999, at 1-2, setting forth the settlement statistics as of that date.
9. *Id.*
10. In Superior Court, Maricopa County, only two percent of all filed criminal cases go to trial. Timelines for trying criminal in-custody cases must be resolved within 150 days of arraignment, out-of-custody cases have a 180-day period, capital cases (which are not complex) may extend to 18 months, and complex criminal cases must be resolved within 260 days of arraignment. 16A A.R.S. Rules of Crim. Proc. Rule 8.
11. *Supra* note 5.
12. Dann & Logan, *supra* note 1, at 286.
13. Similar benefits were described by then-longterm Maricopa County Deputy Public Defender Donna Lee Elm in a Comment filed April 2, 1999, with the Supreme Court praising the two-year experiment under Rule 17.4(a) and urging its permanent adoption. At that time, she supervised one-quarter of the office's criminal defense practitioners.