

CHECKLIST FOR PROSECUTORS: CAPITAL CASES (DISCOVERY AND MITIGATION) Fact Sheet

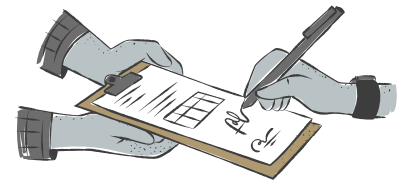


OVERVIEW

After a capital case begins and during discovery, often Defense counsel undertakes an effort to compile mitigation evidence to rebut prosecutor's decision to seek capital punishment. This mitigation process can affect victim rights to refuse interviews, to be treated fairly, respectfully and free from intimidation and harassment and may evoke some ethical considerations. Prosecutors should consider and anticipate these potential challenges facing victim family members during the discovery and mitigation process.

DISCLAIMER: The cited material pertains primarily to Arizona statute and law; however, many states have similar victim rights laws. Additionally, this fact sheet is intended to share **model practices** in this area. Below are some examples to consider when navigating the capital litigation process, regardless of jurisdiction.

MODEL PRACTICE CHECKLIST (DISCOVERY AND MITIGATION)



- ☐ In light of recent case law pending before the Ninth Circuit, depending on the jurisdiction, surviving victims should be informed about their right to refuse defense interview requests.[1]
- ☐ Consider whether to review a decedent or victim's medical or psychological records. Keep in mind that disclosures must be made to Defense if records may be used at trial or contain "information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment." [2]
- ☐ Explain to surviving victims that defense may seek mitigation evidence focusing on mental or physical healthcare records of a deceased victim. Generally, although doctor patient privilege belongs to the patient, the privilege continues after death. [3] Defense must make a particularized showing of a reasonable possibility that information sought includes evidence material to a defense or necessary for cross-examination.[4]

[1] Ariz. Const. Art. II, §2.1(A)(5) (granting victims constitutional rights "[t]o refuse an interview, deposition, or other discovery request..."); see also A.R.S. §13-4433(A); *Arizona Atty's for Crim. Justice v. Ducey*, 2022 W.L. 16631088 (D. Az. 2022) (holding that the defense may still contact victims directly.).

[2] Ariz. R. Crim. P. 15.1(b)(8). *Brady* material.

[3] See, e.g., George E. Dix and Eleanor Swift, *McCormick on Evidence* § 102 at 411 (8th ed. 2022).

[4] *State v. Mandell*, 253 Ariz. 97, 100, 509 P.3d 405, 408 (App. 2022).