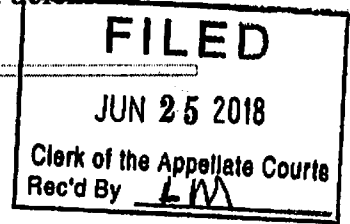


**appellatecourtclerk - support of increased compensation for appointed indigent defense
counsel**



From: Katherine Netzler <katnetzler@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/25/2018 10:35 PM
Subject: support of increased compensation for appointed indigent defense counsel

Hello Mr. Hivner,

I'm writing to express my support of changes to indigent defense representation compensation (No. ADM2018-00796).

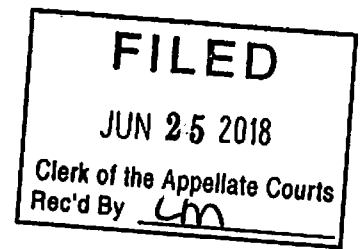
While this increase won't do nearly enough to solve the crisis facing public defenders in Tennessee, I believe it's an important step in the right direction, and I am absolutely in favor of it.

Giving private attorneys appointed to indigent clients a greater incentive to zealously defend their clients is absolutely worth it, and it will help stem the tide of systemic problems that have developed after years of underfunding public defense.

As a resident of Memphis, which has the infamous distinction of being the poorest city in the country, I fully support the progressive reforms recommended by the Indigent Representation Task Force. I'll be following these issues closely over the coming months.

Thank you,

Kat Netzler
1902 Walker Ave.
Memphis, TN 38114
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**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE RULE 13, SECTIONS 2 AND 3
RULES OF THE TENNESSEE SUPREME COURT**

No. ADM2018-00796

**RESPONSE OF THE MARSHALL COUNTY BAR ASSOCIATION TO THE
SOLICITATION FOR WRITTEN COMMENTS CONCERNING THE PROPOSED
AMENDMENTS**

The Marshall County Bar Association, by and through its President, Nicholas W. Utter, respectfully submits this response to the amendments proposed by the Tennessee Supreme Court.

At the outset, it should be noted that Marshall County is a rural county, with a population estimated by the US Census Bureau, at just shy of 33,000 residents as of 2017. The 2016 Median household income estimate is \$44,900, and the poverty rate is listed at 13.2%, with only about 14% of the population holds a Bachelor's Degree or higher. (US Census Bureau). Marshall County has two Courts with General Sessions Jurisdiction. The Marshall County General Sessions Court, is served by the Public Defender's Office, with counsel appointed only for cases in which the Public Defender's Office has a conflict. The Lewisburg Municipal Court also possesses General Sessions Jurisdiction, but does not have any assigned Public Defenders. Thus, the entirety of indigent defense falls upon the members of the local Bar. The volume of Municipal Court is at times commensurate with the volume for the County General Sessions Court, and the need for indigent representation in Municipal Court is worthy of note. Weekly appointments average from 8-13 cases each docket in Municipal Court. Juvenile Court is handled by the Marshall County General Sessions Judge, and the need for indigent representation in Juvenile Court matters, particularly Dependent & Neglect proceedings, is also substantial. Otherwise, Marshall County is comparable in terms of Circuit and Chancery

Court staffing, to other rural counties, with most appointments arising out of conflicts with the Public Defender's office, and child support cases. While an exact number is not available as of this response, based off of interaction with the local Bar Association, there are maybe 15 local lawyers in Marshall County serving all of these courts—though some lawyers practice strictly criminal and other lawyers focus more on family and juvenile. Typically, there are only a few lawyers available at any given time, and it is not uncommon for a lawyer to have, and in some cases turn, six to twelve cases on any given day. When lawyers are double booked in multiple counties, availability of counsel is an even greater issue. This Association is aware of shortages of available counsel, and in some cases this has impacted the ability of the respective courts to conduct business. Shortages are most severe in Juvenile and Municipal Court, as there is more demand for indigent and parent representation. We have a few attorneys who have dedicated their time to providing as much service as they are able to provide, and ultimately wind up working for free because of the case caps and annual caps. This is on top of the *pro bono* work many engage in anyway, as ours' is not a wealthy county. Further, Marshall County has not enjoyed the massive influx of young law school graduates that our larger, more populous counties enjoy. The burden falls on the established lawyers locally, to try and fill the void as best we can, while juggling cases that actually provide sufficient compensation with which to pay for all of the ordinary business expenses we are obligated to pay for, all before bringing any income home. Our County comprises a four county judicial district, and many of our members travel outside of this county in order to generate enough income. The need to travel impacts availability for local appointed work. Collectively, while we appreciate the attention and desire to increase the compensation levels, the most common response from our membership noted that 'the lawn boy received more per hour than lawyers representing indigents.' Further, while rates have been \$40 per hour for out of court time, for longer than most here have been in practice, the obstacles erected to actually get paid for the claims (ICE and ACAP), have compounded. Some of the complex claims can take thirty to forty five minutes each to input—all uncompensated time. Further, while large sums of money have been spent throughout the state, equipping the police with more crime fighting tools, construction of new judicial buildings across the state, up-staffing prosecutors, increasing court staff, and

in some counties even the addition of new Judicial Officer positions, little attention has been given as to indigent representation, and it is the indigent and less economically advantaged who wind up in Criminal and Juvenile Court the most. With this all in mind, our membership would offer the following.

ANNUAL CAPS

The Proposed Amendments do not address the annual cap. Lawyers who practice in Juvenile Court typically face issues with the annual cap, more so than the lawyers practicing in Municipal Court and General Sessions Court. We have one member who regularly serves as *Guardian Ad Litem*, one of maybe two or three, who hit the annual cap every year. As this Court is well aware, Dependant and Neglect cases involve a tremendous and growing amount of in court and out of court time. Lawyers must involve themselves not only in court proceedings, but also the numerous meetings associated with all of the social agencies involved—and most everyone else involved in such a case, receives a salary from the State of Tennessee. The meetings do not stop, and the case does not cease to continue, just because a lawyer has hit the annual cap. Our membership continues on with the representation as best they can. However, once the annual cap is reached, the Court loses the services of the lawyer on new cases, unless that lawyer is in a financial and logistical position to continue on *Pro Bono*. Furthermore, the amount of work, and billable time consumed by Juvenile Court representation, inhibits a lawyer from being able to accept appointments in Municipal, General Sessions and Circuit Court as they are hitting the maximum annual amount just off of Juvenile cases. Candidly, there really exist few reasons to justify the annual cap, aside from perhaps public perception that lawyers are getting rich off of state money. Consider, however, that at the annual cap rate, a lawyer could likely not afford office space, likely not afford a secretary, likely could not afford to advertise and, given the volume, likely would not be available to engage in privately retained cases. After considering the overhead that is unavoidable, those lawyers are also likely earning at a rate on par with median income for their county. To make matters even worse, the volume of work required to actually hit the annual cap on appointed cases creates a nearly impossible situation for a lawyer to engage in private fee cases. The volume leaves little time for office presence, and no one

is available to even answer the phone and book appointments. No attorney in our state is getting rich representing indigents.

PER CASE MAXIMUM COMPENSATION

Our membership largely focused their input upon the proposals concerning maximum case compensation for Juvenile Court matters. In terms of General Sessions and Municipal Court criminal cases, the case caps as proposed are largely appropriate. However, our members indicated a desire to see the hourly rate more commensurate with what a typical legal hourly rate would be. Most of those cases can turn in a hand full of hours, but the rate of compensation leaves little incentive for established lawyers (with overhead and secretaries) to venture down to those courts where they have time to. We would respectfully submit that a substantial increase in the hourly rate, as opposed to extending the maximum case compensation, would generate more interest from the bar in volunteering for indigent representation in those courts. We would submit that a rate of \$80.00 per hour on those cases would encourage the established members of the Bar to participate more.

With respect to Juvenile Court, our membership indicated a desire to see more emphasis on increasing the maximum compensation per case amounts. One of our members indicated she currently has close to 90 open cases, some of which span three or more years, and that she caps out on about 80% of her cases. A good portion of the time, she is working for free. This member has dedicated herself to Juvenile practice, and certainly accepts that a portion of her time will wind up donated. Unfortunately, our County is privileged to have only a few who are in a position to even do this. Given the volume of Juvenile Court, the amount of social agency participation, the legal safeguards afforded natural parents, and the limitations of the Court in adjudicating such a volume of cases, the burden of Juvenile Court practice is such that few lawyers engaging in Juvenile work are able to do much of anything else. I am aware of some attorneys outside of this county, who would not be able to afford to practice in Juvenile Court if they were not being supported by their understanding spouses. In terms of affording indigent persons with access to justice, Juvenile practice is an area that begs for greater attention.

The maximum compensation for contempt and child support cases have, in our experience, been sufficient for the majority of such cases, and our membership would only request consideration of increasing the hourly rate, as per the discussion regarding Municipal and General Sessions Court. Most of the volume in this area is created by child support cases, which in many cases, are reasonably uncomplicated.

The maximum compensation for Circuit Court criminal matters as proposed, appear to provide reasonable compensation for the majority of basic criminal cases. Given that most of the cases are pled, particularly after discovery and motion practice, our membership would request the Court consider increasing the hourly rate. Our jurisdiction has not noted any shortages of criminal lawyers at the Circuit Court level.

HOURLY RATE

As the paragraphs above that address the annual and case caps, also discuss hourly rate, our membership will merely summarize that aside from Juvenile Court practice, hourly rate increases appear best directed towards criminal matters and child support cases, as those cases, at least in Marshall County, do not appear to push against the maximum compensation rates as much. In terms of Juvenile Court, our membership would certainly appreciate increases to the hourly rate, but given the speed at which these cases reach maximum compensation, our membership would encourage more emphasis on raising the case maximum. By in large, most of our members charge hourly rates of \$200 to \$300 per hour on private cases. Like any business, when certain work is unprofitable, revenue demands offset upon the work that generates income. This has a tendency to push the costs up for people who can afford to pay. For a County that is relatively poor, this forces out those people who are in between indigent and financially stable. In terms of accessing justice for those who are on the income margins, many are left with no options in terms of legal representation. Counsel can not be expected to subsidize the legal needs of an entire community, and most of our members do not enjoy a lavish lifestyle. By in large, our members enjoy a standard of living commensurate with most of our averagely situated neighbors. Our members would submit that efforts at increasing the hourly rate be such that lawyers do not lose so much income accepting indigent defendants, that they have to increase rates for other clients. Further, that indigent rates increase such that our members do not have to travel out of County to

sustain their practices. By doing so, the County would retain lawyers locally to be available, and rates for private cases would be more affordable for our local citizens.

CLOSING

In closing, our members appreciate and applaud the Court for addressing the issues of indigent compensation and maximum compensation rates. Our Members would request the Court also address the annual cap. In terms of hourly rate, our Members feel the greater effort could be made in increasing maximum case amounts as well. In terms of all other areas, our Members would encourage the Court consider increasing the hourly rates for those cases. None of our Membership believes, nor intends to become wealthy performing indigent representation. All of our Members understand the burden of their license, and most give of themselves freely in fulfilling the need. As is typical, there are a few who give enormously and, in those cases, there is some concern about killing our race horses. The need for indigent representation in the smaller, more rural and poor counties, is extremely great. The pool of lawyers in such areas is usually older, more experienced, with more overhead, and typically very busy. More compensation across the board will feed those who give the most, will incentive others to give those few race horses a breather, will reduce the economic loss encountered with indigent representation such that fees for private cases can be lowered, and generally provide better access to justice for all of the citizens of Marshall County, and indeed the State of Tennessee.

Respectfully Submitted,



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FILED
JUN 25 2018
Clerk of the Appellate Courts
Rec'd By LM

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE: ADOPTION OF AMENDED)
TENNESSEE SUPREME COURT) No. ADM2018-00796
RULE 13, SECTIONS 2 AND 3)**

**COMMENT OF THE TENNESSEE BAR ASSOCIATION
IN RESPONSE TO THE PETITION FOR THE
ADOPTION OF AMENDED TENNESSEE
SUPREME COURT RULE 13, SECTIONS 2 AND 3**

The Tennessee Bar Association (“TBA”), submits the following comment regarding the adoption of amended Tenn. S. Ct. R. 13, Sections 2 and 3, filed May 25, 2018, to clarify the compensation guidelines and increase the amount of compensation in certain cases.

The TBA has carefully considered the proposed changes to Tenn. S. Ct. R. 13, Sections 2 and 3. The TBA appreciates the Tennessee Supreme Court’s (“the Court”) leadership in strengthening Tennessee’s commitment to indigent representation reform, which resulted in the General Assembly’s passing a recurring allocation of \$9.7 million in the FY 2018-19 budget, which will go into effect on July 1, 2018.

The TBA made increased indigent representation funding its top legislative priority in 2018, and the budget allocation marks a significant achievement in the ongoing efforts for indigent representation reform in Tennessee. The TBA is

grateful to Governor Haslam, the General Assembly, and the Tennessee Supreme Court for increasing funding for indigent defense of Tennessee's most vulnerable citizens and children. Competent representation costs money, and the constitutional right to counsel is only real if lawyers appointed to defend them are paid reasonably.

The TBA also recognizes how committed the Tennessee Supreme Court is to enacting the reforms outlined by the Court's Indigent Representation Task Force, including significantly higher attorney compensation and a statewide indigent representation task force. The TBA looks forward to working with the Court next year to move funding even closer to the amount the Court's Task Force recommended. Increasing compensation for appointed counsel for those unable to afford counsel in criminal and civil cases is critical. Before this additional funding, Tennessee ranked second-from-the-bottom among all U.S. jurisdictions in funding for indigent representation.

Increased funding of indigent defense was one of two key recommendations of the Court's Indigent Representation Task Force, chaired by former Supreme Court Justice William C. Koch Jr. That task force spent two years holding hearings across the State and developing its 198-page report issued in April 2017. The Supreme Court strongly urged the legislature to enact the Task Force's other key finding – the establishment of a statewide indigent representation commission –

but no action was taken this year. The TBA continues to strongly support this Task Force recommendation and will join the Court in seeking the creation of a commission next year.

The new funding will increase the amount attorneys are paid to work on indigent cases, as well as raise the current caps imposed on payment for individual cases. In its review of the Court's proposed changes to Rule 13, TBA sent out a survey to all licensed attorneys in Tennessee asking for their opinions on the Court's proposed amendments to Rule 13. 765 attorneys responded to the survey, and the survey results are included as Exhibit A to the TBA Comment. Nearly 30% of the attorneys who replied responded that the existing caps on compensation affected their compensation in 5-25% of their cases, and over 15% of the attorneys responded that the existing caps on compensation affected their compensation in 75% of their cases. Over 75% of respondents stated that they have taken appointments eligible for compensation under Supreme Court Rule 13 but have not turned in applications for reimbursement because of the low level of compensation. Additionally, 80% of those that responded indicated that they favor the Court using more of the funding for increasing rates versus caps.

Finally, the TBA appreciates the Administrative Office of the Courts (AOC) commitment to implement periodic or "interim" billing for attorneys, replacing the existing system under which most cases cannot be billed until the end. Interim

billing will address the ongoing problem of many attorneys not receiving payment for their work on indigent cases for years, until after the conclusion of a case. Interim billing was also recommended in the Indigent Representation Task Force's original recommendations and report.


The TBA supports the adoption of amended Tenn. S. Ct. R. 13, Sections 2 and 3, filed May 25, 2018, to clarify the compensation guidelines and increase the amount of compensation in certain cases, and looks forward to working with the Court to increase compensation for indigent representation even more next year and address the other issues raised in this Comment.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "B" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.

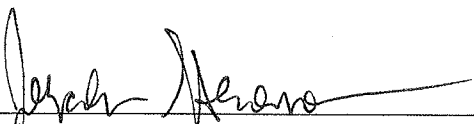
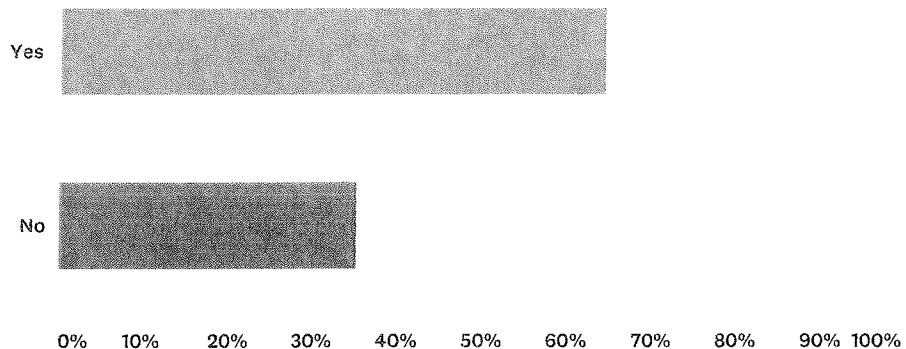

Joycelyn Stevenson

EXHIBIT A

TBA Survey of Lawyers

Q1 Do you handle matter for which you are compensated by the State under Supreme Court Rule 13 for your time?

Answered: 765 Skipped: 1



ANSWER CHOICES

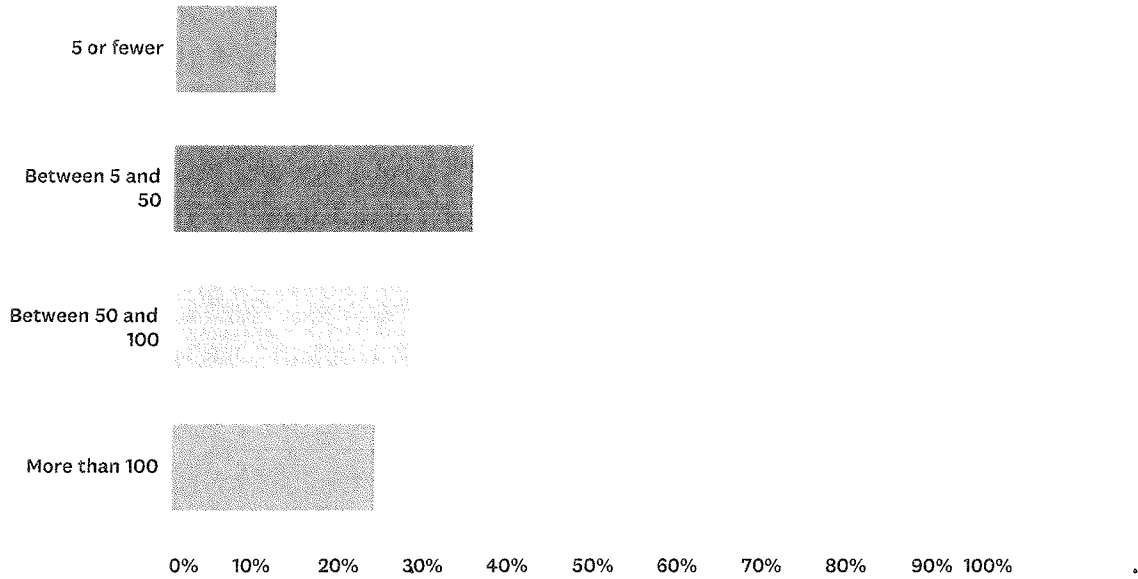
RESPONSES

Yes	64.58%	494
No	35.42%	271
TOTAL		765

TBA Survey of Lawyers

Q2 Please estimate how many such matters you handled at any time in 2017?

Answered: 451 Skipped: 315



ANSWER CHOICES

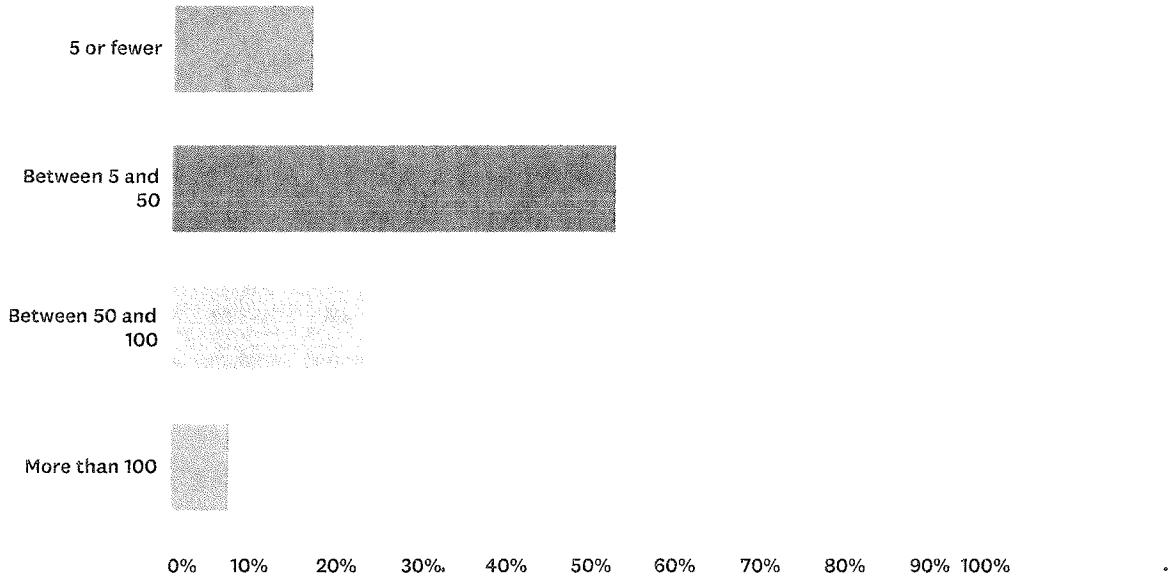
RESPONSES

5 or fewer	12.20%	55
Between 5 and 50	35.48%	160
Between 50 and 100	28.16%	127
More than 100	24.17%	109
TOTAL		451

TBA Survey of Lawyers

Q3 Please estimate how many such matters you have handled so far in 2018?

Answered: 453 Skipped: 313



ANSWER CHOICES

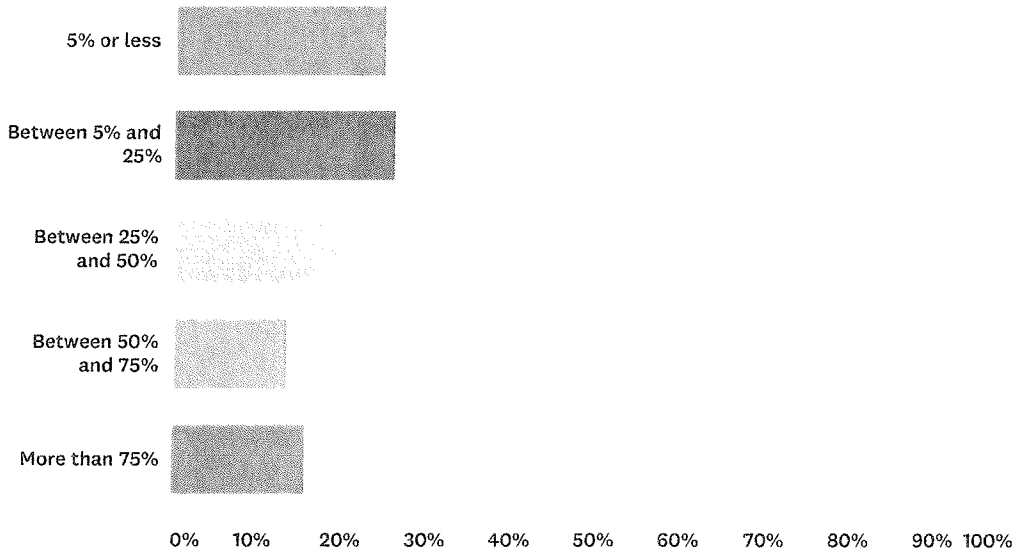
RESPONSES

5 or fewer	16.78%	76
Between 5 and 50	52.76%	239
Between 50 and 100	23.18%	105
More than 100	7.28%	33
TOTAL		453

TBA Survey of Lawyers

Q4 Please estimate the percentage of the cases you handled in 2017 in which the existing caps on compensation affected your compensation.

Answered: 453 Skipped: 313



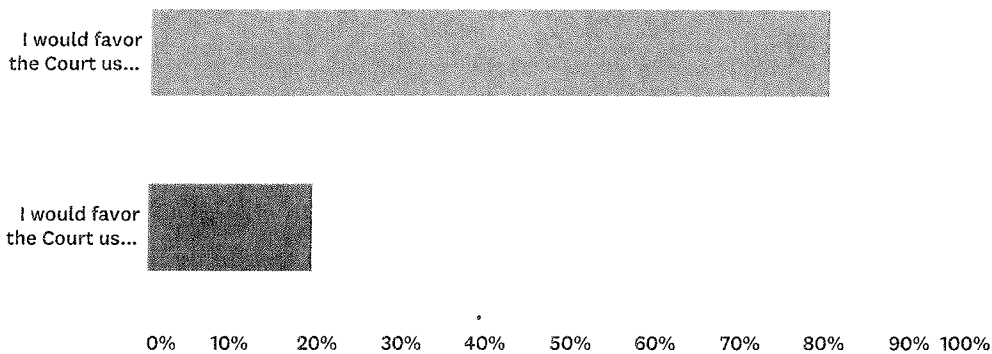
ANSWER CHOICES

RESPONSES

5% or less	24.94%	113
Between 5% and 25%	26.05%	118
Between 25% and 50%	19.43%	88
Between 50% and 75%	13.69%	62
More than 75%	15.89%	72
TOTAL		453

Q5 Assume that, because limited additional funds will be available to increase compensation under Supreme Court Rule 13, the Court will likely need to choose, to some extent, between increasing hourly compensation rates on the one hand, and increasing caps on the other. With that assumption, would you favor more of the additional available funding being used to increase rates and less be used to increase caps or vice versa?

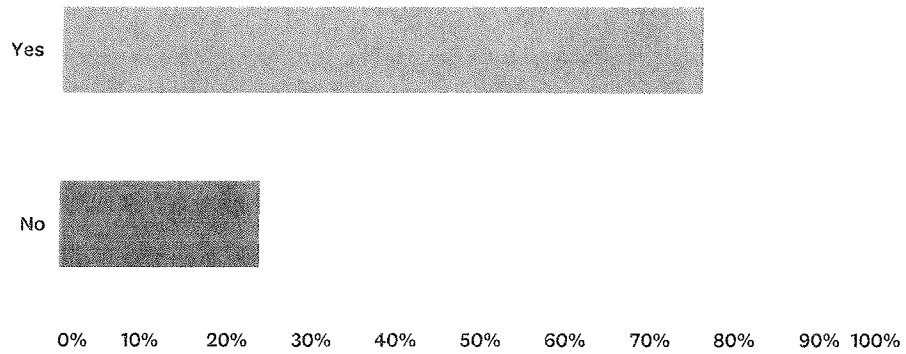
Answered: 450 Skipped: 316



ANSWER CHOICES	RESPONSES	
I would favor the Court using more of the funding for increasing RATES.	80.44%	362
I would favor the Court using more of the funding for increasing CAPS.	19.56%	88
TOTAL		450

Q6 There are reports that some Tennessee lawyers who take appointments eligible for compensation under Supreme Court Rule 13 have taken such cases but not turned in applications for reimbursement because of the low level of compensation. Have you ever accepted an appointment and decided not to see compensation under Rule 13?

Answered: 453 Skipped: 313



ANSWER CHOICES

ANSWER CHOICES	RESPONSES	
Yes	76.16%	345
No	23.84%	108
TOTAL		453

"Exhibit B"

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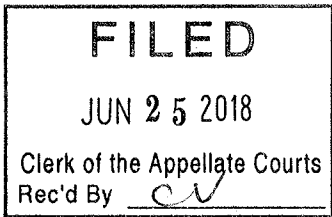
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IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE RULE 13, SECTIONS 2 AND 3
RULES OF THE TENNESSEE SUPREME COURT

)
) No. ADM2018-00796
)

I. Introduction

The Tennessee Association of Criminal Defense Lawyers (TACDL) and the National Association of Criminal Defense Lawyers (NACDL) jointly provide this statement encouraging the Tennessee Supreme Court to adopt such amendments to Rule 13 as necessary to assure all those represented by public defense attorneys have counsel who are sufficiently resourced, supported, and trained, who have caseloads that allow them to provide meaningful representation at all stages of the proceedings, and who are adequately compensated to assure that counsel may fulfill all his or her ethical and legal obligations to their appointed clients.

TACDL is a non-profit corporation chartered in Tennessee in 1973, representing over 1,000 members statewide. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes providing education, training, and support to criminal defense lawyers, as well as promoting advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee.

NACDL is a non-profit voluntary professional bar association that promotes a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. To that end, NACDL seeks to identify and reform flaws and inequities in the criminal justice system, redress systemic racism, and ensure that its members and other in the criminal defense system are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL's thousands of direct members and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges are dedicated to advancing the proper, efficient, and fair administration of justice.

As an organization, NACDL has authored numerous reports relating to the state of public defense, including state focused reports in Louisiana (State of Crisis), South Carolina (Summary Injustice and Rush to Judgment), and Florida (3 Minute Justice); a three-part examination of public defense in America (Gideon at 50 Parts 1, 2 and 3); and an examination of the Federal Indigent Defense System (Federal Indigent Defense 2015: The Independence Imperative). NACDL has also served as amicus on numerous filings related to the provision of indigent defense services in state and local courts including Hurrell-Harring v. State of New York, Tucker v. Idaho and Kuren v. Luzerne County (PA). NACDL hopes that its national perspective drawn from sixty years of advocacy, investigation, training, and public defense reform efforts will be helpful to the Court. As the nation's

preeminent criminal defense bar, NACDL is keenly interested in the issues raised by the proposed amendments to Rule 13 before this Court.

II. Proposed Amendments to Rule 13

The proposed amendments to Tennessee Supreme Court Rule 13, sections 2 and 3 provide only small cosmetic changes to the compensation system currently in place. The modest increase in the case preparation rate and related changes to some of the case compensation fee caps (“fee caps”) do not fully address the more fundamental need to redress Tennessee’s current compensation structure. Both TACDL and NACDL encourage the Court to heed three recommendations of the 2017 Tennessee Indigent Representation Task Force (“Task Force”) report, *Liberty & Justice for All: Providing Right to Counsel Services in Tennessee* (“*Liberty & Justice*”) relating specifically to Rule 13, to wit:

- (1) Eliminate the distinction between the rate paid for work done outside of court and the work done while the attorney is in court;
- (2) Raise the rate of compensation for court appointed counsel to at least \$75/hour; and
- (3) Eliminate the use of caps and the need for specific “complex case” designations, allowing attorneys to be paid fully for the work they perform.

TACDL and NACDL believe these changes are vital to assuring a healthy, vibrant, and constitutionally effective public defense delivery system in Tennessee.

The Court’s Proposed Changes:

The Court’s current amendments meet the first of these recommendations, raising the rate for case preparation work from \$40 per hour to \$50 per hour, and thus providing a single compensation rate for all work on appointed cases. This change provides not only an increase in payment, but serves as an important recognition that the work done preparing for the case is just as important as the work done in the courtroom itself. This welcomed change will reinforce for all criminal justice actors that keys to effective representation include early, regular, and meaningful contact between the attorney and client, conducting factual and mitigation-focused investigations, conducting research and drafting and filing motions.

Unfortunately the resulting proposed universal rate of \$50 per hour is still woefully inadequate compensation, especially when it is coupled with compensation caps. This low fee, limited hour construct may keep costs down for the locality, but that is done at the expense of assuring meaningful and constitutionally effective representation for the person accused or, alternatively, by forcing a small segment of the legal community to personally subsidized the state’s obligation to provide counsel to all who are eligible.

The Need for Proper Compensation:

From 1994 to the present day, attorneys accepting court appointments have been paid \$40/hour for out of court work and \$50.00/hour for in court work. Over this same 24 year period inflation has grown. As a result, stagnation in the attorney compensation rate has effectively meant an annual *decrease* in pay for those attorneys accepting court appointments.

YEAR	COURT APPOINTED RATE (for in court work)	VALUE BASED ON CONSUMER PRICE INDEX ¹
1994	\$50/hr.	\$50.00/hr.
2004	\$50/hr.	\$39.47/hr.
2015	\$50/hr.	\$31.25/hr.
2018	\$50/hr.	\$29.49/hr.

Several prior filings to this Court regarding the need to increase the court appointed attorney rate have cited a 1992 study by the Spangenberg Group. This report indicated the average overhead costs for a court appointed criminal defense attorney was \$47.26 per hour. In other words, *in 1994*, after expenses, attorneys *earned \$2.74* for every hour they were in court on a court appointed case (paid at a rate of \$40.00 per hour) *and lost \$7.26 per hour* each hour they worked on a case outside of court.

Today the gap between overhead expenses and income has grown from a crack to a chasm. If overhead expenses simply kept pace with the Consumer Price Index, the \$47.26 hourly overhead cost would now be \$124.22, thus widening the gap between expenses and payment from an earned income of \$2.74/hour to a loss of \$74.22 per hour.

Notably, while court appointed counsel rates have remained the same for nearly a quarter century, pay for other key court system actors including public defenders, prosecutors, and judges, have all risen. These other system actors, by statute, receive regular increases in their salaries tied to either pay increases provided to other state employees (T.C.A. sec. 8-7-201 et. seq. and T.C.A. sec. 8-14-207) or the Consumer Price Index (T.C.A. sec. 8-23-103). The fact that these other system participants receive increases to account for increases in daily expenses, makes clear such steps are necessary to retain qualified persons for these positions.

In addition to regular increases in pay based upon changes to the cost of living, the statutory compensation scheme for both Assistant Attorneys General and Assistant Public Defenders provides for increases in pay based upon years of service. In creating this provision for prosecutors, the legislature noted that such was needed to further "the goal of

¹ CPI represents the Consumer Price Index. The CPI values calculated in this table reflect the cost and CPI adjustment on January 1 of the year listed. https://www.bls.gov/data/inflation_calculator.htm (last visited June 23, 2018)

developing a corps of capable and experienced full-time prosecuting attorneys throughout the state, and thus enhancing the state's ability to cope with recent increases in crime and criminal activity in the state." T.C.A. sec. 8-7-201. The practice reflects recognition that in order to develop and retain high caliber attorneys, the state must provide pay which reflects their growing expertise. Despite this provision's existence for prosecutors and institutional defenders, no such steps are taken to provide higher compensation rates for court appointed attorneys based upon their years of experience or the complexity of the cases they are handling.²

This inadequate pay rate is further exacerbated by the use of fee caps. These types of barriers, especially as they are now set, serve to further financially burden those defenders who take on court appointed cases and engage in zealous, constitutionally effective representation. Upon reaching the number of hours allotted under the cap, these defenders must either continue to work with no compensation, or attempt to establish their case is one which should be classified as a complex or extended case.

The current criteria for complex or extended cases are such that a lawyer must demonstrate his or her case is an exception. Only a small percentage of cases each year are classified as complex/extended. However, a review of practice standards such as the ABA's Criminal Justice Section Standards for the Defense Function reveal the myriad of responsibilities placed on defense counsel, from having early and regular communications with clients, to engaging in discovery, investigations, and mitigation; conducting negotiations with the prosecutor; researching and advising clients of collateral consequences of their case; preparing for court proceedings; and conducting hearings. It is unquestioned that the complexity and sheer volume of information being provided in criminal cases has grown—with regularity attorneys are receiving multiple video/audio recordings from body worn cameras, in-vehicle dash cams, and private sources (such as surveillance cameras); being confronted with issues relating to forensic evidence such as DNA, fingerprints, or tool marks; and needing to gather and review a variety of medical and mental health records. This means attorneys must spend significantly more hours on their cases today than they did even just a decade ago. However, the compensation caps have remained largely unchanged. As a result attorneys must choose to either complete the work needed to provide effective representation without compensation or take short cuts to assure they are able to be fully compensated for the work they have done on a case.

While the Court's proposed changes do call for some increase to the compensation caps, the increases are minor (\$250 to \$500) and do not fully take into account the increasing complexity of criminal defense obligations. Rather, the increases seem to largely be designed to account for the \$10/hour increase in the case preparation rate, although alarmingly, there is no increase in the compensation cap for misdemeanor matters.

² Rule 13 does provide for a higher rate of compensation for lead counsel in a capital case (\$80/hour) and co-counsel in a capital case (\$60/hour) but does not make any additional provisions for increased pay rates for those handling murder or Class A or Class B felony cases.

In misdemeanor cases, just like their felony counterparts, defense attorneys have an obligation to meet with and keep the client reasonably informed about their case, to conduct investigation and legal research, to receive and review discovery, to advise their client on how to proceed in the case, and to prepare for court. Misdemeanors compose a large percentage of criminal cases in which counsel is appointed, yet the Court's proposed changes to Rule 13 fail to reflect an increase in the cap for these cases.

Similarly concerning is that the Court's proposed changes provide minimal compensation for direct appeals and post-conviction and habeas representation. These areas are highly specialized and extremely complex and require additional expertise, experience, and skill. By maintaining low compensation rates, the proposed rule changes can only work to further dissuade individuals to accept these specialized cases and to dissuade other attorneys from gaining any expertise in these fields.

Rather than adjusting the compensation caps, this Court should follow the recommendations of the Task Force and remove the caps and the use of complex/extended case designations, allowing each case to be compensated based on the actual number of hours necessary to assure effective constitutional representation.

III. The Importance of Adequate Compensation for Court Appointed Counsel

"That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command... an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Majority opinion by Justice O'Connor in Strickland v. Washington, 466 U.S. 668, 686 (1984).

The right to counsel as guaranteed by the Sixth Amendment has various crucial components. Counsel must have the requisite skill, experience, and knowledge to provide meaningful representation in the case to which they are assigned. *Id.* Counsel must also have adequate resources and reasonable caseloads that allow the lawyer to meet the standards for constitutional representation.³

Having adequately resourced, skilled, and trained counsel helps protect against wrongful convictions, because they are able to conduct thorough investigations and make meaningful challenges to improper forensic sciences. Attorneys with proper caseloads and support have the ability to assure meaningful examinations of government conduct, preserving the Fourth, Fifth and Sixth Amendment rights of the community. Counsel with time, education, and experience can assist in identifying and addressing underlying conditions such as substance abuse, mental illness, and trauma, allowing for the use of treatment, services and diversions which help reduce recidivism. The intervention and actions of counsel can help mitigate the myriad of collateral consequences that often attend

³ Meaningful representation guidelines can be found in the ABA Standards for Defense Function, Standards 4-3.2, 4-3.6, 4-4.1, and 4-1.3(e).

convictions of even the most minor of crimes. Collectively, meaningful representation protects the state's coffers and increases the community's confidence in the justice system.

The right to counsel also encompasses the right to have conflict free counsel. This means not only counsel free of a traditional conflicts of interest but includes having counsel whose commitment to his or her client does not compete against the attorney's financial interests in operating their practice and earning a living wage.⁴

It is easy to understand that excessively low compensation results in poor quality representation. Low rates of pay force many attorneys to take on more cases than they can properly handle in an effort to earn sufficient income. While the Rules provide that an attorney may not take on more than 2000 hours of court-appointed representation annually, there is nothing preventing these attorneys from handling a full-time court appointed caseload (40 hours per week x 50 weeks=2000 hours/year) AND operating a full-time private practice.

Low rates of pay also discourage higher quality, more experienced counsel from accepting court appointments. Moreover, inadequate rates of pay will lead to counsel devoting minimal time to their work if they are losing money throughout the representation, as it appears that the rate of compensation is likely significantly below the hourly overhead cost.

IV. Courts Have the Authority to Act

While this Rule petition falls within the purview of the Court, the funding for any increases in public defense spending must be appropriated by the legislature. This factor can lead courts to be inactive in pursuing public defense reforms, as they see their actions as limited by the appetite of the legislature to provide additional resources. However, across the nation, courts have acted when other branches of government have failed to protect fundamental fairness in the judicial system. State cases where courts have acted regarding assigned counsel rates are discussed in The Constitution, Compensation, and Competence: A Case Study, 27 Am. J. Crim. L.1, Robert Rigg, 1999. Cases demonstrating the court's authority to act include:

- Alabama: *Wright v. Childree*, 972 So.2d 771 (Ala.2006): Holding attorneys entitled to overhead plus a reasonable fee.
- Alaska: *DeLisio v. Alaska*, 740 P.2d 437 (Alaska 1987): "Requiring an attorney to represent an individual criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." The *DeLisio* court found that the state cannot deny

⁴ According to the ABA's Task Force on the Financing of Legal Education, those graduating law school in academic year 2012-2013 had an average student loan debt of \$88,000 if attending a public school and \$127,000 if attending a private school. By contrast, in AY 2005-06, student debt for public and private law school graduates was \$66,000 and \$102,000 respectively.

reasonable compensation to appointed counsel; to do so constitute taking without just compensation.

- Arizona: Zarabia v. Bradshaw, 912 P.2d 5 (Az.1996): Court held that a flat fee contracting system used in Yuma County was invalid as it appointed attorneys without consideration of their skill or experience. In so ruling the court also found the contract failed to pay counsel the “reasonable and equitable compensation” the Arizona Rules of Criminal Procedure required because a “compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable.”
- Florida: In Re Order on Prosecution of Criminal Appeals by 10th Judicial Circuit Public Defender, 561 So.2d 1130 (Fla.1990): Court directs if legislature did not provide sufficient funds within 60 days to provide counsel the court would entertain habeas petitions and order immediate release of the accused;
- Kansas: State v. Smith, 747 P.2d 816 (Kan.1987): Kansas Supreme Court recognized that the state has an obligation to pay court appointed counsel at a rate which includes consideration for both out-of-pocket expenses and overhead. The Court found the current system in place in Kansas violated several provisions of the U.S. and Kansas Constitutions including violating the Takings Clause when legal services are provided without adequate compensation.
- Iowa: Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981): Case addressed what is “reasonable compensation” as authorized by the statute in effect. The Iowa Supreme Court directed in doing so the trial court must “put itself in the position of a reasonable attorney at the time the services were undertaken. The court must recognize the high standards of diligence and preparation which is [sic] demanded of counsel in criminal cases.”
- Louisiana: State v. Peart, 621 So.2d 780 (La.1993): The Louisiana Supreme Court created a rebuttable presumption that certain indigent defendants were not receiving effective assistance of counsel because the attorneys in those areas were carrying excessive caseloads and thus were unable to properly fulfil their obligations. “We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.”
State v. Wigley, 624 So.2d 425, 429 (La.1993): the Louisiana Supreme Court found that requiring attorneys to represent an accused without compensation (at all) was an abusive extension of their professional obligations and directed such attorneys were entitled to receive reimbursement for out-of-pocket expenses, overhead expenses and a fee for their services. “[B]udget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys’ professional responsibilities.”
- Massachusetts: Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895 (Mass.2004): Low level of compensation for appointed counsel left county with shortage of attorneys willing to accept appointments, resulting

in lengthy delays in appointing counsel. The court concluded there was a high likelihood accused would not receive effective assistance of counsel (and that the current lack of counsel violated his right to assistance of counsel in having bail set and in lost opportunities for investigation). The court found the accused could not meaningfully prove prejudice; therefore the court had to provide prospective protection. The court entered an order for the attorney general to explain why any petitioner held more than seven days without bail should not be released and those charged with felonies without counsel for more than 30 days should not have their charges dismissed without prejudice until counsel is provided.

- Mississippi: *Wilson v. State*, 574 So.2d 1338 (Miss.1990): Counsel was entitled to costs of overhead as part of their “actual expenses” in addition to the hourly rate set by the legislature. The court set the overhead compensation rate at \$25/hour.
- New Mexico: *State v. Young*, 172 P.3d 138 (N.M.2007): Capital counsel operating under flat-fee contracts are so inadequately funded they cannot recoup overhead makes it “unlikely that any lawyer could provide effective assistance of counsel.”
- New York: *NY County Lawyers Association v. State*, 192 Misc. 2d 424 (N.Y.2003): The court raised assigned counsel rates because the current amount did not cover normal hourly overhead expenses.
- Oklahoma: *State v. Lynch*, 796 P.2d 1150, 1163 (Okla.1990): Court appointed counsel challenged the statutory fee caps. The Oklahoma Supreme Court took jurisdiction, setting guidelines for compensation until such time as the legislature acted. In finding it had the authority and obligation to act, the court cited its “constitutional responsibilities relating to the managerial and superintending control of the district courts and the practice of law” and “the inherent power of the court to define and regulate the practice of law.” The Oklahoma Supreme Court also recognized while compensation is something that also lies within the sphere of the legislature, until the legislature acted, the court had a responsibility to address the constitutional claim raised.
- West Virginia: *Jewell v. Maynard*, 383 S.E.2d 536 (W.Va.1989): The court found court appointed counsel were being forced to “involuntarily subsidize the state” when they were paid a rate that was below the cost of overhead.

The national trend in class action litigation has confirmed the court’s role in assuring the criminal justice system operates fairly. Courts therefore have been proactive in assuring systematic flaws do not result in injustice. A movement away from a post-conviction examination of the quality of representation in a single case allows systemic flaws to be examined and addressed. Cases demonstrating this national trend include:

- *Duncan v. State of Michigan*, 775 N.W.2d 745 (Mich. 2009): The court allowed a class action to proceed, rejecting suggestions that the only means by which to consider ineffective assistance of counsel issues is through a post-conviction analysis.

- *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y.2010): Class action permitted to proceed on a claim of constructive denial of effective assistance of counsel due to systemic deficiencies. The case asserted that the mere existence of a public defender office did not meet the minimum requirements of the Sixth Amendment when such office lacked sufficient skill and experience to provide constitutional representation. The resulting settlement included establishing caseload standards, state sharing responsibility for paying for counsel, and an agreement to the timely provision of counsel at first appearance/arraignment.
- *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 112 (W.D.Wash.2013): The court found a Sixth Amendment violation based on counsel routinely meeting clients for the first time at court and defendants being regularly advised to plead guilty without meaningful communications with their counsel. The court concluded this was “represent[ing] the client in name only . . . having no idea what the client’s goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions or criminal history exist.” The court indicated while the majority of defendants may have received reasonable resolutions of their cases, they did not have the meaningful relationship with their attorney required by *Gideon*.
- *Kuren v. Luzerne County*, 146 A.3d 715 (Pa.2016): Constructive denial of counsel lies where systemic deficiencies create an imminent risk that the right to counsel will be violated. The challenges included routine underfunding of the public defender preventing the provision of constitutionally sufficient representation. The court recognized that sufficient facts had been alleged to pursue an injunction to force the county to adequately fund the county public defender office.
- *Tucker v. Idaho*, 394 P.3d 54 (Idaho 2017): Case alleges Idaho fails to provide adequate resources, training and oversight of its public defenders thus neglecting its responsibility to ensure constitutionally adequate representation. Litigation still ongoing. In April 2017 the Idaho Supreme Court ruled that the case could proceed holding “the counties have no practical ability to effect statewide change” so the “state must implement the remedy.” Case was certified as a class action in January 2018.

As these cases demonstrate, as part of its role in assuring compliance with the constitutional right to effective assistance of counsel, courts can act to set a minimum threshold of compensation because the provision of indigent defense services the state’s constitutional obligation. For example, courts may set specific rates as a floor for adequate compensation. Courts could also opt to tie adequate compensation rates to other indicators such as the CJA rate or to call for increases that mirror those provided to other government employed judicial system actors such as prosecutors, public defenders, or judges. Another possibility would be for courts to conclude that when attorney compensation is at or below a particular threshold, there is a presumption that the representation was ineffective and the burden shifts to the state to overcome that presumption. Such a threshold could be

determined by examination of overhead and the average cost of operating a criminal defense practice within the state.

The *Gideon* Court made clear the obligation to provide counsel for those unable to afford it lies with the state. Although the court did not prescribe a specific manner in which counsel was to be provided, the responsibility lies with the state.

Low hourly rates are an abdication of the state's responsibility. They force a small segment of the private bar to personally shoulder the true cost of the criminal justice system. Not all lawyers take appointments, nor should they since many lack the requisite training, skill and expertise to handle criminal matters. The burden of inadequate compensation therefore falls on a small segment of the private bar.

While setting flat fee contracts or case caps can appear advantageous by making the defense expenditures more predictable, when a court does so, it merely passes along to individual defenders the responsibility for personally funding the cost of public defense.

TACDL and NACDL urge this Court to follow the recommendations of the Task Force—not only its current proposal to remove the distinction between rates for case preparation and those for court work, but also the removal of case compensation caps and the provision of an hourly rate that will provide adequate compensation for appointed counsel. While the judiciary does not allocate funds, it does bear responsibility for the quality of justice in its courtrooms and for the enforcement and protection of the state and federal constitutions. These require the Court to act to assure every person who stands accused has beside him or her an experienced and capable advocate, who has a manageable caseload and access to the necessary resources to assure the attorney can provide the representation our constitution demands, and who is properly compensated to assure that high quality advocates are able to do this vital work without concerns for the personal financial cost of their representation.



Joseph S. Ozment
President, TACDL



Norman L. Reimer
Executive Director, NACDL



TACDL

...wherever justice demands

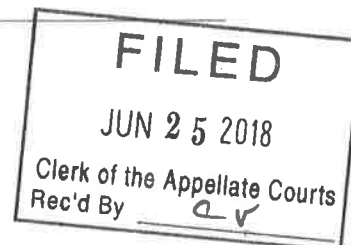


**NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

Christine Vicker - Comments to Proposed Changes to Rule 13; Docket # ADM2018-00796

From: Ben Houston II <bhouston79@comcast.net>
To: <appellatecourclerk@tncourts.gov>
Date: 6/25/2018 1:13 PM
Subject: Comments to Proposed Changes to Rule 13; Docket # ADM2018-00796

Dr. Mr. Hivner:



Please accept this email as my comment to the proposed rule changes to Rule 13 of the Rules of the Tennessee Supreme Court. As you know, it has been about a quarter of a century since the last rate increase for Tennessee attorneys, who are appointed to represent indigent adults and children in criminal cases, juvenile delinquency cases, and cases involving dependent and neglected children. The proposed rate increase is woefully inadequate. I would urge the Tennessee Supreme Court to reconsider its proposed change by significantly increasing the amount of the rate increase.

Sincerely,

Ben H. Houston II

Attorney at Law

717 N. Central Street

Knoxville, TN 37917

(865) 546-0011

(865) 546-0038 (fax)



June 25, 2018

FILED JUN 25 2018 Clerk of the Appellate Courts Rec'd By CV

VIA E-Mail: appellatecourtclerk@tncourts.gov

Knoxville Bar Association 505 Main Street, Suite 50 P.O. Box 2027 Knoxville, TN 37901-2027 PH: (865) 522-6522 FAX: (865) 523-5662 www.knoxbar.org

James Hivner, Clerk of Appellate Courts Tennessee Supreme Court 100 Supreme Court Building 401 Seventh Avenue North Nashville, TN 37219-1407

Re: IN RE Rule 13, Sections 2 and 3, Rules of The Tennessee Supreme Court; No. ADM2018-00796

Dear Mr. Hivner:

The Knoxville Bar Association ("KBA"), through its Professionalism Committee ("Committee") and Board of Governors, has carefully considered the proposed change to Tennessee Supreme Court Rule 13, Sections 2 and 3

After discussion, the Committee voted to recommend to the KBA Board of Governors (the "Board"), that the Board express its appreciation to the Court for their efforts to increase compensation for appointed attorneys but to address serious concerns that the proposed compensation is still inadequate to fund the system that will provide the thorough representation and constitutional protections that should be available to the growing number of defendants who qualify for services.

The matter was thoroughly considered at the Board meeting held on June 20, 2018. Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously adopted the Committee's recommendation.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Handwritten signature of Keith H. Burroughs

Keith H. Burroughs, President Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail) KBA Executive Committee (via e-mail)

Officers

Keith H. Burroughs President

Wynne du Mariau Caffey-Knight President-Elect

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Carrie S. O'Rear

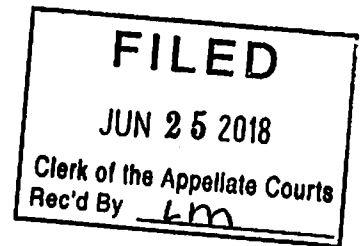
T. Mitchell Panter

M. Samantha Parris

Robert E. Pryor, Jr.

Mikel A. Towe

Executive Director Marsha S. Watson mwatson@knoxbar.org



James M. Hivner, Esquire and Clerk of Court
Re: Rule 13, Sections 2 and 3 - No. ADM2018-00796
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Hiver,

I am writing concerning the proposed changes to Rule 13, which would raise the hourly rate from \$40 to a flat \$50 an hour for non-capital cases and increase the maximum compensation an attorney may receive in a particular case.

As most of my practice is in Davidson county in Juvenile Court, I appreciate the increase of the hourly rate, maximum compensation of \$1000 for dependent or neglected child cases, \$1250 for all post dispositional proceedings, \$1250 for termination of parental rights cases, and cap increases to extended or complex cases, i.e., \$2000 on dispositional matters and \$2500 for post dispositional matters.

In hopes for further reforms for next year and following years, I would like to highlight two types of cases in which I serve as Guardian ad Litem. First, a percentage of my cases involve complex scientific and medical evidence and expert testimony, as well multiple protracted hearings and complex legal issues. Second, a larger percentage of my cases involve post dispositional matters and issues of child permanency which may take years to resolve.

For example, in one complex case which I participated in, we had 9 full days of trial, multiple depositions of medical experts from several states, all involving very complex and significant medical evidence and legal issues, multiple evidentiary motions, and memorandums of law. In light of this type of case, I am wondering if these could be considered as an "enhanced" to complex status? I spent over 100 hours in research, not billed, and in order fully understand the multidimensional issues in the matter, including the vast array of medical issues.

For the second type of case, for post dispositional matters, the Guardian ad Litem's responsibilities and representation in juvenile cases can often take years to conclude. I have many of these types of cases, where permanency for the children can take 2 years and longer. Some children require representation until they turn 18, or even to 21, if they opt in to extension of foster care services. I would hope for these cases, which may

take years in the post dispositional phase, the Guardian ad Litem's compensation could have an additive to their compensation.

I appreciate the time and effort you, the court and the task force have done in understanding and adopting reforms in the representation of eligible adults and children.

Please do not hesitate to call or write, if I may be of service to you, in this regard.

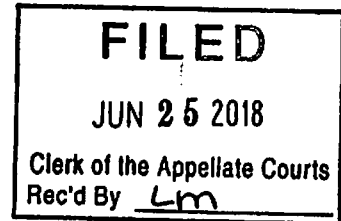
Respectfully yours,

Bruce Radek, Esquire
6508 Broken Bow Drive
Antioch, Tennessee 37013
bruceradek@yahoo.com
615-579-3001

appellatecourtclerk - Written Comments on No. ADM2018-00796 on Rule 13 Amendments

From: "Bruce Radek, Esq." <bruceradek@yahoo.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 6/23/2018 12:38 PM
Subject: Written Comments on No. ADM2018-00796 on Rule 13 Amendments
Cc: "bruceradek@yahoo.com" <bruceradek@yahoo.com>
Attachments: Letter to James Hivner - Compensation.pdf

James M. Hivner, Esquire and Clerk of Court
Re: Rule 13, Sections 2 and 3 - No. ADM2018-00796
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407



Dear Mr. Hivner,

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In hopes for further reforms for next year and following years, I would like to highlight two types of cases in which I serve as Guardian ad Litem. First, a percentage of my cases involve complex scientific and medical evidence and expert testimony, as well multiple protracted hearings and complex legal issues. Second, a larger percentage of my cases involve post dispositional matters and issues of child permanency which may take years to resolve.

For example, in one complex case which I participated in, we had 9 full days of trial, multiple depositions of medical experts from several states, all involving very complex and significant medical evidence and legal issues, multiple evidentiary motions, and memorandums of law. In light of this type of case, I am wondering if these could be considered as an "enhanced" to complex status? I spent over 100 hours in research, not billed, and in order fully understand the multidimensional issues in the matter, including the vast array of medical issues.

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I appreciate the time and effort you, the court and the task force have done in understanding and adopting reforms in the representation of eligible adults and children.

Please do not hesitate to call or write, if I may be of service to you, in this regard.

Respectfully yours,

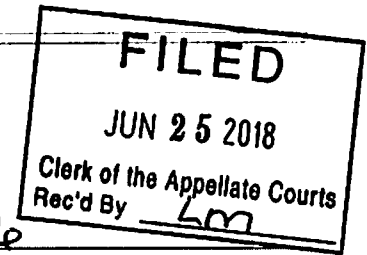
Bruce Radek, Esquire
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bruceradek@yahoo.com
[615-579-3001](tel:615-579-3001)

RADEK LAW & MEDIATION, PLLC
Bruce Radek, Esq.,
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Lisa Marsh - Appointed Attorney Compensation

From: James Patterson <jamesapattersonjr@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/24/2018 12:25 PM
Subject: Appointed Attorney Compensation



ADM2018-00796

I am submitting comments on the proposed rule changes to attorney compensation. My name is James Patterson TN BAR #031258. I am a newish attorney involved in solo practice for a little over three years. During that three years, I have accepted appointments in General Sessions-Criminal, Circuit-Criminal, Dependency/Neglect, Child Support, Juvenile Delinquency, Termination of Parental Rights, Dependency/Neglect Appeals, and Criminal Appeals. I have never had a case in Mental Health arena. My counties of practice are Davidson and Wilson. Davidson County appointed cases were only in the General Sessions-Criminal courts and Wilson County was the lion's share of my appointments and in all areas.

I have two points. The first point is that the hourly rate needs to be larger than \$50. The Tennessee Supreme Court own recommendations indicated that. That is all that I have to say about that. Point two is that the caps should be removed. The attorney has to show his billable time and the judge has to approve when it gets submitted for approval. That is check number one against inflated billing (if that is the concern). Check number two is when the AOC office gets the claim and reviews it. Check number three is when the case gets appealed and the next attorney is going through the time entries to see the work performed on the case and any issues presented in brought up on appeal. Having the cap is telling the attorney you can only work on this kind of case X hours as opposed to the facts of the case indicate that X hours will need to be worked and charged accordingly for the representation. In the capped case, the attorney still has a duty to work the case until it is finished and not be compensated for the hours worked and those same necessary hours worked counts against the 2000 hour yearly cap, if memory serves me right. Sounds like a potential takings clause violation to me, but I am not a practicing constitutional takings law attorney. That is all that I have to say about that.

As I have said what I think about the two points, I am led to two additional issues. No public defender in the Wilson County juvenile delinquency and child support courts and repeated failure by attorneys to bill for court appointed child support cases in Wilson County. I have been wrapping up my law practice for a month now and I am still having difficulty getting the necessary closing paperwork signed. The difficulty in getting proper child support case documentation to bill for the case is probably one of the reasons that the Wilson County Child Support Court cannot get more than a few attorneys to take appointments there. The public defender's office does not staff the Child Support Court even though respondents can be jailed for nonpayment or contempt of court. That issue has to be looked at. And the public defender does not man the Juvenile Delinquency Court as well. That is another issue.

As for me, I stopped working as a police officer in Nashville to practice law full-time. I took at least a \$10,000 a year pay cut to do that. I took less than five paying cases a year. I did not have an attorney position waiting for me, so I went into solo practice with a home office. Over the three years of solo practice, I was late on my mortgage at least 80 percent of the time and the mortgage amount is under \$1000, which is less than most apartments. I have received several disconnect notices of all my utilities at one time or another and other late payment notices from my creditors. I am leaving private practice to drive a city bus in Australia at \$30/hr. The slowness of pay and

basically paying just enough to keep a light on, but not enough to run all of the lights, is the reason why I am leaving practice. I have went over cap more than once and criminal appeal cases are a guarantee to run over the \$1000 cap with the boxes of documents to review. I wish you luck on finding enough freshly minted TN bar attorneys that are desperate/big enough of a sucker. As I finish my rant, I would remind the reader that the state of Queensland pays appointed attorneys at the lowest hourly rate of \$117/hour depending on the type of case and the USD and AUD is within 30 cents of each other presently. Thank you for your time and evaluation.

James Patterson

THE STANUSZEK LAW GROUP, PLLC

ATTORNEYS AT LAW

MICHAEL J. STANUSZEK*

800 SOUTH GAY STREET, SUITE 700
KNOXVILLE, TENNESSEE 37929

mjs@stulaw.org

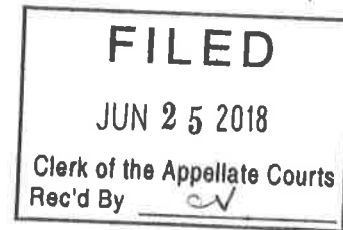
TELEPHONE (865) 696-1032
FAX (865) 381-1340

* ALSO LICENSED IN OHIO

June 25, 2018

Via email at appellatecourtclerk@tncourts.gov only

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219



RE: Comments to the Proposed Changes to Rule 13
Docket No.: ADM2018-00796

Dear Mr. Hivner:

Please accept this letter as my comment to the proposed changes to Rule 13 of the Rules of the Tennessee Supreme Court.

Let me start by saying that I am somewhat skeptical that this comment, or any of the comments submitted, will do much good. Last time the Supreme Court asked for public comment on a proposed rule change which affected the indigent bar, it was when someone over there thought it was necessary to cap the annual hours an attorney could bill the state at 2,000. That proposal was almost uniformly opposed by the bench and the bar; yet, the Supreme Court ignored the public comments and adopted the annual cap anyway – much to the disbelief of court appointed counsel everywhere. That may explain the lukewarm response to the Supreme Court's request for comments here.

However, that being said, I would like to think that as times change, attitudes change. Therefore, I - as the eternal optimist - submit this comment for your consideration.

I have been accepting court appointed cases since 2008. In that time, I have billed between 1,800 and 2,000 hours each year on these cases. In 2012, my firm started an apprenticeship program for new attorneys (each within their first three years of practice); as part of that apprenticeship program, these new attorneys are expected to accept court appointments and bill between 1,800 and 2,000 hours per year on these cases as well. I have accepted 16 such associates into my apprenticeship program. Between my associates and me, my firm has resolved tens of thousands of court appointed cases (both criminal and juvenile).

It is with that background that I would like to express my utter disappointment in the rate increase proposed by the Supreme Court this year.

I am not going to waste a lot of time going into the history of our indigent rates. A truncated version will suffice: In 2011, the Tennessee Association of Criminal Defense Lawyers (“TACDL”) sued to increase the compensation rates for court appointed counsel because the rate had not increased since 1994. That matter was later resolved (by agreement) when the Supreme Court agreed to investigate the possibility of raising our rates. In 2015, the Indigent Representation Task Force was formed to investigate said rate increase, which concluded with a report issued at the end of 2017 that recommended, among other things, a rate increase to at least \$75/hour but no more than \$125/hour (for both in court and out of court time), along with an increase in our caps.

Instead of following the recommendations of the report, however, the Supreme Court sought only to increase the rates to \$65/hour (for both in court and out of court work), and to increase our caps by \$250-500. Somebody, somewhere determined that in order to make that work, it would require \$20M in additional funding from the state legislature. The legislature, of course, only approved half that amount, \$9.7M.

In the weeks following that announcement, I attended a panel discussion with a number of state legislators where our indigent rates were a hot topic. Each legislator on the panel stated that it was their belief that the \$9.7M in additional funds would result in \$60/hour for court appointed counsel. I believe most of us were okay with that; it was not quite the \$65/hour that the Supreme Court had shot for, and we were still way short of the \$75-125/hour that was recommended by the Indigent Representation Task Force, but it was a start.

Imagine our reaction, then, when the Supreme Court came out with its proposal to increase our rates to only \$50/hour with a \$250-500 increase in our caps. The indigent bar was livid. Social media was on fire. There was almost universal disappointment – and in some cases, downright anger – by my peers. We had been told from the time the Task Force was formed back in 2015 that this was a “once in a generation” type effort to increase our indigent rates, but it felt like all we got were scraps.

Consider this: right now, court appointed counsel make \$40/hour for out of court work and \$50/hour for in court work, which AOC tells us averages about \$43/hour when you consider both out of court and in court time. The Supreme Court is proposing that we go to \$50/hour for both out of court and in court work - an increase of \$7.00/hour. With that increase, I cannot even hire a staff member at minimum wage. Even if I came up with the extra quarter, who am I gonna get at \$7.25/hour? A college graduate? A paralegal? Someone you trust to handle time-sensitive, confidential documents?

And to make matters worse, the way the Supreme Court made the announcement was completely belittling. The announcement was released via the TBA daily email after 6:00 pm on the Friday of Memorial Day weekend. You know - at the end of the week, right before a holiday weekend; just like when an employer fires an employee and they do not want to cause a scene. Trust me, this fact was not lost on anybody.

Also, the announcement was released contemporaneously with a TBA article trumpeting the Supreme Court for securing the funding to finally provide the necessary compensation for indigent counsel. The announcement and the article were listed next to each other on the TBA email, and the optics of the whole thing were terrible. On the one hand, you have indigent counsel reading for the very first time about how after 25 years of waiting for a rate increase, we were getting next to nothing, and on the other hand, you have the TBA and the Supreme Court spiking the football over how successful they were in securing the \$9.7M. I still question how the TBA

and the Supreme Court could have been so ignorant as to how the indigent bar would react to this announcement.

Even the way the TBA worded the announcement was insulting. An uninformed reader would have thought that the indigent bar was ecstatic with the results. Case and point, I sat in the TBA convention two weeks ago, and the \$9.7M in additional funds were touted again and again from the podium (just as they were in the initial announcement) - each time to thunderous applause from TBA members *who do not accept court appointments* (while members of the indigent bar sat quietly with pursed lips).

I can only assume that word got out about the indigent bar's disappointment because on June 8, 2018, Chief Justice Bivins and Lucian Pera did a YouTube question/answer session that was linked through the TBA's daily email. In that video recording, Chief Justice Bivins stated that it would cost \$7M to increase indigent rates to \$50/hour for both in court and out of court cases, \$200,000 to increase rates for capital cases, and \$2.5M to raise the caps by \$250-500 - for a total of \$9.7M. He also stated that it was cost \$10.7M just to increase our rates to \$55/hour (across the board) with no increase in our caps. I have requested the financial data which supports these figures from the Tennessee Supreme Court via Chief Justice Bivins and Justice Lee, the AOC via Deborah Taylor Tate (multiple times), and the TBA via Lucian Pera. Apparently, no one has this financial data or is willing to share it because I have received nothing.

That being the case, we have to extrapolate some from the numbers provided by Chief Justice Bivins in his video. We currently receive \$43/hour. He says it would cost \$10.7M to raise our rates to \$55/hour with no corresponding increase in our caps. That is an increase of \$12/hour. So, for every \$891,667 in additional funds, that produces a \$1/hour rate increase ($\$10.7M/12$). We were approved for an additional \$9.7M in funds. So, if we chose to do a rate increase with no corresponding increase in our caps, that would equal a rate increase of \$10.87/hour ($\$9.7M/\$891,667$) to \$53.87/hour (or approximately \$54/hour). That number makes sense because the initial ask was for \$65/hour, which is a \$22/hour increase. We got approximately half the amount requested (\$9.7M), which means we would be looking at a \$11/hour increase from \$43/hour to \$54/hour.

Now, I recognize I am using averages here and that my numbers are not exact (that is what happens when the state is unwilling to provide you with its financial data), but we know from Chief Justice Bivins that it costs \$7.2M to increase the rates to \$50/hour and \$10.7M to increase our rates to \$55/hour. So, the remaining to \$2.5M ($\$9.7M$ minus $\$7.2M$) could be used to increase our rates to somewhere between \$50-55/hour if we are willing to forego an increase in our caps. So, the question becomes whether the indigent bar is willing to do that?

I can say very confidently that the overwhelming majority of court appointed counsel would answer that question in the affirmative. Any attorney worth their salt will tell you that raising the caps by the proposed \$250-500 will have a minuscule effect on their cases. Think about this - AOC said a couple of years ago that the average juvenile court case has phase one fees of approximately \$330. Even if you figured phase one fees at \$50/hour instead of \$43/hour, the average attorney will still only have phase one fees of \$383. That being the case, how does increasing the caps from \$750 to \$1,000 have any affect on the attorney's compensation at all? My firm resolves thousands of indigent cases each year; I suspect raising these caps will affect maybe 8-10/year. It effectively does nothing to help us - it is a benefit in name only.

An additional rate increase, however, is far, far more wide-reaching. It would affect all of our cases; not just a few outliers each year. Even a rate increase to \$53/hour instead of \$50/hour would quadruple the impact that raising these caps ever will. It would allow indigent counsel to hire a staff person, or maybe move their practice from their living room coffee table to an office, or actually purchase malpractice insurance.

Also, I do not know if anyone has considered this yet, but whatever rate the Supreme Court chooses to adopt is not really going to become "effective" until months after the effective date of the rate increase. Consider this, right now our claims are submitted with a mix of time at \$40/hour and \$50/hour. If the effective date of the rate increase is July 1, 2018, then all of our claims submitted after that date will still have billable time at \$40/hour which was earned prior to July 1, 2018. So, if \$7.2M was required to bill everything in the next calendar year at \$50/hour, but all of the claims submitted in the next 8-10 months will still have time at \$40/hour, then AOC will be way under budget with \$7.2M in additional funds. Matter of fact, this \$9.7M will act as a windfall for AOC, which would be better used to fund a higher rate increase for court appointed counsel.

That aside, I ask that you consider all of the other obstacles that court appointed counsel have to hurdle just to stay afloat, and how this proposed \$7/hour increase looks to those of us who are in the trenches each day:

- We have this ridiculous phased-based billing system, which keeps us on court appointed cases for years at a time without the ability to bill;
- We have to deal with AOC, which is unresponsive to our suggestions and concerns and appears to be completely unaccountable for its mistakes;
- We have to wait for payments from the state for 10-12 weeks at a time;
- We have this annual cap on the number of hours we can bill to the state; so, even if we are committed to helping the indigent, the state will not let us make up for our lost income by working more hours;
- We have this new ACAP billing system, which (other than New Coke) may have had the worst rollout in American history (seriously, ACAP almost put my firm, along with a number of other firms, under);
- We bill the state in six minute increments, but AOC's policy is that .1 of an hour includes anything that takes eight minutes or less (yes, that is actually written on the AOC website);
- We have judges who cut our fee claims arbitrarily because it somehow makes their numbers look better. We are told by AOC that there is no recourse for this;
- We have judges that refuse to use the online billing system, so you still have to present them with a paper copy of your claim form for their signature. This can add weeks onto the amount of time it takes to get paid;
- Firms are not allowed to be appointed to cases, only individual attorneys; so, if I have one of my associates cover a hearing for another, I have to just eat their time;

- We are not compensated for any of our overhead, including our case expenses which we have to cover until our case becomes billable. So, for example, if I request medical records and they cost \$400, I have to spend the \$400 and then get reimbursed by the state later on (if the expense is even approved) when the case becomes billable, which could be years down the road;

We run our law firms at an hourly rate which the Indigent Representation Task Force tells us was inadequate 20 years ago. Most do so from a coffee table, without marketing or malpractice insurance, representing a segment of the population that is often times mentally ill and likely to file a Board complaint.

We are told by the Supreme Court that pro bono work is noble, that indigent representation is important, and that poor people should have equal access to justice. Then, it thumbs its nose at the attorneys who actually do the work. This \$7/hour rate increase is a slap in the face to those few of us still willing to accept court appointments.

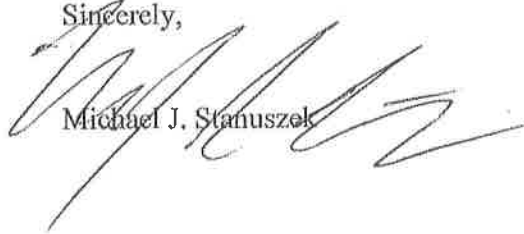
Is it a step in the right direction? Sure. Instead of the 49th worst indigent representation system in the country; we will now be like the 46th.

We appreciate that only \$9.7M in additional funds were approved by the legislature, and that is all the money the Supreme Court has to work with. The Supreme Court has a real opportunity here, however, to at least show the indigent bar that it is listening to our frustrations, that it genuinely wants to help us, and that it is committed to doing the most good with the additional funding.

Therefore, I respectfully submit that this would be best accomplished by foregoing an increase in our caps, and instead increasing our rates to the highest amount financially possible with the additional funding.

As always, thank you for your consideration. With kindest personal regards, I am,

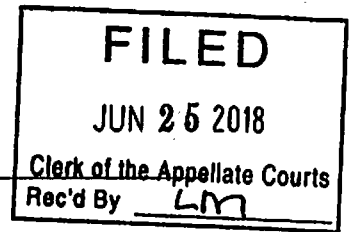
Sincerely,


Michael J. Stanuszek

MJS/kns

appellatecourtclerk - Re: No. ADM2018-00796 - proposed fee changes for indigent degense

From: Philip Swan <phil@pgswanlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/25/2018 9:36 AM
Subject: Re: No. ADM2018-00796 - proposed fee changes for indigent degense
Cc: <mjs@stulaw.com>



On Mon, Jun 25, 2018, 10:33 AM Philip Swan <phil@pgswanlaw.com> wrote:
To whom it may concern:

I am a private practice attorney and close friend of one Michael Stanuszek, who has largely been the main individual voice, speaking for many members of the bar, expressing concerns about the rates paid to attorneys by the AOC.

I graduated law school in 2017, and have been operating my own practice since October of that year.

In the short time I have been practicing law, I have largely stopped soliciting additional appointments that pay from the AOC. I have found that my time is much more valuable to privately retained clients. While this is to be expected, it illustrates that if an attorney as new as myself is already choosing to avoid AOC cases, then I must imagine that access to justice across the state, particularly in urban areas where more legal work is available, must be suffering.

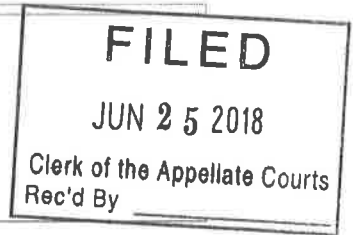
There are a number of attorneys that regularly practice in Knox County Juvenile Court who I believe would be far more qualified than myself to comment on this matter, but the point I must emphasize is this: those who characterize this conversation as non-entrepreneurial attorneys seeking handouts would be severely misguided. The issue is not about what attorneys deserve, but rather what the indigent citizens of Tennessee deserve - which is representation by counsel that is adequately and timely compensated, so as to not experience the physical and emotional fatigue that is all too common in our practice.

If a child of an opioid addicted parent is appointed an adequately compensated attorney, even if we are to disregard moral issues in the matter, the state will save money in the long run via social services and law enforcement efforts circumvented in the future. Those few willing to devote their time to the thankless cause of indigent defense should not have to choose between paying their rent (or mortgage if they are so lucky) and whether or not to aid the most vulnerable in our society.

Your humble servant,
Philip Swan

Lisa Marsh - Comments on Proposed Revisions to Rule 13, No. ADM2018-00796

From: Claire Addlestone <addlestoneclaw@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/25/2018 9:08 AM
Subject: Comments on Proposed Revisions to Rule 13, No. ADM2018-00796



Dear Mr. Hivner,

I have been following with great interest the discussions surrounding indigent compensation in Tennessee. By way of background, I am a 1994 graduate of Vanderbilt School of Law. After practicing corporate and securities law in both Dallas and Atlanta, I took some time away from the law while my children were young. During that time, we moved to Kingsport for my husband to begin a new position. I began my current practice, which is limited to acting as a guardian ad litem (primarily in juvenile court dependency and neglect cases, but also occasionally in conservatorship and contested custody cases). As a result, my income is almost exclusively from indigent defense.

After almost 10 years practicing in this capacity in Northeast Tennessee, I have a number of observations about the impact of indigent defense rates on the quality of representation provided to our most vulnerable citizens – abused and neglected children and severely disabled adults. These cases are often complex and require experience to be handled well. Repeatedly, I have seen young attorneys develop competency in handling these matters only to stop accepting appointments due to the low rate of compensation. Further, due to the caps in place many attorneys who do accept these appointments are not able to dedicate the time and resources necessary to provide excellent representation. Dependency and neglect cases frequently exceed the number of hours that can be paid under the caps, both during the adjudicatory phase and during the post-disposition phase. In addition, many of these cases continue for many years, but no compensation is received until the close of the cases. I have had many cases extend for more than 5 years. Typically, the caps (including caps for extended and complex cases) are reached during the first couple of years of representation. Even though there is no additional income to be earned once caps are reached, an appointed GAL must continue to represent their client until the case is finished. This can result in waiting several years for payment, a burden that is not expected of any other profession. In some courts, the judge may be willing to relieve a GAL in this situation and appoint a new GAL for the child. This is not in the best interest of the children. Often, I am the only professional working with the child who is involved throughout the life of the case. Finally, the indigent defense billing system is burdensome, and the new ACAP system is more difficult to navigate than the previous online system. I don't know of any attorneys accepting indigent defense appointments who don't sometimes choose not to bill for certain smaller cases because billing is so difficult.

In light of these concerns, and recognizing that the funds available to increase indigent defense compensation are limited, I suggest the following:

- Most attorneys I have spoken with believe they would benefit more from a larger increase in hourly rates with no change to caps than a small increase in hourly rates and a small increase to caps.

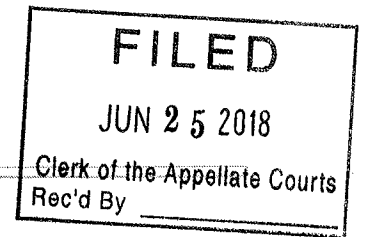
- . Interim billing would be extremely helpful. Expecting attorneys to wait years to get paid is unreasonable. Currently, I am aware of some attorneys who bill once the cap is reached even if the case will continue for several more years. This still typically means the attorney has worked 1-2 years without any payment. In addition, once the bill is submitted the attorney is unable to seek reimbursement for additional expenses incurred in connection with the representation.
- . The billing system should be simplified to decrease the burden on attorneys who are already overworked and underpaid.
- . Standards should be set for the payment of submitted claims. There is currently no standard on the amount of time the state can take to process and pay a claim. I have been paid in as little as 3 weeks or as long as 5 months.
- . Based on the task force's recommendations for hourly rates significantly higher than those currently proposed and for the elimination of billing caps, the Supreme Court should develop a plan to work towards reaching those targets and continue to seek additional funds for this purpose.

Thank you for your work on this issue and your review of these comments.

Claire Addlestone
Attorney at Law, CWLS*
5629 John Gaines Blvd.
Kingsport, TN 37664
(423) 343-0335



Lisa Marsh - Indigent Fee Changes



From: Jennifer Bjornstad <jsbjornstad@aol.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/23/2018 6:02 AM
Subject: Indigent Fee Changes

ADM 2018-796

Dear Mr. Hivner,

I am writing in response to the request for comments regarding the proposed changes in Rule 13.

I spend a great deal of my time representing indigent clients. It is my understanding that the issue is whether to raise the hourly rate at a minimal rate along with cap increases or significantly change the rates with no cap changes. I believe, and EVERY attorney that I have discussed this with believes, that the rates should be changed at a much higher rate without cap increases. As professionals, our work should be valued. Value is not shown by allowing us to work more to get paid more on a case but by the rate of hourly compensation. Many of my cases do not reach the current caps and most likely would not reach the cap with a \$10 per hour increase. My private rates are \$250 to \$300 per hour, however I do appointed work because I believe that the work representing indigent clients is extremely important. The indigent have a right to competent representation and the way to try to ensure competent representation is by significantly increasing the rate not the caps. Many attorneys cannot afford to do appointed work because the rates are so low. Everyone in the courtroom, including mental health professionals and translators, are paid more than the attorneys who are charged with representing the indigent. This shows the lack of importance attached to the representation of the indigent. If the rates are significantly higher, then more competent attorneys would ask to be added to the Clerks' appointment lists because they could afford to represent the indigent.

Thank you for your time and consideration!

Jennifer Bjornstad
Attorney at Law
448 North Cedar Bluff Rd., #310
Knoxville, TN 37923
(865) 384-4103 voice & text
jsbjornstad@aol.com

Lisa Marsh - Docket # ADM2018-00796 Comment to proposed Rule 13, Sections 2 and 3 changes



From: Lisa Cothron <lcothron@nctc.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/24/2018 9:00 AM
Subject: Docket # ADM2018-00796 Comment to proposed Rule 13, Sections 2 and 3 changes

This is my comment to the proposed Rule 13, Sections 2 and 3 changes. The Docket # is ADM2018-00796. Please confirm receipt of this comment by return email.

The TBA did a survey and requested comments. I admit that I have been very disheartened by this proposed change, and needed time to meditate before commenting. I will speak plainly, nonetheless. I have practiced as a sole practitioner (with one short interval elsewhere) in Macon County for just under 25 years. I have striven to balance the practice of law with the desire to parent my child, and help care for aged parents during their final years. I have limited my practice accordingly.

The Task Force did a comprehensive review of this issue and recommended, if I recall correctly, that the hourly rate be increased between \$75 and \$100. Then the suggestion was lowered to \$65. Now its \$50 across the board. You can imagine that, as the lowest paid professionals (including court reporters and interpreter) in the courtroom, this was not well-received by any lawyer that I've heard from or read concerning the matter. Many of us seriously consider doing as many of our brethren and sisters have done, and ask not to be appointed. But I wanted to be an attorney to advocate for those who need one. I believe it is important to do this work.

We are needed. We provide a very valuable service to defendants and families. Why are we not valued? At every opportunity to help those of us who take on this responsibility, the opportunity is not taken.

I plan to go through the information the TBA requested in their response, as I have been keeping a comprehensive spreadsheet of my appointed cases since mid 2014, with the spreadsheet having been modified over time to reflect information as I saw a need for it.

As background, I have been a Delegate in the TBA House of Delegates for over 10 years now, I believe. For the past six, at least, we have had a Rural Caucus in that group to address the concerns of lawyers who work in non-urban areas, and who are particularly affected by the indigent compensation rates.

At last count, in my home county of Macon, we have 7 private attorneys (not judges, not DAs, not PDs).

We have a very active D&N docket in Juvenile court, with regular dockets on the first and third Thursday of every month. I am the only in-county attorney that regularly/voluntarily takes appointments in that court. Not every lawyer is appropriate for the D&N docket. We work to help

families resolve whatever challenges bring them before the court; and when those issues aren't remedied, we work toward other permanency. It requires a heart for families and children, and a great deal of patience, understanding, and love for our fellow man. Not to mention the specific laws that apply in these cases.

We also have a very busy General Sessions Criminal Docket. That is every Wednesday (or at least the first four) of each month. In addition to those dates, we have Preliminary Hearing dates and contested bench trials or contested Juvenile hearings on Mondays or Friday, typically.

In addition to these court dates, each D&N case has a number of CFTMs (Child and Family Team Meetings,) the scheduling of which, between case workers and their supervisors, and a lawyer for the child, and for each parent(s) has become incredibly unwieldy, to the point that I have them schedule them with my assistant. Emails go out asking for possible dates, Lawyer 1 replies with good dates, Lawyer 2 responds that only one or two of those times/dates are good, and Lawyer 3 says none of them work, and we go to a different set of dates. It is a major time stealer, and a challenge to get a final confirmed date. All that time, just like the time my wonderful assistant spends doing the initial draft of letters/envelopes to go out to the appointed clients who do not call me, to remind them of court dates and copy them on documents, for whom we cannot get/keep good addresses/phone numbers, etc., tracking the postage and copying, and time setting up files, entering clients in the spreadsheet, and entering the time in the ACAP system (you don't want to know how upset I was when my assistant became so frustrated with this that I feared she was going to quit) is needed on these cases —but I am in no way compensated for the time my assistant devotes to indigent work. \$40 or \$50/hour for the typical solo that is able to bill an average @3 hours a day, (there was some data that was recently reported as to this, but I can't recall the source) is not sufficient to cover overhead of even a modest office. My assistant does not work *pro bono*.

We have two Criminal Court judges, one part-time civil. CCI meets for up to two weeks in February, June and October. If an attorney has cases in Criminal Court, one can expect to be tied up in court for most of the day for 2 if not 3 of those days, even if one does not have a trial. The CC2 judge hears cases every 2 months which is usually half or a whole day, minimum. Add to those dates, the regular calls from inmates and their families, and trips to jail.

The local attorney that takes D&N and GS cases can expect to be tied up most of the day in both courts 4-8 days a month, not counting the necessary time to prepare for those dates. This does not include Criminal Court. Not counting the numerous CFTMs. Not counting the clients that do come to meet with me; nor the home/school visits when I'm GAL.

Last year, I had to tell my judges that I could not take any more criminal cases in either GS or Criminal Court. I couldn't keep my private, paying clients' work done in a timely manner because I could not control my time obligations on appointed cases, nor the number of them. I advised that I would continue to take Juvenile cases, as that is an area that I have spent quite a bit of time on during the 24 years of my practice; but that I would certainly take my share when the other local attorneys appearing on criminal cases had taken their share, or the inevitable case where a parent in juvenile court also gets charged with a Crime, and has a PD conflict.

We have two 2-3 person firms in our county, totaling the 7 private lawyers. If a firm with 2 lawyers gets multiple criminal court appointments, there is still that other lawyer in the office generating private income to keep the office afloat. In the solo firm, as is mine, when I am committed to indigent defendants, or as GAL for a child, there is no other attorney in my office earning income

to pay the fixed and variable expenses, of which rent and payroll are the two largest. We recently were able to close a file that had been open since, I believe 2014--Years with no payments received for that work. What other judge or state employee works for months/years without being paid? Why are we expected to?

On top of that, before I finally get to the data that I plan to include, when I do finally get to close a case that has been open for 6 months, or 2 years, it still takes 30 days-45 days+ to receive payment. That time frame has increased significantly during the fiasco that has been the ACAP transition. (For which, if that had been in the private sector, decision makers would have been fired!) You will understand, no doubt, that it is frustrating to know that every state employee manages to get paid regularly within 30 days, but it is obviously not important that the devoted, knowledgeable and experienced lawyers that are subsidizing the obligations of the State of Tennessee get paid their pittance within a reasonable period of time.

It must be understood that there are too few lawyers in our rural counties for them not to feel serious economic hardship when they take these cases. Which is why most lawyers ask not to be appointed to these cases. And no, the most recent lawyers in my county have been practicing maybe 3 years in an established family firm. The other newest one for several years more, also in an established firm. We have no "baby" lawyers trying to build their practices. Perhaps it is not the same in urban locations where—maybe--a lawyer might have so many appointments that they can maximize them somehow into a reasonable income. I can't speak knowledgeably about this. In our rural counties, there is so much work, and so few criminal clients that are able or willing to hire private lawyers, that the lawyer loses money and may have a hard time staying in business.

Add to that the perception by potential clients that the expensive private lawyers must be much better than the Public Defenders (they group the lawyers taking appointments into this group) that when a client does choose to pay a private lawyer, they don't seek out the ones that have been taking these cases by appointment. They seek out the private lawyers who never take appointments.

Here's some of the data: (I submitted a redacted spreadsheet during the Task Force meetings which was uploaded at one time. I suppose its still there if you wish to see a more comprehensive picture.)

How many appointments did I take : (this includes different phases of the same matter—Adjudication, Post, Appeal, Criminal, etc.):

2017: 44, 4 are still open

2016: 46

2015: 56

2014: 60

2013: 32 incomplete as the spreadsheet wasn't regularly maintained til May 2014, I believe.

2018 so far: 13

Of the 2017 cases, what percentage of cases went over the caps? These are numbers for cases APPOINTED in 2017, not including those that remained open in 2017 from earlier years: 2%
For cases appointed in:

Year	Number of over-the-cap cases
2013:	1

2014: 1
 2015: 3
 2016: 0
 2017: 1

The amounts over the cap range from \$22-\$1258, with the average being \$352.85.

However, if the rates were increased, the current caps would be hit/surpassed with great regularity. The ones that went over were typically appeals, highly contested, or cases that stayed open due to parents who wouldn't work a plan, but the child was over 14 and refused to be adopted.

Amounts billed since mid 2014-2018, includes all types of cases:

Average \$337.21
 Sum \$81,943.01
 Min \$0 (being Federal lawsuit and one that wasn't billed within 180 days)
 Max \$3258
 Count 243

From my appointments from mid May 2014 , til June 23, 2018 this is the

	Min	Max	Average			
# of days file is open	1	1003	171*			
# days from billing to receipt	6	176	42			
Hours billed for work during billed so far	'13 p/o	'14	'15	'16	'17	'18
In	7.5	43.5	68.2	52.2	22.8	11.3
Out	120.9	455.4	381.7	403.9	302.3	54.8
	128.4	498.9	449.9	456.1	325.1	66.1

=1924.5 if my calculator usage is correct

1924.5 hours x my regular rate of \$195 (I recently increased it to \$205) = \$375,277.5
 1924.5 x Average rate \$40.35 = \$77,653.58
 Difference (loss to my income potential) (297,623.92) over 4+ years

That difference would have helped with college and other expenses for my daughter and my household.

Have I taken appointments and not billed? Not that I recall. And not intentionally. I did get sued in Federal Court in 2015 (along with the Governor, every DCS person involved, the previous GAL and me as the current GAL, foster care providers and their contract agency) as the result of a D&N case; the time and expense for which I certainly was not compensated.

*There were 6-7 clients where the close date was not listed. I estimated the close date.

All this data is as accurate as I and my assistant can keep it. There may be an error that I've not found.

Finally, in my opinion, there are more lawyers that prefer and are knowledgeable about criminal matters than those that tolerate and are competent in d&n cases. These d&n and tpr cases are very

important cases, and deserve to be staffed with knowledgeable, competent, willing, and experienced lawyers.

Most of us do these cases because we feel very strongly about making a difference for these families.

But this funding status places us in danger of neglecting our own families, in order to advocate for others. It is unfair, it is disrespectful to us, and it needs to be changed. I recognize that the state has funding concerns. But currently, the state has shifted its own responsibility into the purse of the private lawyers. It is time to remedy this injustice. The rate should be set no lower than \$75/hour, with reasonable caps; and reasonable opportunities for billing cases in a timely manner.

I am very willing to speak to anyone about the experience of a rural practitioner toward coming up with a reasonable and respectful solution to this whole issue.

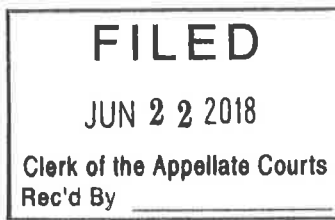
Lisa C. Cothron

Attorney at Law
Rule 31 Listed Family Mediator
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Pray for Robert S. Mueller III.

Wherefore take unto you the whole armour of God, that ye may be able to withstand in the evil day, and having done all, to stand.

Ephesians 6:13



ADM2018-796

According to the National Center for State Courts, Tennessee has an adjusted rank for pay for General Sessions and trial level courts of \$176,845.00, the highest paid in the country. Our intermediate appellate court justices are paid \$176,436.00 to rank 8th in the country. Our Supreme Court Justices are paid \$182,508.00 to rank 12th in the country.

I have over 40 years in practice and have worked as appointed counsel. I have won a case in the U.S. Supreme Court while in law school. I have tried in excess of 100 criminal jury trials. I have represented more than 100 people charged with first degree murder. I have represented seven defendants for whom the death penalty was sought. An appointed lawyer, me included, is paid \$40.00 per hour (out of court) or \$1,000.00 for 25 hours of legal representation, or \$50.00 per hour (in court) or \$1,000.00 for 20 hours.

From these paltry amounts a lawyer must deduct all office and other business expenses. My monthly expenses exceed \$3,000.00. That means if I only took appointed cases, I could earn a grand total of \$3,720.00 per month for a 40 hour work week, less taxes, less medical insurance, malpractice insurance, liability insurance, "privilege" tax, etc, which would likely give me an annual salary of approximately \$36,000.00, minus federal income and employment taxes. I would take home approximately \$2,400.00 per month. Not exactly fair compensation for seven years of undergraduate and law school tuition and effort and 40 years experience including several cases tried and won before this Court.

If you read this and even remotely contemplate what it means, you would realize that the rate for appointed counsel should be at a minimum \$85.00 per hour out of court and in excess of \$100.00 per hour in court and significantly increased "caps" on overall compensation. I doubt seriously that any members of this Court have worked for such a nominal wage in the last 20 or 25 years.

If you don't pay adequate wages, you don't get competent counsel. This should not be difficult to understand. IT IS FAR LESS EXPENSIVE FOR THE SYSTEM TO TRY THE AVERAGE CASE CORRECTLY AND ONLY ONCE. Adequately paid, competent counsel, are necessary to protect the citizens as required by the Sixth Amendment and to bring the efficiency to the system that we all know should be required.

You need only look at the salaries of members of the judiciary to realize how unfair and inappropriate, and further, unconstitutional the paltry rate paid to appointed counsel really is. Decent lawyers need a decent hourly rate.

Sincerely,

HANK HILL, ATTORNEY AT LAW



Hank Hill

HH:me



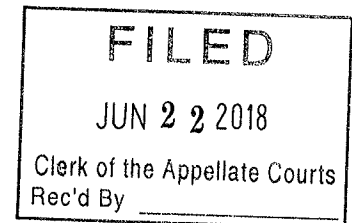
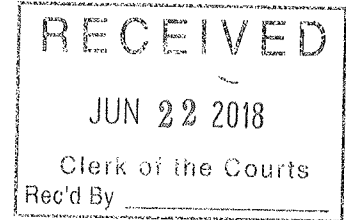
JOSHUA LOUIS BRAND

Attorney at Law

June 20, 2018

James Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Rule 13, Sections 2 and 3
Docket No. ADM208-00796



To Whom It May Concern:

I am deeply disappointed to review the proposed changes to Supreme Court Rule 13 as it relates to compensation for the representation of indigent defendants. After such a thorough and public examination of the issue in Tennessee, and the appearance of concern by members of the bar and the Courts, the Supreme Court has apparently indicated that compensation for indigent defendants will be driven by legislative budgeting. This abdication of responsibility does no justice to the needs of our citizens, to the constitutional mandates under which our courts operate, and in many respects, is clearly indicative of the value the Court places on the opportunity for criminal justice reform in our State.

My concern draws directly from first hand experience. Indigent representation has been a significant part of my practice for many years. I have represented hundreds—if not thousands—of Tennessee citizens accused of crimes by the State, ranging from public intoxication to First Degree Murder. At \$40 per hour (and \$50 during court proceedings) I reached the rule-based “caps” on countless occasions, particularly when a trial of the cause was necessary. I have lost thousands of dollars, hundreds of hours of work, and numerous opportunities for professional growth because of our pay structure.

The Indigent Representation Task Force that provoked so much earnest praise was apparently for show. Compensation was a highlight of the 200-page “report” that painstakingly identified many areas of improvement. The Task Force very clearly suggested that, to be in line with other judicial systems, to ensure qualified and dedicated attorneys *continued* to do this work, and to provide the resources necessary to protect our citizens, compensations rates should be set between \$75 and \$125 per hour with no caps. In a dismissive snub to these findings, the Supreme Court initially indicated their intent to raise the rates to \$65 per hour, with a meager cap increase. To be sure, with the caps still in place, the hourly increase would be meaningless for most practitioners handling serious cases.

After this budget season, we have seen the true mettle of the Supreme Court. Pen-to-paper finds the rule proposing \$50 per hour. This is NO increase for in court time, and an even further decrease from the initially dismissive glance at the Task Force findings. Shockingly, both the Chief Justice and the Tennessee Bar Association very publicly congratulated themselves on such a significant achievement for indigent representation.

I write now to ardently object to the changes to Rule 13 because I believe it is far too little. I do not believe the Court will be ready to continually revise this Rule at each budget season. This nominal increase will instead provide support for continued Legislative cuts without push-back from the judicial branch. Now is the time for the Supreme Court to take a stand, to declare that this work is valuable. Now is the time to declare this issue has been studied, and the Court supports the work being doing on behalf of the justice system.

The Supreme Court is an independent body. The Legislature does not set these rates—the Supreme Court does, and for good reason. If the rates are set where they need be, between \$75 and \$125, with no caps, and the current budget is depleted, so be it. The bar and citizens will know the justice system has an advocate on the highest bench and the message will be sent to the Legislature that the annually-reviewed budget needs to be adjusted accordingly. Otherwise, a constitutional crisis looms. The dedicated defense attorneys will not leave their guard for lack of a budget and may direct their energies to the proper channels. If instead the Court chooses to send the message that this nominal increase is the only change they see fit, then I believe criminal justice practitioners will face increasing moral and ethical dilemmas over whether representation can sufficiently meet the needs of citizens accused in the upcoming years.

I implore you to reconsider the recommended revisions to Rule 13. Faith in our courts is the cornerstone of our justice system. This is an opportunity to show that you are on the side of justice, and that you understand the value of the adversarial system. The independence of our Courts is at stake, and as always, the very freedom of each and every citizen.

Respectfully Submitted,

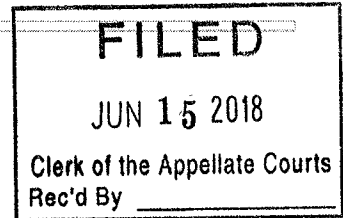


Joshua L. Brand

Cc: Tennessee Bar Association, c/o Jason Pannu, President
Nashville Bar Association, c/o Erin Palmer Polly, President
Tennessee Association of Criminal Defense Attorneys

Lisa Marsh - Comments to Proposed changes to Rule 13

From: "Daniel Hellman" <dhellman8@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/15/2018 3:00 PM
Subject: Comments to Proposed changes to Rule 13



Comments on Proposed changes to Rule 13. I will try to be brief and to the point as I assume you are receiving a lot of comments.....

First and foremost I would state that the increases in funding this year are much appreciated. I assume that this is just the beginning of a process over the next few years to raise the funding to continue to address inadequate rates, caps and the inability to do interim billing in cases that go on for years.

As to the currently proposed Rule 13 changes.

Raising the caps is the last priority. Most of our cases do not approach the caps, and as indigent defense attorneys we try to avoid hitting the cap. It impacts very few of our cases.

The PRIORITY needs to be to get the \$40/\$50 rate closer to the \$75/\$100 paid in the capital cases. Therefore I think the hourly rate (previously the \$40/\$50 rate) needs to be raised as high as possible this year, even at the expense of raising caps and raising the amounts paid for capital cases.

Frankly the \$40/\$50 rate from 20 something years ago is a bit embarrassing. I would reference the TACDL Petition (of which I am sure the Court is familiar) filed a few years back which stated that (on page 4) when the \$40/\$50 rate was set in 1994, the average overhead for attorneys was \$47.26 indicating that we were already taking a loss of \$7.26 per billing hour to take indigent cases. Elsewhere in that petition it alludes to the fact that the overhead cost has risen into the \$70's per billable hour. THE GAP HAS WIDENED WHEN IT COMES TO THOSE WORKING CASES AT \$40/\$50. Effectively attorneys handling such cases are losing \$25-\$30 per billable hour..... Raising the rate to a flat \$50 really doesn't close that gap a great deal.

Again assuming that this is just one step in a several year process to address all issues, there will be a time to address the caps, and to address the compensation for capital cases-but at this time AT LEAST the current capital case rates are covering their overhead.

In summary, raise the \$40/\$50 rate as high as you can (and one rate for in and out of court) this year.

When an increase in funding is available, continue to address both the non-capital rates and capital rates, caps, and interim billing on lengthy cases.

SIDENOTE: You really should reconsider the 2000 hour cap. I never really understood this concept. This only effects full time indigent attorneys. We are your most efficient attorneys. When we show up for court on 8 cases and other attorneys are there on 2 the cost per case is a lot lower for the full time indigent attorney. Working additional hours allows for affording office space and staff-which will simply increase our efficiency. I was told by the AOC that they don't want us to be full time indigent attorneys—WHAT? We carry more cases at less cost than the private attorney taking a few appointments here and there.

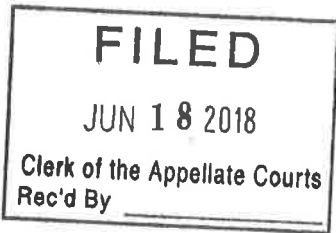
How does this raises the cost to the AOC? As a full time indigent attorney I am forced to take less cases to make sure not to exceed the 2000 limit. So if I tell a judge not to appoint me for a bit to manage my case load that means I will be appearing on fewer cases each time I come to court-and the AOC's expenses per case go up. If I can work 2500-3000 hours a year, not only can I take more cases, but I may add the staff that makes me more efficient. Now maybe I am telling the judge to load me up and I am appearing on 8-10 cases each court date again. YOU NEED TO RECONSIDER THIS LIMIT.

I greatly appreciate the Court's continued efforts to support and emphasize the importance of indigent defense funding.

Daniel Hellman, Esq.
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Knoxville TN 37939
Fax: (865) 381-0652
Phone: (865) 323-2178

NOTICE: I am a debt collector trying to collect a debt, and any information obtained will be used for that purpose.

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AMANDA McCULLOCH
ATTORNEY

865 335 7822 | Amanda@AttorneyAmanda.com | www.AttorneyAmanda.com

PO Box 381 | CLINTON, TENNESSEE 37717

June 18, 2018

The Honorable Justices of the Tennessee Supreme Court
Care of Hames Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2018-00796, Proposed Changes to Rule 13 Compensation

Your Honors,

I humbly request that you increase the compensation of counsel under Rule 13 to a level that is comparable to market rates. If you do so, Tennessee will benefit from higher quality representation as seasoned attorneys won't be as inclined to decline appointments, as well as job creation as attorneys are able to afford much needed staff.

I have seen countless new attorneys take appointments only to be hired by a firm that instructs them to offload all of their appointed cases and decline new ones. The net effect is that newer, less experienced, attorneys tend to take the appointed cases only to eventually stop when a better paying job comes along. In contrast, raising the Rule 13 compensation rates to a rate competitive in the legal market would result in more experienced attorneys accepting appointments and an overall rise in the quality of representation. Solo practitioners would be better able to hire support staff, allowing more time for them to do important legal work instead of on non-billable and time consuming administrative tasks.

If you will indulge me, I'd like to tell you my brief story. I have been operating as a solo practitioner taking court appointments since 2014. In that time I have focused primarily on Guardian ad Litem appointments in dependency and neglect cases. I have come to learn the meaning of the term "practice" of law as I constantly learn and grow within this particular field. And it is not for the faint of heart, and all too often attorneys decide that they don't have the time or the stomach for it. I have held, fed, and comforted crying children who were just removed from squalid or abusive situations. I have represented children whose own parents repeatedly choose drugs instead of them. I have represented children who calmly describe the abuse

they've endured and others who are too paralyzed with fear to speak to me even after many attempts. I have wept with families. I have wept alone.

I feel called to this particular work and I'd like to believe I am good at it. However there is a constant financial temptation to remove my name from the appointment rolls and only take retained work or seek other employment all together. I graduated law school in the height of the economic recession with well over \$100,000 in student loans and do not see any prospects of paying them off any time soon. However, because I am not a government or non-profit employee, I am ineligible for the same loan forgiveness programs. I do not own a home and have no immediate prospects of doing so. If I didn't have a spouse with employee insurance benefits, I would have long had to abandon this area of practice as my medical bills last year alone would've exceeded \$60,000. If you were to raise the compensation rates higher than the proposed \$50 an hour to a rate more competitive in the legal market here, I would be able to build a better life for my family as well as those individuals that I could then afford to employ.

I am called to this work and have a strong sense of duty. However, I have children of my own to consider. While I'm trying to do my small part in improving the life of Tennessee's children, I also struggle with the obligation I have to my own children to make their future as secure as possible.

My story is not unique. It's with that I humbly request that you raise the rate of compensation to more than the \$50 proposed, but rather to a competitive level.

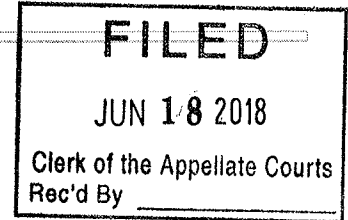
With appreciation,

A handwritten signature in black ink, appearing to read "Amanda McCulloch". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Amanda McCulloch, Esq.
BPR# 030606

Lisa Marsh - Indigent Rates in Tennessee

From: John McDougal <jgmcdougal@aol.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 6/18/2018 3:55 PM
Subject: Indigent Rates in Tennessee



To Whom it may concern:

There have been many places to comment on the indigent rates. Originally, the notice we received was for \$65 per hour. Then the notice is for \$50. I believe a rise in the rates would be more fair, as we have to maintain offices, access to library for appeals and research, some of us have office staff, phones, office equipment. Plus, the time that it takes to be paid makes it difficult to earn a living taking cases. I have been taking cases in all courts since hanging out my shingle back in 1994. No one can raise a family and take cases. If the court want to have decent attorneys that can handle the cases, The court should follow the recommendations of its committee that studied this problem.

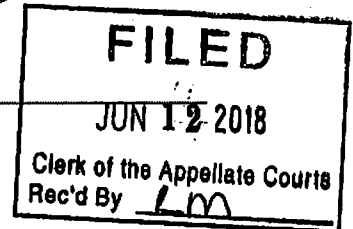
Sincerely,

John G. McDougal, Attorney at Law
707 Georgia Avenue, Suite 402
Chattanooga, TN 37402
Phone (423) 756-0536
Fax (423) 756-0533

Lisa Marsh - Support for Rule 13 increases

From: "Waites, Elizabeth (Metro Clerk)" <Elizabeth.Waites@nashville.gov>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 6/12/2018 7:18 PM
Subject: Support for Rule 13 increases

ADM2018-00796



Honorable Mr. Hivner,

I am writing in my personal capacity as an attorney who previously worked in private practice and, at times, accept appointed cases in Juvenile and Criminal Courts. I now serve as the Metropolitan Clerk of Nashville and Davidson County. I would like to submit my support for an increase to rates, and I especially believe that the caps are problematic- potentially more so than the (extraordinarily low) hourly rate. I found the current system to discourage the work for attorneys, which borders on raising ethical issues that must be weighed against the fairness and equity to the attorney in doing numerous hours of free work. The people represented by appointed counsel represent the most vulnerable people who encounter our judicial system, particularly Juvenile Court guardian ad litem. These individuals should most especially receive a significant increase to the applicable caps, and preferably removed completely for that classification of attorneys. I say that as someone who actually preferred defense work, with a full recognition that it is the children are those who deserve most to have adequate representation. I do note that increase to GAL could prove problematic in that it could potentially deter counsel from choosing to act as parents' attorney if there was an applicable cap. A slight increase to the other attorneys – criminal and d&n parent attorneys – may be one idea to offset that issue. I know you all have done much work in this area, so I won't presume to offer further detailed suggestions.

Thank you for your assistance to the Supreme Court in these efforts, and I convey my appreciation to the Court for engaging in this conversation.

Elizabeth Waites
Metropolitan Clerk
BPR No. 029439
1 Public Square, Suite 205
Nashville, Tennessee 37201
(615) 862-6770

FILED

JUN 11 2018

Clerk of the Appellate Courts
Rec'd By _____

Lisa Marsh - Indigent defense rates

From: Jamie Herman <jherman@jhermanattorney.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 6/11/2018 5:33 PM
Subject: Indigent defense rates

ADM2018-796

June 11, 2018

I support raising attorney fees for those engaged in indigent defense work.

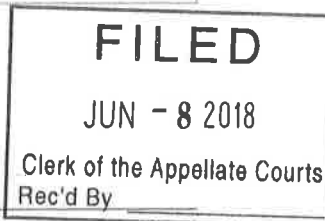
If this work is not adequately funded, the right to a court-appointed attorney becomes an empty gesture. Worse, the argument could be made that inadequately funded counsel per se are inadequate to meet the constitutional mandate for counsel.

Thank you for the opportunity to write in support of this important work.

Jamie L. Herman
Attorney
409 E. Watauga Avenue
Johnson City, Tennessee 37601
phone: 423-928-5480
fax: 423-928-5480
BOPR 9186

Christine Vicker - No. ADM2018-00796

From: John Cavett <jcavett@cavettandabbott.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 6/8/2018 1:54 PM
Subject: No. ADM2018-00796



Our government was founded as a constitutional democracy; protecting human rights, which do not need to be created but which need to be respected, was a principal motivating factor of our founding fathers and mothers. They understood that creating a foundational document assuring these rights was only the first step and that the document would fail in its central purpose if there was no one to protect and enforce the rights contained therein. The criminal justice system is the place where the almost unlimited power and assets of the government, populated by fallible men and women, intersects most often with the lives of individual citizens. Because the arena is a Court of law, the individual will always be mismatched without the services of a competent and zealous attorney. One person's loss of his or her constitutional rights is devastating to that individual but it also erodes the protections enjoyed by all citizens whether or not they ever see the inside of a criminal court room.

The criminal defense attorney, whose job, among others, is to insist that the Courts recognize and protect the rights of the citizen accused, plays perhaps the most important role in the system. Competent attorneys are the only players in the game with both the duty and ability to accomplish this critical task.

Lawyers who are appointed to represent indigent defendants are private businessmen and women, with families to raise and bills to pay. That any of them choose to work for pennies on the dollar is a testament to the profession; that great numbers choose to do so speaks to their deep sense of duty and powerful belief in the constitutional rights they protect.

There are several reasons why such attorneys should be paid an appropriate amount for their services. A rational sense of fairness and recognition of the important role they play dictates that they be paid fairly. As in other aspects of our market economy, more pay would assure better quality attorneys taking appointed cases. Adequate pay is a powerful statement of recognition of the crucial duties such attorneys perform; failing to make adequate compensation available, conversely, is tantamount to an abandonment of those protections.

Our government has endured in historically unprecedented ways. But it will surely fail the day attorneys decline to fulfill their role in the justice system. As someone who has taken state and federal appointments for 37 years, I am proud to play the role I have accepted. But neither I nor any other attorney can be forced to accept these representations. The fees allowed in indigent representation must be raised to at least a level that reflects the need for motivated attorneys to continue and I urge that the rates be raised substantially.

John C. Cavett, Jr.

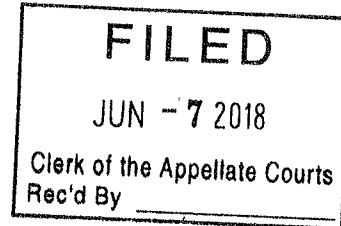
Cavett, Abbott & Weiss, PLLC

801 Broad Street, Suite 428

Chattanooga, Tennessee 37402

David C. Veazey
Attorney at Law
PO Box 3206
Chattanooga, TN 37404

James Hivner, Clerk
Re: Rule 13, Sections 2 and 3
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407



Dear Mr. Hivner:

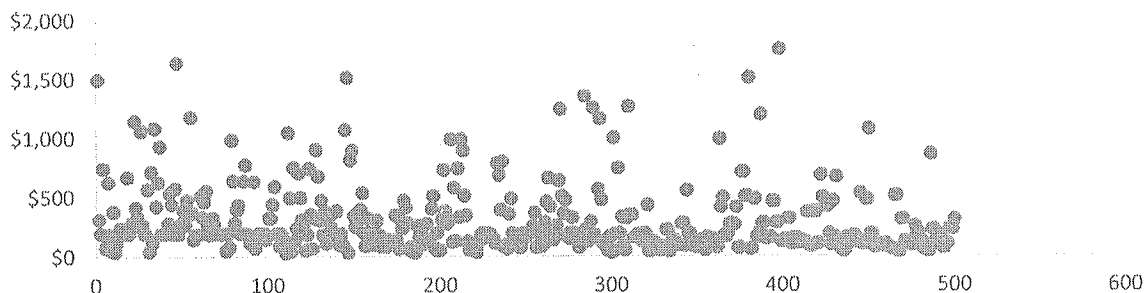
ADm2018-00796

The proposed amendments to Rule 13 that address attorney compensation in indigent cases is neither a reasonable account of the Task Force's recommendations. The focus on caps rather than on increasing the hourly rate does not improve overall compensation. The increase in the hourly rate also does not bring compensation in line with inflation.

The proposed amendments appear to take an either/or approach to hourly compensation and caps. By focusing on raising caps, the proposals wrongly assume that most indigent fee claims already approach the caps.

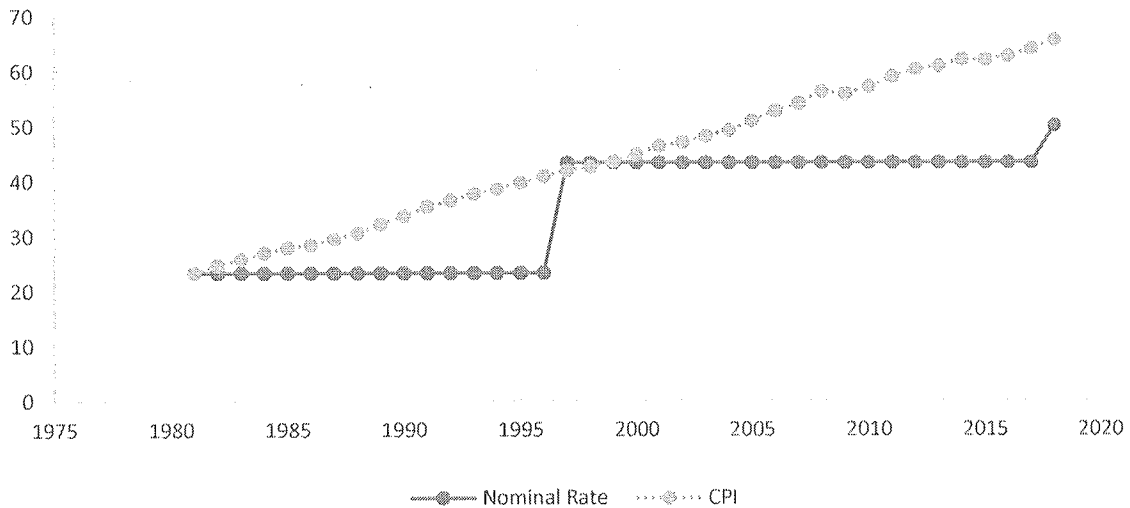
Although I do not have access to aggregate data from the Administrative Office of the Courts on fee claims from all attorneys, I believe my own claims over the years are somewhat representative. An analysis of my 500 most recent claims, going back to October 2014, shows that most are clustered well below the caps prescribed by Rule 13. The average claim was for \$289 and the median claim was worth \$195. Visually, you can see in the chart below that most of the claims are tightly clustered below the \$500 level. Claims that approach the current caps of \$750 and \$1000 are rare. Extended and complex claims beyond the caps are even rarer. Therefore an increase in caps without sufficiently raising the hourly rate does little or nothing to improve overall compensation for attorneys representing indigent clients.

500 Most Recent Claims



The graph below shows the progression of hourly rates versus increases in the consumer price index (CPI). Each data point in the CPI uses the month of April for the sake of comparison. The CPI data is taken from the Bureau of Labor Statistics (https://www.bls.gov/data/inflation_calculator.htm). To calculate the “weighted” hourly compensation rates, I assumed that for each hour an attorney bills “in court,” there will be two hours billed “out of court.” For example, the current compensation scheme calls for \$40 per hour out-of-court and \$50 per hour in-court. The weighted compensation would thus be \$43.33 per hour.

Weighted Rule 13 Compensation vs. CPI/Inflation



The graph shows that when the compensation rates were last revised in 1997, the weighted rates were increased to a level slightly above that of the CPI in 1997. Perhaps this was not coincidental. The CPI level increased to \$65.60 in April 2018. However, the current proposed increase to \$50.00 per hour only brings compensation up to 2005 levels in the CPI. To bring compensation in line with the CPI, the hourly rate must be at least \$65 per hour. Given that this compensation issue was last revisited 21 years ago, the compensation rate should rather be indexed to the CPI to avoid giving attorneys a pay cut, in real terms, year after year in the future.

I appreciate you giving me an opportunity to comment. I hope that my comments may be useful.

Yours sincerely,

David C. Veazey
 David C. Veazey, BPR # 028753

FILED

MAY 31 2018

Clerk of the Appellate Courts
Rec'd By _____

appellatecourtclerk - Indigent representation

From: Beth Ziarko <beth@brasfieldandbrasfield.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/31/2018 10:07 AM
Subject: Indigent representation

ADM 2018-00796

We have been requested to provide comments to the rules regarding indigent representation. I am about to retire so you may think I should not have an opinion, but I care very much what happens to the children who are represented in Juvenile Courts and their families. I used to practice regularly in that court, but one of the reasons I gave it up was because of the pitiful amount attorneys were given for the representation. I am able to operate my office on an unusually small amount of overhead, but even with that, I could not cover my overhead with the amounts provided for payment for indigent clients. I had an attorney practicing with me for several years who was primarily a defense attorney. He lost money on the appointed cases. He has now left private practice for a federal position. I think it is outrageous that the amounts allowed for attorneys has stayed the same for so many years and now that there is some hope of a realistic increase, we find out the Supreme Court is not even using the amounts recommended. Maybe they should come back to a private practice and see what it is like to make a living when you are given cases and your payments do not even cover your overhead.

Right now the lawyers who take the appointments are primarily the youngest, least experienced lawyers. They use this as a route to get name recognition and once their practices pick up, they stop taking appointed cases. We have a Supreme Court that wants to push pro bono work, but then apparently does not care if the lawyers they want representing people for free or at greatly reduced rates can make a living otherwise. I am not sure other lawyers will be so bold to complain because they may find themselves before that Court from time to time. Since I am not in that position, I do not mind speaking for them.

Elizabeth B. Ziarko

appellatecourtclerk - Rule 13 comments

ADM 2018-00796

From: Nick McGregor <nick@mcgregorlawtn.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/31/2018 3:35 PM
Subject: Rule 13 comments

I'm sure you're getting a lot of these so I will keep it brief.

Rate *definitely* needs to increase.

Murders should be \$10 more per hour than regular cases.

Annual hourly cap needs to increase.

If the annual cap does not increase above 2000 hours then murder cases should not count toward the 2000 hours.

Some of these murders have thousands of pages of information and hours of recorded interviews. The consequences are too grave to skim or cut corners. Particularly when, if the defendant is convicted, the attorney will have to later defend the work he/she did in a post conviction hearing.

Raise cap on appeals to \$1500 but keep rate the same.

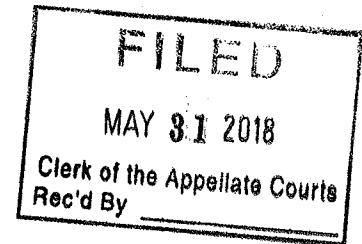
Call me if you have any questions,
Nick

--

McGregor Law
222 2nd Avenue North
Suite 416
Nashville, TN 37201
(615)290-5205
mcgregorlawTN.com

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An Attorney-Client Relationship has not been formed unless both parties have agreed.



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MAY 30 2018
Clerk of the Appellate Courts
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appellatecourtclerk - Comments on Rule 13, Sections 2 and 3

From: Thomas Hutto <thutto@maurycountytitle.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 5/30/2018 3:31 PM
Subject: Comments on Rule 13, Sections 2 and 3
Cc: Lucian Pera <lpera@tnbar.org>
Attachments: 2018-05-30 Comments on Rule 13.pdf

ADM2018-00796

Dear Mr. Hivner,

I have attached my comments in the form of revisions to the current Rule 13, Sections 2 & 3.

I believe my revisions greatly simplify the process and will both increase the quality of indigent representation and the participation by both new attorneys and experienced criminal lawyers. Rather than try to micro manage every criminal transgression, I think the state should simply adopt a flat cap on payments to attorneys for providing indigent defense. I have proposed it be \$80,000.00 per year as the current rules cap an attorneys hours at 2000 for the year, and 2000 hours X \$40.00 equals \$80,000.00. For non-capital cases, I suggest that an attorney be paid ½ their customary rate, and that lead counsel in capital cases be paid their customary rate.

Having a flat cap on the amount paid will allow attorneys the flexibility to take cases in an amount that is reasonable and provides them the resources to devote adequate time to each case. Currently, attorneys routinely exceed the current monetary cap on an individual case due to the time required for a trial and end up being under compensated for their efforts. Knowing that they will be paid for their full efforts will encourage experienced attorneys to take appointed cases and allow them to do so without losing money on each case.

Under my proposal an attorney could take 100 general sessions matters a year at an average of \$800 per case, or 50 simple felonies at \$1600 per case. They could decide to take 10 major felonies and average \$8000 per case or even 1-2 capital cases per year and provide the required defense necessary and be able to pay for experts, investigators, and travel costs that are currently beyond the ability of many solo attorneys and small firms. This flexibility will allow for an attorney to take on the cases that they can reasonably defend and I think will improve the quality of representation in our state.

Understandably, I also think there is potential for the abuse of this system, however, I cannot imagine that it is any greater than what is occurring under the current Rules and I imagine that any of our judges reviewing and approving these amounts would both deny an attorney who is overcharging the state and reconsider appointing the attorney to future cases.

Best regards,

Thomas M. Hutto
Attorney-at-Law

Lawwell, Dale, Graham & Hutto
805 S. Garden Street
Columbia, TN 38401
931-388-2822
<http://www.lawwelldaleandgraham.com/>

Section 2. Compensation of counsel in non-capital cases.

(a)(1) Appointed counsel, other than public defenders, shall be entitled to reasonable compensation for services rendered as provided in this rule. Reasonable compensation shall be determined by the court in which services are rendered, subject to the limitations in this rule, which limitations are declared to be reasonable.

(2) These limitations apply to compensation for services rendered in each court municipal, juvenile, or general sessions; criminal, circuit, or chancery; Court of Appeals or Court of Criminal Appeals; Tennessee Supreme Court; and United States Supreme Court.

(b) Co-counsel or associate attorneys in non-capital cases shall not be compensated.

(c)(1) Any attorney providing indigent defense in any court in Tennessee or the United States Supreme court may be compensated up to a total maximum amount of \$80,000.00 per year regardless of the amount of cases or representation undertaken.

(2) The hourly rate for an attorney may be no more than ½ their usual and customary rate proved by sworn affidavit and submitted on an annual basis to the Administrative Office of the Courts not later than June 1 of every year. The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars (\$40) per hour for time reasonably spent in trial preparation and fifty dollars (\$50) per hour for time reasonably spent in court.

(2) For purposes of this rule, “time reasonably spent in trial preparation” means time spent preparing the case to which the attorney has been appointed to represent the indigent party. “Time reasonably spent in court” means time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.

(d)(1) ~~The maximum compensation allowed shall be determined by the original charge or allegations in the case. Except as provided in section 2(c), the compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:~~

~~(2) Five Hundred Dollars (\$500) for:~~

~~(A) Contempt of court cases where an adult or a juvenile is in jeopardy of incarceration;~~

~~(B) Parole revocation proceedings pursuant to the authority of state and/or federal law;~~

~~(C) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;~~

~~(D) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34;~~

~~(E) Cases under Tennessee Code Annotated section 37-10-304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors;~~

~~(F) Cases alleging unruly conduct of a child which place the child in jeopardy of being removed from the home pursuant to Tennessee Code Annotated Section 37-1-132(b);~~

~~(3) One thousand dollars (\$1,000) for:~~

~~(A) Preliminary hearings in general sessions and municipal courts in which an adult is charged with a felony;~~

~~(B) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;~~

~~(C) Direct and interlocutory appeals in the Court of Appeals or Court of Criminal Appeals;~~

~~(D) Direct and interlocutory appeals in the Tennessee Supreme Court;~~

~~(E) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;~~

~~(F) Non-capital post-conviction and habeas corpus proceedings;~~

~~(G) Probation revocation proceedings;~~

~~(H) Cases in which a juvenile is charged with a non-capital felony;~~

~~(I) All other non-capital cases in which the indigent party has a statutory or constitutional right to be represented by counsel.~~

~~(4)(A) One thousand, five hundred dollars (\$1,500) for cases in trial courts in which the defendant is charged with a felony other than first degree murder or a Class A or B felony;~~

~~(B) Two thousand, five hundred dollars (\$2,500) for cases in trial courts in which the defendant is charged with first degree murder or a Class A or B felony;~~

~~(5) Maximum compensation for juvenile dependency and neglect proceedings and termination of parental rights proceedings is as follows:~~

~~(A) Seven Hundred and Fifty dollars (\$750) for:~~

~~(i) Dependent or neglected child cases, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;~~

~~(ii) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings; and~~

~~(iii) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, from the filing of the dependency petition through the dispositional hearing, including the preliminary hearing, ratification of the initial permanency plan, adjudicatory and dispositional hearings;~~

~~(B) One Thousand Dollars (\$1,000) for:~~

~~(i) Dependent or neglected child cases, for all post dispositional proceedings, including foster care review board hearings, post-dispositional court reviews and permanency hearings;~~

~~(ii) Guardian ad litem representation in accordance with section 1(d)(2)(C) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated Sections 37-1-401 through 37-1-411, for all post dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings; and~~

~~(iii) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(D) for a child or sibling group who is or may be the subject of a report of abuse or neglect or an investigation report under Tennessee Code Annotated sections 37-1-401 through 37-1-411, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.~~

~~(C) One thousand dollars (\$1000) for:~~

~~(i) Proceedings against parents in which allegations against the parents could result in termination of parental rights;~~

~~(ii) Guardian ad litem representation in termination of parental rights cases in accordance with section 1(d)(2)(D); and~~

~~(iii) Counsel appointed pursuant to Tennessee Supreme Court Rule 40(e)(2) and in accordance with section 1(d)(2)(C) for a child or sibling group in termination of parental rights cases;~~

~~(e)(1) Notwithstanding the provisions of section (2)(d), an amount in excess of the maximum, subject to the limitations of section (2)(e)(3), may be sought by filing a motion in the court in which representation is provided. The motion shall include specific factual allegations demonstrating that the case is complex or extended. The court shall enter an order which evidences the action taken on the motion. The following, while neither controlling nor exclusive, indicate the character of reasons that may support a complex or extended certification:~~

~~(A) The case involved complex scientific evidence and/or expert testimony;~~

~~(B) The case involved multiple defendants and/or numerous witnesses;~~

~~(C) The case involved multiple protracted hearings;~~

~~(D) The case involved novel and complex legal issues.~~

~~(E) If the motion is granted, an order shall be forwarded to the Director of the AOC (herein "director") certifying the case as complex or extended. The order shall either recite the specific facts supporting the finding or incorporate by reference and attach the motion which includes the specific facts supporting the finding. To qualify for payment under this section, the order certifying the claim as extended or complex must be signed contemporaneously with the court's approval of the claim. *Nunc pro tunc* certification orders are not sufficient to support payment under this section.~~

~~(2) All payments under section 2(e)(1) must be submitted to the director for approval. If a payment under section 2(e)(1) is not approved by the director, the director shall transmit the claim to the chief justice for disposition. The determination of the chief justice shall be final.~~

~~(3) Upon approval of the complex or extended claim by the director or the chief justice, the following maximum amounts apply:~~

~~(A) One thousand dollars (\$1,000) in those categories of cases where the maximum compensation is otherwise five hundred dollars (\$500);~~

~~(B) One thousand, five hundred dollars (\$1,500) in those categories of cases where the maximum compensation is otherwise seven hundred and fifty dollars (\$750);~~

~~(C) Except as provided in section (2)(e)(3)(D), two thousand dollars (\$2,000) in those categories of cases where the maximum compensation is otherwise one thousand dollars (\$1,000);~~

~~(D) Three thousand dollars (\$3,000) in cases in trial courts in which the defendant is charged with a felony other than first degree murder or a Class A or B felony; and~~

~~(E) Five thousand dollars (\$5,000) in cases in trial courts in which the defendant is charged with first degree murder or a Class A or B felony. Where the felony charged is first degree murder, the director may waive the five thousand dollar (\$5,000) maximum if the order demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.~~

~~(f) Attorneys shall not be compensated for time associated with traveling to a court in another county for the sole purpose of hand delivering or filing a document.~~

~~(g) [Amended effective December 31, 2013.] Counsel appointed or assigned to represent indigents shall not be paid for any time billed in excess of 2,000 hours per calendar year unless, in the opinion of the Administrative Director, an attorney has made reasonable efforts to comply with this limitation, but has been unable to do so, in whole or in part, due to the attorney's representation pursuant to Section 3 of this Rule. It is the responsibility of private counsel to manage their billable hours in compliance with the annual maximum.~~

~~[The following additional language is a transitional provision and shall be repealed effective December 31, 2013:]- An attorney who has an existing caseload at the time of the adoption of this new subsection (g) shall take the annual hourly limit into consideration prior to accepting new appointments. An attorney who exceeds the annual hourly limit in 2013 due at least in part to hours billed in cases to which the attorney had been appointed prior to the adoption of this new subsection may request a waiver of this limitation for 2013. Any such request shall be submitted to the Director in writing and shall include details regarding the attorney's good faith efforts to comply with the rule. [As amended by order filed March 5, 2013.]~~

Section 3. Minimum qualifications and compensation of counsel in capital cases.

(a) For purposes of this rule, a capital case is a case in which a defendant has been charged with first-degree murder and a notice of intent to seek the death penalty, as provided in Tennessee Code Annotated section 39-13-208 and Tennessee Rule of Criminal Procedure 12.3(b), has been filed and no order withdrawing the notice has been filed. Non-capital compensation rates apply to services rendered by appointed counsel after the date the notice of intent to seek the death penalty is withdrawn.

(b)(1) The court shall appoint two attorneys to represent a defendant at trial in a capital case. Both attorneys appointed must be licensed in Tennessee and have significant experience in Tennessee criminal trial practice, unless in the sound discretion of the trial court, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, a public defender shall serve as and be designated "lead counsel."

(2) If the notice of intent to seek the death penalty is withdrawn at least thirty (30) days prior to trial, the trial court shall enter an order relieving one of the attorneys previously appointed. In these circumstances, the trial court may grant the defendant, upon motion, a reasonable continuance of the trial.

(3) If the notice is withdrawn less than thirty (30) days prior to trial, the trial court may either enter an order authorizing the two attorneys previously appointed to remain on the case for the duration of the present trial, or enter an order relieving one of the attorneys previously appointed and granting the defendant, upon motion, a reasonable continuance of the trial.

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice *pro hac vice*;

(2) have regularly participated in criminal jury trials for at least five years;

(3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;

(4) have at least one of the following:

(A) experience as lead counsel in the jury trial of at least one capital case;

(B) experience as co-counsel in the trial of at least two capital cases;

(C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case;

(D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or

(E) experience as a judge in the jury trial of at least one capital case.

(5) The provisions of this subsection requiring lead counsel to have participated in criminal jury trials for at least five years, rather than three years, and requiring six (6) hours of specialized training shall become effective January 1, 2006.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice *pro hac vice*;

(2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;

(3) have at least one of the following qualifications:

(A) qualify as lead counsel under (c) above; or

(B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

(4) The provisions of this subsection requiring six (6) hours of specialized training shall become effective January 1, 2006.

(e) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.

(f) If new counsel are appointed to represent the defendant on direct appeal, both attorneys appointed must be licensed in Tennessee, unless in the sound discretion of the judge, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate.

(g) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, and they must have at least one of the two following requirements: experience as counsel of record in the appeal of a capital case; or experience as counsel of record

in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal *habeas corpus* practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.

(i) No more than two attorneys shall be appointed to represent a death-row inmate in a proceeding regarding competency for execution. See *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). At least one of the attorneys appointed shall be qualified as post-conviction counsel as set forth in section 3(h).

(j) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the court in which such services are rendered, subject to the limitations of this rule, which limitations are declared to be reasonable. Compensation shall be limited to the two attorneys actually appointed in the case. Appointed counsel in a capital case shall submit claims in accordance with Section 6 of this rule.

(k) Hourly rates for appointed counsel in capital cases shall be as follows:

Subject to the provisions in Section 2(c)(1) Lead counsel shall be compensated at their usual and customary rate as proved by sworn affidavit and co-counsel may be compensated at $\frac{3}{4}$ of their usual and customary rate as proved by sworn affidavit and submitted on an annual basis to the Administrative Office of the Courts not later than June 1 of every year.

~~(1) Lead counsel out of court—seventy five dollars (\$75);~~

~~(2) Lead counsel in court—one hundred dollars (\$100);~~

~~(3) Co counsel out of court—sixty dollars (\$60);~~

~~(4) Co counsel in court—eighty dollars (\$80);~~

~~(5) Post-conviction counsel out of court—sixty dollars (\$60);~~

~~(6) Post-conviction counsel in court—eighty dollars (\$80);~~

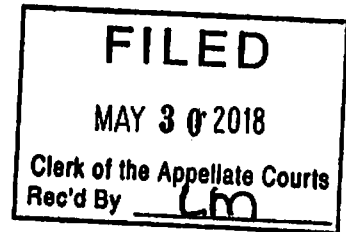
~~(7) Counsel appointed pursuant to section 3(i) out of court—sixty dollars (\$60);~~

~~(8) Counsel appointed pursuant to section 3(i) in court—eighty dollars (\$80).~~

~~(l) For purposes of this rule, "out of court" means time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party. "In court" means time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.~~

(m) Attorneys shall not be compensated for time associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

From: Angela Blevins <ablevs11@aol.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/29/2018 4:50 PM
Subject: Proposed Supreme Court 13 rule change



ADM2018-00796

To whom it may concern,

I am writing at the behest of my colleague Mike Stanuszek, Mike unlike me is an optimist and believes that the Supreme Court is legitimately interested in our input. The Supreme Court started this indigent defense journey almost two years ago. I was immediately suspicious when the committee appointed to study indigent representation was made up of individuals who clearly have never taken Court appointments. Nonetheless, these individuals went on a listening tour, studied the issue and came back with a fair recommendation. That was a year ago, and those recommendations have been completely ignored. Instead we have a proposed rule that changes the indigent representation fee structure by an aggregate of eight dollars an hour. And lets be real, that is eight dollars an hour more after 24 years of no raise. Eight dollars an hour doesn't even keep up with cost of living raise in 24 years. So here is my comment on the proposal. You should be embarrassed by the message you are sending to the very few attorneys who are still willing to take Court appointments, as well as to the indigent litigants they represent. The Supreme Court goes on and on about access to justice, with programs and commissions and encouraging attorneys to donate their time. You should consider that the most accessed point of justice for the indigent is through the indigent appointment system. It is when the indigent are experiencing the biggest crisis of their lives that the state steps in to appoint and pay for an attorney. Eight dollars an hour is a shameful increase.

You should ask yourselves, what message are you sending me about my value to the State of Tennessee, what message are you sending to the indigent in the state? Eight dollars an hour increase is currently speaking for you.

Best,

Angela M. Blevins
Attorney at Law
P.O. Box 70432
Knoxville, TN 37938
865-776-2946
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P.O. Box 113

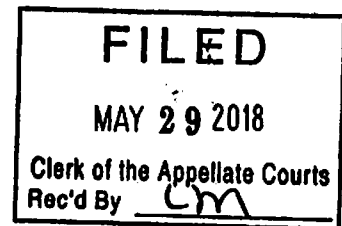
(423) 639-3511

Fax (423) 639-0394

May 26, 2018

ADM2018-00796

Mr. James Hivner, Clerk
RE: Rule 13, Sections 2 and 3
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue South
Nashville, TN 37219-1407



Dear Mr. Hivner:

As I was preparing to enter into my reverie over this Memorial Day weekend, the traditional beginning of summer, and the time to reflect upon those who gave their lives to make this country the greatest in the history of the world—which said reverie consists of a three-day holiday without phone calls from clients and with the ability to catch up on my paperwork at the office, so no family trips for me—I closed out my evening yesterday (Friday), with what I normally do: peruse the TBA TODAY publication which is sent to my email's inbox every day. I find the TBA TODAY to be my primary source for not only news about our State's legal profession, but also my primary source for reading new cases and rules that have been issued, not only by our appellate courts, but also by the Sixth Circuit.

In reading yesterday's TBA TODAY, I immediately jumped at the opportunity to read the new proposed amendment to Supreme Court Rule 13. You see, for the past three to four years, this aspect of our jurisprudence in this state—payment of attorneys who do the grunge work for our Bar—has been THE hot topic among most attorneys in this State. And, after a Blue Ribbon panel led by former Justice Koch spent time out of their own schedules, on their own "hook", so to speak, and told the branches of government what ought to occur in this regard, I felt that, finally, just compensation would be paid.

I then read the proposed amendments, which pertain to the alteration in the schedule of compensation for those attorneys who perform indigent defense work. I have some adjectives to describe these amendments:

- Cheap
- Niggardly
- Penurious
- Parsimonious
- Stingy
- Avaricious
- Petty
- Privatious
- Peonage (not an adjective, but an apt description)

Mr. James Hivner
May 26, 2018
Page 2

In case the meaning of 8 adjectives and one noun are not known to you or your readers, let me respectfully, use these in sentences, thus:

“The General Assembly of the State of Tennessee is cheap in that it authorized only \$9.7 million extra to fund a necessary right for all citizens accused of crimes who are too poor to pay for competent defense.”

“The opinion of the Tennessee Executive Branch that the mere pittance it deigns to give attorneys who practice indigent defense law shows a niggardly attitude toward the attorneys’ subsistence.”

“The judicial branch of the Tennessee government is certainly penurious when it opines that an additional \$10.00 per hour and \$500.00 per case will correct the inequities in the funding of the indigent defense system that have been existent for a quarter century.”

“It is parsimonious to pay attorneys \$50.00 per hour for indigent defense work, which is less that what is paid to many categories of expert witnesses employed by the attorneys representing indigents.”

“The General Assembly of the State of Tennessee is stingy when it allots less than \$10,000,000 new monies to fund indigent defense. The lobbyists who control the 132 members of the General Assembly are NOT stingy, when they pay at least 10 million or more to provide Tennessee’s solons with free food, free spirits, and free “entertainment,” (read between the lines).”

“The Executive Branch of the State of Tennessee is avaricious: The current occupant of the office has a personal net worth of over \$1 billion. Thus, \$10 million to him would be like, say, \$2,000.00 to us mere mortals.”

The General Assembly is petty. The conservative-dominated General Assembly believes that “these criminals don’t need a lawyer and need to get what they deserve.” Yet, let one of their family members be arrested, and each of them will cry “foul” the loudest.”

“The privatious attitude all branches of State government, in finding only \$10 million extra out of its \$40 BILLION DOLLAR BUDGET to fund indigent defense is a shame. \$10,000,000.00 is .00025th of the state budget. The median income of a family of four in Tennessee is \$75,000.00. If a beggar, who had been mercilessly beaten, stabbed, and run over with a car, came to the door of a typical family of four in Tennessee and requested .00025th of its median income, the amount the beggar received, \$18.75, would be enough to buy the beggar only one meal from a McDonald’s. Thus, this family would be called privatious, but why is State Government not called privatious when it figuratively spits on attorneys.

Mr. James Hivner
May 26, 2018
Page 3

And, finally....

"Once again Tennessee's attorneys are forced into utter peonage."

I thought, Mr. Hivner, that peonage, or slavery, if you will, was outlawed in this country over 150 years ago.

I shall not comment further. I, and others, have been, to euphemistically quote an upper East Tennessee saying, "shoveling manure against the tide," for many years. Yes, this is a *fait accompli*. Bill Haslam congratulates himself while secretly checking his Pilot Oil billion-dollar balance sheet, all the legislators slap themselves on the back and go to the nearest lobbyist party in Nashville, the "skyscraper lawyers" (a Bill Haltom characterization) who are disproportionately represented in the Tennessee Bar Association clap their hands, congratulate themselves, and then find ways to bill their insurance and corporate clients \$500 per hour, and the Administrative Office of the Courts and its personnel continue to draw their salaries, with many non-lawyers in the AOC making more than the typical attorney who comes out of multitude of law schools in Tennessee or other states with no hope of making a living, and contributing to building a strong family (and, more importantly for the conservatives in the legislature, who seem to ignore this aspect—as my colleague shared with me last night—building a SMALL BUSINESS that (a) pays taxes, (b) employs people, (c) joins civic clubs, (d) runs for office or does its civic duty elsewhere, such as serving on town boards or contributing to charity). It is a damned shame.

I, however, sir, am a big believer in Karma. The world always rotates 360 degrees in a 24 hour period, and there shall be many 24-hour periods to come. One wonders whether, as in New Orleans, the attorneys who perform indigent defense work (and, as I have said in many letters to you on many subjects, this amounts to less than 10% of my income, but I pray for those who depend upon indigent defense work for their bare subsistence) in this State will go out on strike. When the prisons become crowded, and court dockets become crowded, and there is chaos, what will our government do then? I am, of course, just hypothetically speaking.

Obviously, if you have not gleaned from my words above, I respectfully dissent from the proposed amendments to Rule 13: the amendments do not go far enough in insuring fair defense for indigent people and fair compensation for the people who defend them.

Yours very truly,


Francis X. Santore, Jr.

SENT VIA EMAIL ONLY—HARD COPY RETAINED—TO appellatecourtclerk@tncourts.gov.

FILED

MAY 29 2018

Clerk of the Appellate Courts
Rec'd By _____

appellatecourtclerk - Comment on Proposed Changes to Rule 13

From: Kelly Wojciechowski <kellywojciechowski@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/29/2018 11:08 AM
Subject: Comment on Proposed Changes to Rule 13

ADM2018-00796

The Task Force recommended the following: "The compensation rate for private counsel appointed under Tenn. Sup. Ct. R. 13 should be increased to between \$75 and \$125 per billable hour and corresponding adjustments in the amount of claims exempt from judicial approval should be made." Why did Tennessee expend resources for the Task Force if the Court is not following their recommendation? Per the Task Force's report, \$50 in 1997 would be the equivalent of \$75.65 today. Although \$75 is still significantly lower than most private attorneys are paid per hour, \$75 would at least account for inflation and cost of living adjustments. Indigent counsel are forced to spend countless hours working on these cases to make ends meet due to the inadequate compensation provided by the state. Often times, counsel is not even paid for all of the hours worked due to the caps. Our Constitution gives indigent defendants the right to counsel. Please increase the pay to what was recommended by the Task Force in order to give indigent counsel the means and resources to adequately represent their clients.

Thank you,

Kelly A. Wojciechowski
Attorney at Law
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Maryville, TN 37802
Phone: 865-233-8509
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kellywojciechowski@gmail.com

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appellatecourtclerk - Compensation Limits

FILED

MAY 29 2018

Clerk of the Appellate Courts
Rec'd By _____

From: "Larry Roddy, Attorney at Law" <filesuit@volstate.net>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/26/2018 8:47 AM
Subject: Compensation Limits

Adm 2018-00796

The limits for DNN and TPR cases needs to be increased. These cases should receive priority and the limit of \$750.00 is nowhere what it needs to be. Much time is necessary to do these cases right and the consequences of not doing everything, being effective counsel, is disastrous. These children and their parents deserve an attorney who can devote the time to protect them properly. But, with the current limit of \$750.00 most of the time expended ends up pro bono. Even so, where I practice, Rhea County, I see attorneys, as well as myself, going way beyond the time limit and compensation limit regardless. Please consider increasing the limit on these type of cases.

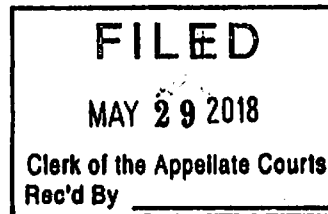
appellatecourtclerk - Compensation for appointed counsel

From: Richard Duncan <rduncanlaw@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/26/2018 3:00 AM
Subject: Compensation for appointed counsel

ADM2018-00796

The proposed changes in compensation for appointed counsel are inadequate, but represent a step forward.

Richard Duncan
#012905
Knoxville Bar



FILED

MAY 29 2018

Clerk of the Appellate Courts
Rec'd By _____

appellatecourtclerk - Rule 13 Proposed Changes

From: "Ryan C. Davis" <ryan@ryancdavislaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 5/28/2018 9:53 AM
Subject: Rule 13 Proposed Changes

ADM2018-00796

To Whom It May Concern,

I take quite a few court appointed criminal cases, so I have watched the development of the increased hourly rates closely. I even attended one of the task force meetings. I read the task force's recommendations cover to cover and was hopeful that we would see an increase to at least \$75 an hour, which is in line with majority of the rest of the country's hourly rate for court appointed attorneys. After reading your proposed increase to only \$50 an hour, I am deeply disappointed in the Supreme Court for not placing a higher value on my services, and more importantly, not placing a higher value on the Constitutional Right to an attorney for all citizens. I have been struggling to afford to take appointed cases at the current rate, and at only a \$10 increase, I will not be able to continue taking appointed cases. This troubles me, as I believe the work I do is so important. But I have a family and a mortgage, and the math just doesn't work. I cannot provide my clients quality representation and make ends meet at this rate. And I personally am not willing to give my clients anything less than my best. So this insulting increase is forcing me to stop accepting any court appointed cases and focus on growing my retained business.

I truly hope that you will take my message to heart and consider the increase that your very own task force recommended.

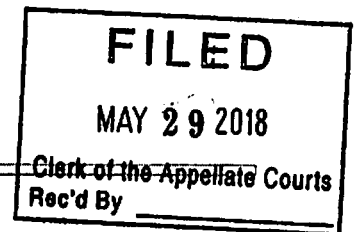
Sincerely,
Ryan

Ryan C. Davis
Attorney at Law
1230 2nd Ave S
Nashville, TN 37210
615-649-0110

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appellatecourtclerk - Rule 13 Compensation



From: Zale Dowlen <zale.dowlen@outlook.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 5/29/2018 8:03 AM
Subject: Rule 13 Compensation

ADM2018-00796

Dear Court:

While I was hoping for a little more of an hourly rate, any increase is helpful.

Zale Dowlen, Attorney

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"Learn to do good. Seek justice. Help the oppressed.
Defend the cause of orphans. Fight for the rights of widows."
Isaiah 1:17 NLT