

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 2nd Meeting of the 2018 Interim

July 6, 2018

Call to Order and Roll Call

The 2nd meeting of the Interim Joint Committee on Judiciary was held on Friday, July 6, 2018, at 10:00 AM, in Room 171 of the Capitol Annex. Representative Joseph M. Fischer, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Representative Joseph M. Fischer, Co-Chair, Senator Whitney Westerfield, Co-Chair; Senators Danny Carroll, Perry B. Clark, Ray S. Jones II, Alice Forgy Kerr, John Schickel, Wil Schroder, Dan "Malano" Seum, and Robin L. Webb; Representatives John Blanton, Larry Brown, McKenzie Cantrell, Daniel Elliott, Angie Hatton, Joni L. Jenkins, Chad McCoy, Reginald Meeks, C. Wesley Morgan, Kimberly Poore Moser, Jason Nemes, Jason Petrie, Brandon Reed, Kevin Sinnette, and Gerald Watkins.

Guests: Geno Yoscovits, Samantha Budzyn, John Cooper, John McGarvey, William May, Debbie Donnelly, Gabrielle Summe, Lindsay Hughes Thurston, Andrew English, Randy White, Chris Cohron, Brian Wright, Michael Mannheimer, and Damon Preston.

LRC Staff: Katie Comstock, Alice Lyon, Chandani Kemper, Breanna Miller, and Yvonne Beghtol.

Chairman Fischer welcomed those in attendance and asked for a motion to approve the minutes from the June 1, 2018 meeting. Senator Schickel made a motion that was seconded by Representative McCoy and approved by voice vote.

eNotarization and eRecording: An Overview

Geno Yoscovits, with Quicken Loans, and Samantha Budzyn, with Amrock, testified about the different types of eClosings and their security measures. Ms. Budzyn explained the three types of eClosings:

1. Hybrid In-Person - Face-to-face with the notary, almost all non-notarized documents are signed electronically, and all notarized documents are wet signed and notarized on paper.
2. In-Person eNotarization (IPEN) - Face-to-face with the notary, but all documents are electronic, eSigned, and eNotarized.

3. Remote Online Notarization (RON) – Two-way audio-visual (similar to Skype or Face Timing, but with more security) and all documents are electronic, eSigned, and eNotarized.

Mr. Yoscovits emphasized the convenience (can be done from anywhere), security (scanning visual ID, answering security questions), environmental (less paper), and technological (consumers expect it) advantages. Nine states have already adopted the RON eClosing system, and many others have introduced the movement and are moving towards its adoption.

In response to Representative Watkins, Mr. Yoscovits said that Quicken Loans has had 4,500 closings in Kentucky during the past six months.

In response to Representative Sinnette, Ms. Budzyn said that the audio-visual recordings are securely stored on a cloud with either the title company, the lender, or the software provider. Mr. Yoscovits said that the recordings are required under statute to be stored 5 to 7 years. Due to the possibility of a lender going out of business, Quicken Loans is pushing for the title company to be the holder of the recordings. Ms. Budzyn said that having the document in an electronic format gives access to multiple parties, making the change of lenders more seamless.

In response to Senator Webb, Ms. Budzyn said that privacy and security issues could be addressed by the statutory requirements of the bill. Having the title company, who already has firewalls in place, in lieu of the notary keeping the information would help ensure security.

In response to Senator Carroll, Chairman Fischer said that no revenue to Kentucky is lost by having an out-of-state online lender as compared to having an in-state lender. The lender would still have to pay a transfer tax. This was reiterated by Mr. Yoscovits.

In response to Chairman Westerfield, Ms. Budzyn informed that, while the uploaded identification needs to be of good quality, there is no set standard. A third party reviews the uploaded ID to verify its authenticity. Mortgage Industry Standards Maintenance Organization (MISMO) is a company that sets the criteria for online loan applications, in an effort to keep fraudulent applications from being accepted. Ms. Budzyn knows of six or seven companies that offer similar electronic services in Virginia.

In response to Representative Petrie, Mr. Yoscovits acknowledged that the goal is to make eNotarizing and eClosings an option for Kentucky. Ms. Budzyn said that a live notary would be available online to answer any questions or to contact the involved vendors to get obtain information for the client. Many vendors are considering an online video conference with multiple parties to assist with any questions during the process. Having an attorney present would certainly be an option if the borrower thought it would be beneficial.

eNotarization and eRecording: The Kentucky Bankers Association's Perspective

John McGarvey, with Morgan & Pottinger, said that electronic recording has been available for 14 years and is currently in 34 states. The purpose is to give county clerks the legal authority to prepare for electronic recording. Fees may increase to pay for the additional technology that will be required in the clerks' offices. The difference between ordinary electronic records and real estate records is that it has to be recorded with a title trail. To modernize, Kentucky should recognize the need to equate electronic documentation with the paper document and establish standards. One benefit of the Revised Uniform Law on Notarial Acts (RULONA) is authorizing remote notarization.

In response to Representative Petrie, Mr. McGarvey agrees that because reliable internet broadband to all parts of Kentucky is still an issue, electronic signing is an option and not mandatory. Adding the requirement that broadband be available to all of Kentucky would have a large fiscal impact; permitting the option would be reasonable.

In response to Representative Hatton, Mr. McGarvey could not assume that any savings the Act may offer the lender would be passed along to the borrower. As to whether this would provide an unfair advantage to out-of-state lenders over local institutions, Mr. McGarvey said that the Kentucky Bankers Association strongly supports this Act.

In response to Representative McCoy, Mr. McGarvey said the two model laws already in existence are the Uniform Real Property Electronic Recording Act (URPERA) and RULONA. They do not dictate the file format to be used but authorize the local board to adopt standards for Kentucky.

eNotarization and eRecording: A County Clerk's Perspective

William May, Executive Director of the Kentucky County Clerks Association, introduced the panel.

Debby Donnely, Hardin County Clerk, said that the Kentucky County Clerks Association has a task force to make sure legislation concerning eNotarization meets industry standards for speed and efficiency and protects citizens from fraudulent practices.

Lindsay Hughes Thurston, Assistant Secretary of State, discussed the Secretary of State's four-year Notary Task Force that seeks assist Kentucky in getting up-to-date with eNotarization. Kentucky's notary laws have not been updated since 1956. The fact that four bills regarding notaries were presented during the past session indicates that Kentucky is ready and moving in that direction. Ms. Thurston stated that using RULONA as a guideline will keep Kentucky in line with the 23 states that have already enacted eNotarization. Secretary Grimes and those behind this Act are hopeful it will come to realization during the 2019 Session.

Gabrielle Summe, Kenton County Clerk, said the task force is important to ensure that small counties are included and protected. The Notary Task Force has not yet voted on specific legislation relating to eRecording or eNotarization. The Uniform Electronic Transactions Act (UETA) adopted in Kentucky in 2000 included specific exceptions pertaining to real estate law. There are still many issues to be considered, such as recording fees, the affects the county clerks' offices, passing a deed through a will, preservation of records, costs, and others. There is a lawsuit on the Mortgage Electronic Registration System (MERS) because of the way things had been moved. While the clerks are looking forward to the change, they want to make sure all of these items are considered.

In response to Representative Petrie, Ms. Summe believes all but a few of the counties keep data online. Mr. May offered to get information regarding any counties not currently keeping data online. Regarding the cost to updating each county, Ms. Summe said that updating her 1991 computer system could cost approximately \$100,000. Regarding written recommendations on notaries from the notary task force, Ms. Thurston offered to obtain that information.

In response to Chairman Fischer, Ms. Thurston said that the task force is active and will invite interested legislators in an effort to better prepare for the 2019 session.

In response to Senator Schroder, Ms. Thurston said the task force is aggressively working to make recommendations by September. After working with the different entities, the plan is to present one bill.

In response to Senator Carroll as to which documents would be available to the public and which would be online or hard copies, Ms. Thurston said it would depend on the document requested. Some are available at no cost, but some may require a fee.

Capital Punishment: An Update from the Justice Cabinet

Andrew English, General Counsel for the Kentucky Justice and Public Safety Cabinet, discussed the death penalty in Kentucky. The last execution in 2008. In 2010, the courts issued an injunction to cease executions. In 2012, the Department of Corrections attempted to rewrite the regulations in accordance with federal laws and to address the concerns in the injunction. In trying again to rewrite the regulations, DOC is taking into consideration more access for defense counsel, the drug protocols (moving away from the two drug protocol to the more traditional one drug protocol), and the defendant's mental capacity.

In response to Chairman Fischer, Mr. English feels comfortable that the new regulations address the concern of whether the defendant's IQ versus mental capacity will prevail, but the courts would have the ultimate determination. Randy White, Deputy Commissioner of Adult Institutions, stated that Kentucky has 31 inmates on death row. He will obtain a demographic breakdown.

In response to Representative Petrie, Mr. English said that the Department of Corrections does not take a position on the death penalty. DOC carries out the sentencing required by law.

In response to Representative Jenkins, Mr. White believes Kentucky has had approximately 163 executions since 1910, the last being in 2008. Mr. English agreed with Chairman Fischer that three executions since 1976 sounds correct.

In response to Representative Meeks, Mr. White will obtain a profile report for the 31 inmates on death row. Only one is female, and he estimates 5 or 6 are African American. Chairman Westerfield requested that the report include age, the offense, and the length of time on death row. Mr. White stated that the average time on death row at this time is 24.5 years. Representative Jenkins requested that the report include how many were able to obtain private attorneys. Senator Webb requested information on whether new technology. Chairman Fischer asked that the report be sent to staff for distribution to all members.

Capital Punishment: A Prosecutor's Perspective

Brian Wright, Commonwealth's Attorney for the 29th Judicial Circuit, discussed the process to determine what cases merit the death penalty. Things to consider would be the nature of the offense, criminal history, mental health issues, input from law enforcement, and from the victim's family.

Chris Cohron, Commonwealth's Attorney for the 8th Judicial Circuit, said that it is the Commonwealth's Attorney's decision to decide if the case warrants seeking the death penalty or life without parole. It is not sought without substantial cause. He said that the Department of Corrections website has a summary of the individuals on death row. The Commonwealth's Attorneys Association believes the death penalty is still a necessary and viable option for Kentucky.

In response to Senator Jones, Mr. Cohron said that there is a list of statutory offenses that could warrant seeking the death penalty. Chairman Fisher included it in the member's packets. Mr. Cohron and Mr. Wright agree that a timelier follow through on death penalty sentencing is needed to give the victims and their families a sense of closure.

Capital Punishment: An Opponent's Perspective

Representative McCoy introduced the panel's standpoint of "does this law work" from a criminal law and economic perspective.

Michael Mannheimer, Professor at Chase College of Law, spoke on the American Bar Association's (ABA) Death Penalty Assessment issued December 2011 (available online at www.ambar.org/kentucky). The Death Penalty Assessment Team was assembled in 2009. The purpose was to evaluate how fairly the death penalty was implemented. The

assessment required 90 different benchmarks established by the ABA, under 12 different categories. Two major areas of concern were affording every capital defendant a fair and accurate proceeding, and minimizing the risk of executing the innocent. He advised that, since the report is from 2011, some of the information may have changed. From 1976 to 2011, 50 of the 78 sentenced to death had their convictions overturned on appeal due to trial errors. Retrials due to these errors are a costly expense. Biological evidence is not required to be retained for the length of the incarceration. DNA is only required if probable cause exists that the inmate sentenced to death is innocent, but not when determining if the defendant should be sentenced to death. There is no uniform standard on eyewitness identifications and interrogations, which are the two leading causes of wrongful convictions. Kentucky does not prohibit death penalty sentencing for a defendant with a severe mental illness. At least 10 of the 78 sentenced to death were represented by attorneys who were later disbarred. Another factor is the excessive caseloads and low pay for the defense attorneys, along with insufficient funding for the investigative services. A survey showed that a high percentage of jurors failed to understand the sentencing instructions before making decisions. There is no statewide mechanism to guide prosecutors in determining when to seek the death penalty, and there is a lack of data collection and retention throughout the administration. Knowing if a prosecutor could have sought the death penalty and did not or whether it was sought and was not imposed could determine if there is racial bias and whether defendants are being treated equally across the Commonwealth. While the Racial Justice Act (RJA) in Kentucky is strong, there are shortcomings that prevent it from being an effective remedy. As a result of the findings, the team recommended a suspension of execution until the issues were rectified.

Damon Preston, Public Advocate, addressed the cost of seeking the death penalty. Many argue that the death penalty is more cost efficient than life without the chance of parole. However, the majority of the cost is on the front end during the trial when the death penalty is an option. With only one execution in 42 years, the state will continue to incur the full cost of a trial that seeks the death penalty, although the sentencing becomes life in prison without the possibility of parole. There are 52 cases in which the prosecutor has filed a notice of intent to seek the death penalty. Only one case in the last five years has received the death penalty. Regarding a recent death penalty case in Lexington involving two defendants, eight fulltime DPA employees were assigned, which cost about \$80,000 just for their pay and benefits during the four week trial. The outcome was that one defendant was acquitted and there was a hung jury on the other.

Representative Nemes reiterated that being cost efficient with Kentucky's resources is reason enough to not offer the death penalty. The only justifiable reason to take a life is to protect another life. Therefore, life without parole would satisfy this need. Representative Nemes stated that, if society does not believe the government can do small jobs efficiently, society should not give it the power to decide whether to take a life. The state should not expedite the process, given the number of death row inmates who have been exonerated.

In response to Representative Cantrell, Representative Nemes believes, if the stay is lifted, Kentucky would be able to procure the necessary means for the executions.

Senator Webb agrees that the death penalty should be considered and discussed thoroughly before taking action.

In response to Representative Elliott, Mr. Cohron believes the best defense for a moratorium is that the only pressure to act in a timely manner is on behalf of the victim's family. Mr. Wright believes there should not be a moratorium because the issues are more of a practical, not a fundamental, problem with the death penalty.

In response to Chairman Fischer, Mr. Cohron and Mr. Wright agree that not having the death penalty as an option would not be more cost efficient on the prosecutors' end.

In response to Senator Carroll, Mr. Cohron and Mr. Wright agree that having the death penalty carried out more efficiently and timely benefit the victim's family.

Representative Watkins gave statistics on death row inmates. He said that life in prison is not much of a deterrent, but the death penalty is.

Representative Jenkins believes poverty and race play a role in who is charged with the death penalty. She would like more available data to research this issue.

Representative Blanton believes that the death penalty is necessary because the victims do not get a choice on when or by what means their lives are taken. Whether to have the death penalty should not be based on the financial cost.

Chairman Fischer said that the August 3rd meeting will be at Lake Barkley State Resort Park.

There being no further business, the meeting adjourned at 12:35 pm.