F. A. STEINBERG, PhD & ASSOCIATES, P.C.
FORENSIC and CLINICAL PSYCHOLOGY

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Memphis, Tennessee 38103
Telephone: (901) 527-3737 Fax: (901) 521-7900

OCT 15 2003

October 13, 2003

Cecil V. Crowson, Jr.
Re: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Re: Rule 13 proposed changes

Dear Mr. Crowson:

I have learned that there are some proposed changes to Rule 13, which specifies the procedures for obtaining experts in criminal cases. For forensic psychologists, there is a possible reduced hourly fee from $150 to $125 per hour. Travel may only be billed at half this proposed hourly rate per hour. Also, there is a proposal to eliminate interim billing in non-capital cases. I would like to respond to this proposal out of concern for the legal system that I serve.

In my clinical practice, I have observed how managed care has prevented clinicians from using available technology to adequately answer referral questions. Managed care has failed. I am already seeing the State have a tendency to reduce fees and "caps" for forensic psychological services. Accepted forensic psychological methodology in dealing with our cases involves interviews of the defendant, collateral interviews, psychological testing, review of documents and records pertaining to the defendant. Properly done, it is very time intensive. The possible feigning of mental disorder must be assessed. Thoroughness is necessary to state scientific fact or lack of it. This is particularly true when dealing with issues of death penalty and as well as human rights. *Ake v. Oklahoma,* 470 U.S. 68 *(1983),* which provides for the mental health evaluations of indigent defendants, is one of the landmark cases that helps differentiate our court system from those of oppressive governments.

Of all professions in the mental health arena, the only professional trained as a scientist (in addition to being practitioners) is the psychologist (Ziskin, 1995). The most established, scientifically reliable assessment procedures done within the forensic evaluation are the tests that we use. We rely only on tests with established, acceptable levels of scientific reliability. Many researchers have found the clinical interview alone as notoriously unreliable (Cattel, 1973; Saghir, 1971; Woody, 1972; Robins, 1985; and Aiken, 1985). Therefore, within our armamentarium, forensic psychologists are probably most equipped to conduct comprehensive and *quantifiable* assessments. Our

purpose is to aid the trier of fact. The more adequately this is done, the more the State is apt to save money. Having said this, I am having a difficult time understanding why the State would propose to pay a psychiatrist $250 per hour for a relatively less reliable assessment procedure, and $125 per hour for a psychologist's time, given the above facts.

I understand that the fee range for forensic psychologists has been from approximately $90 to $200 per hour. The proposed $125 an hour fee for psychologists may be an attempt to arrive at an "average" fee billed by psychologists. If this is the case, it is my opinion that other considerations need to be addressed to arrive at an alternate reasonable fee for forensic psychology consultations. I would assume that the lower end fees are billed by those who either have little training in forensic evaluation, do minimal or cursory evaluations requiring little professional time, or work at mental health centers. There is quite a difference in assessment reliability between the psychologist who spends an hour with the defendant yielding a one paragraph report, and an evaluation with the above described forensic methodology that requires 25 to 30 hours of professional time for assessment and potential mitigation purposes. In the latter case, frequently a 20 page report is generated that assesses obtained findings with references to the available scientific literature. In this sense, the "average" fee for psychologists may not be a true indicator of the service value and level of expertise that the State is receiving for forensic psychological consultations and evaluations.

Please understand the spirit of this letter. This is not about turf between psychology and psychiatry. The forensic psychologist is in a unique position within the forensic arena. However, being a psychologist does not necessarily make one competent to do these forensic assessments. While I am obviously raising the banner for forensic psychology, I am concerned that lowering the fees will result in the exit of qualified forensic psychologists and leave a vacuum ultimately filled by psychologists who are not trained or qualified for this work, and lacking the thoroughness that these cases require. This phenomenon already occurred in response to managed care by health care providers.

I have recently lowered my fee to $150 per hour in compliance with the most recent guidelines established July 1, 2003. I understand that the State is having budget problems. However, I urge the State to at least maintain the $150 per hour fee level for forensic psychologists, considering the above logic.

Sincerely,

F.A. Steinberg, PhD

References

Aiken, L.R. (1985). *Psychological Testing and Assessment* (5th ed.). Boston: Allyn & Bacon.

Cattell, R.B. (1973). The measurement of healthy personality and the healthy society. *The Counseling Psychologists,4,* 13.

Robins, L.N. (1985). Epidemiology: Reflections on testing the validity of psychiatric interviews. *Archives of General Psychiatry, 42,* 918-924.

Saghir, M.T. (1971). A comparison of some aspects of structured and unstructured psychiatric interviews. *American Journal of Psychiatry, 128,* 180-184.

Woody, R. (1972). R.H. Woody and J.D. Woody (Eds.). *Clinical Assessment in Counseling and Psychotherapy.* Englewood Cliffs, NJ, Prentice-Hall, Inc.

Ziskin, J. (1995). *Coping with psychiatric and psychological testimony.* Law and Psychology Press. Los Angeles, California.

PAMELA AUBLE, PH.D., ABPP-CN
Clinical Neuropsychology, Personality Assessment
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(615) 284-4686 fax (615) 284-4679

October 24, 2003

Cecil V. Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

OCT 27 2003

Re: Comments on Rule 13

Dear Mr. Crowson:

I am a board certified neuropsychologist with extensive experience in forensic psychology. I have given testimony in more than 90 depositions and have been qualified as an expert to testify in the courts of Tennessee more than 150 times. I have testified in civil cases in Davidson, Campbell, Rutherford, and many other counties. I have also testified in criminal cases in Bedford, Carroll, Cheatham, Coffee, Davidson, De Kalb, Dickson, Dyer, Fayette, Giles, Greene, Grundy, Hamblen, Hamilton, Henry, Hickman, Knox, Lincoln, Macon, Montgomery, Overton, Robertson, Sequatchie, Sevier, Shelby, Sullivan, Van Buren, Warren, White, Williamson, and Wilson Counties as well as in Federal District Court in Nashville, Cookeville, Memphis, and Greeneville, Tennessee.

I have reviewed the proposed changes to Rule 13 which is available at the AOC web site. The maximum fee listed for psychologists is set at $125 per hour with $62.50 per hour allowed for travel time. From examination of the 2003 AOC's list of psychological experts (listed under Clinical Psychology, Forensic Psychology, Neuropsychology, Psychology), the median rate for services is $150 per hour. Of these listed psychologists, 20 charge $150 per hour, 1 charges $175 an hour, 1 charges $200 an hour, and 1 charges $250 an hour (see Appendix A).

Twelve psychologists with telephone numbers in the AOC list are reported as charging less than $150 per hour (between $100 and $135 per hour). I called the numbers listed for these 12 psychologists to ask them their hourly rates for criminal forensic work. The results are summarized in Appendix B. One of the listed psychologists told me that he was not a psychologist. The telephone numbers were obsolete or inaccurate for three of the listings. Two of the psychologists no longer do this type of work. Of the remaining six psychologists, none of the listed rates were accurate. One psychologist charges $150 an hour instead of the listed $125 an hour. Another charges $175 an hour instead of the listed $135 an hour. The third charges $300 per hour instead of the listed $125 per hour. The fourth charges $150 per hour out of court

and $200 in court instead of the listed rate of $100 per hour. The fifth charges $150 for hour for evaluations and more than that for court appearances rather than the listed rate of $125 per hour. The sixth charges $150 per hour instead of the listed $100 per hour.

Thus, none of the Tennessee psychologists that were contacted on the AOC list of experts charged less than $150 an hour and four of the six charged more than $150 an hour at least for some services. For the AOC listed psychologists who are actually currently performing criminal forensic consultations in Tennessee, the average hourly rate is $155 per hour. No one in the AOC list was reported as charging half their usual rate for travel time. Travel time is time which can be used for clinical services at the usual fee schedule if the psychologist were not required to drive to evaluate incarcerated defendants.

The fee schedule for psychiatrists was listed as being capped at $250 per hour, double the rate of psychologists. From examination of the 2003 AOC list for this specialty, $250 per hour is about the going hourly rate for this specialty (see Appendix C). Four psychiatrists charge $250 per hour, five are listed as charging less, and four are listed as charging more. The average hourly rate charged was $227 per hour from the AOC list.

Often, a defendant can be adequately evaluated by either a psychologist or a psychiatrist. At present, many mental health consultations on criminal cases are handled solely by psychologists without involvement of psychiatrists. Rule 13 is setting the hourly rate for psychologists lower than their usual rate while setting the rate for psychiatrists at their usual rate. An unforseen consequence of this decision is going to be to decrease the number of cases in which psychologists are retained and increase the number of cases in which psychiatrists are retained (because more psychiatrists than psychologists are going to be willing to work for the Rule 13 rates). This is going to increase overall costs for indigent defense rather than lowering costs because there will be more claims at $250 per hour than at $125 per hour. I would recommend that the cap for hourly rate for psychologists be raised to reflect their usual hourly rates, and that travel time be allowed to be billed at the usual hourly rate.

If interim billing is not allowed in non capital cases, this will be a significant hardship for all experts. Cases can remain pending for four or five years, especially in some jurisdictions. Meanwhile, the expert's overhead expenses and living expenses must still be paid on an ongoing basis. I understand the AOC's concern about the cost of processing claims. Perhaps allowing interim billing on a limited basis (e.g., quarterly billing) could be done.

Sincerely,

Pamela Auble

Appendix A

Psychologist	AOC Listed Rate	Comments
Deborah Huntley	$150	
F. A. Steinberg	$200	
Jane Murray	$150	
Mark Cunningham	no rate listed	Texas psychologist, charges at least $150 per hour
James Walker	no rate listed	$250 per hour listed under Vanderbilt neuropsychologist
Pamela Auble	$130	I raised my rate to $150 per hour in July, 2003
Peter Young	$150	
Vanderbilt Medical Center (James Walker)	$250	
Berryman and Associates	$100	dentist office not psychologist office
Eric Engum	$100	$150 actual rate
Joseph Angelfilo	$150	
Dee Lambert	no rate listed	
Nancy Lanthorn	no rate listed	
Diana McCoy	$150	
Andrea Nichols	no rate listed	
Victor Pestrak	$150	
Sparks Clinic	$150	
Bruce Seldner	$150	
Treadway Clinic	$100	does not do this type of work anymore
Mike Barnes	no rate listed	

Janie Berryman	$100	actually charges $150 per hour out of court, $200 per hour in court
John Ciocca	$150	
Candice Blake	$150	
Kathleen Broughan	$150	
Michael Buckner	$150	
Michael Guinle	$135	actually charges $175 per hour
Ann Durant, Life Counseling Services	$135	actually charges $150, more for court appearances
Barnard Lyons	$150	
Wyatt Nichols	$150	
Roger Nooe	$125	no telephone number listed
Gary Olbrich	$150	
Sandra Phillips	$125	actually charges $300 per hour
Paul Rossby	$150	he is not a psychologist
Alix Weiss Sharp	$120	does not do this type of work anymore
Roy Smith	$120	no one by that name at the listed telephone number
David Solovey	$150	
Charlton Stanley	$125	actually has charged $150 per hour for the past 18 years
Vernon McCoy	$175	
James Walker	$150	actual fees are $250 per hour through Vanderbilt
Lynne Zager	$150	
David Patterson	$125	he is not a psychologist
Phillip Murphy	$150	

Diana Elliott	$100	California psychologist, the listed number is not in service

Appendix B

Psychologist	AOC listed rate	Actual rate
Berryman and Associates	100	dental office, not psychologist office
Eric Engum	100	150
Treadway Clinic	100	does not do this type of work
Janie Berryman	100	150, 200 for court
Michael Guinle	135	175
Life Counseling Services	125	150, more for court appearances
Sandra Phillips	125	300
Alex Weiss Sharp	120	does not do this type of work
Roy Smith	120	no one by that name at that number
Charlton Stanley	125	150
David Patterson	125	he is not a psychologist
Elena Elliott	100	number not in service

Appendix C

Psychiatrist	AOC listed rate per hour
William Bernet	$250
Bernard Hudson	$150
Stephen Montgomery	$250
Keith Caruso	$250 out of court, $300 in court
Michael Cross	$150
Robert Saddoff	$350
Stuart Grassian	$300
William Kenner	$290
Bell Psychiatric	$150
David Bender	$145
Peter Brown	$250
Margaret Robins	$150
George Woods	$275

TENNESSEE
MEDICAL
ASSOCIATION

OCT 23 2003

October 22, 2003

Cecil V. Crowson, Jr.
RE: Rule 13 Comments
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mr. Crowson:

These comments to Proposed Supreme Court Rule 13 are submitted on behalf of the 6500 members of the Tennessee Medical Association ("TMA"). TMA is opposed to the adoption of the Proposed Rule as submitted.

TMA believes that the Rule would result in an impediment to justice and reduce the pool of highly qualified physicians who might testify for indigent defendants in criminal and capital post-conviction proceedings.

Specifically, TMA objects to the following provisions of the Proposed Rule:

1. Hourly fees are capped substantially below the standard hourly rates of most medical experts. §(d)(1)(B) and (c).

2. All travel time is restricted to billing at one-half the hourly rate. §(d)(2).

3. Interim billing on non-capital cases is prohibited. §(f).

Many forensic psychiatrists and other highly specialized experts charge twice the capped rate for their services. Therefore, the cap might prevent qualified physicians from testifying in criminal and capital post-conviction matters. Having worked as a staff attorney for the Tennessee Department of Health from 1989-1998, I can personally attest to the difficulty of obtaining experts when caps are imposed. My quote of the then prevailing $400 review and $500 per day testimony caps earned me many a refusal from potential experts that I attempted to retain for medical malpractice and over-prescribing cases.

Thank you for the opportunity to submit these comments.

Sincerely,

Yarnell Beatty

Yarnell Beatty
General Counsel

YB/ra

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OCT 27 2003

Diplomate in Forensic Psychology
American Board of Professional Psychology
Diplomate in Counseling Psychology
American Board of Professional Psychology
Fellow of the Society of Antiquaries of Scotland
Licensed in Tennessee, North Carolina & Virginia

October 14, 2003

Cecil V. Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

RE: Comments on Rule 13

Dear Mr. Crowson:

I received a notice a few days ago regarding proposed changes in the Rule 13 fee schedule. I notice that the fee schedule for Forensic Psychologists is subject to a recommended $125.00 from the previous $150.00 per hour. I understand that the amount of $125.00/hour is based on a calculation of the median fee charged by psychologists. There is a difference between a median and an arithmetical mean. In a case such as this, the median is probably less representative of what service providers charge than the mean.

Not all psychological evaluations are the same. For example, I am aware that some mental health centers may charge several hundred dollars for court appointed "forensic" interviews that last less than an hour, and the report may be only one or two paragraphs. Other providers may charge less than a hundred dollars hourly for several reasons: (1) They do not maintain offices outside the home, (2) are subsidized in some way, (3) or are new graduates trying to build a practice by offering to do work at a cut rate.

When a forensic psychologist performs an evaluation for mitigation, competency or criminal responsibility, it is time intensive. There is usually extensive testing, collateral interviews, review of voluminous documentation, and writing a comprehensive report. The techniques are specialized and complex, often requiring the application of legal standards to psychological questions. This is not an area for amateurs or dilettantes. Too much is at stake.

If a clinical psychologist makes a mistake in ordinary practice, there are usually few repercussions. In forensic cases, it can be a life or death matter, or involve the loss of a person's freedom for decades.

It is curious that the proposed fee for psychiatrists is exactly twice that proposed for psychologists. Perhaps you are not aware of research that shows a psychiatric interview is far less reliable than a psychologist using psychometric testing to obtain data. Some years ago, a research article appeared in the Journal of the American Psychiatric Association. This article revealed that general clinical psychiatrists were no better at predicting dangerous behavior than architecture students. Since then, several research journals have confirmed those results. Because of the shortcomings of the clinical interview, many psychiatrists now rely on psychologists to do diagnostic testing for them.

Psychologists are the only terminal degree practitioners that use specialized psychological testing in order to answer questions posed by the Courts. Forensic Psychologists, as an occupational specialty, are the only psychologists who have made a formal specialty of applying research and psychometric findings to legal issues.

While it is possible to hire a local psychologist to do some work for an attorney, the attorney who wants to avoid an accusation of incompetent and ineffective counsel is wise to seek out a forensic psychologist. Preferably, that person will be Board Certified as a Diplomate of the American Board of Professional Psychology. ABFP is a specialty division of the American Board of Professional Psychology. The ABFP/ABPP Diploma is the only one recognized by the US Government and the American Psychological Association as a legitimate forensic credential by psychologists.

It should be instructive to even the most casual observer that there is a reason for the creation of Board Certification for professionals providing forensic services to the legal system. The demands placed on practitioners by the legal system are heavy, the responsibility great, and the issues complex. Although many naive and novice practitioners see forensic work as easy work with good pay, they are undercutting those of us who try in good conscience to provide the judicial system with quality services. This is not to say that only those psychologists who hold the ABFP/ABPP Diploma are competent. Many excellent forensic psychologists have not bothered to become board certified.

My point is this. One cannot lump all psychologists into the same basket. Not all specialties are created equal. The specialist in any discipline typically charges more than the general practitioner. This is true of physicians, dentists, pathologists, and psychiatrists. For example, there is Board Certification for Forensic Psychiatrists. Forensic psychiatrists are much more knowledgeable about legal issues than their general clinical psychiatrist brethren. The same is true of Forensic Psychologists.

If the legitimate expenditure of funds for indigent defense is reduced or capped, then there is the possibility that ethical practitioners will avoid this kind of work. If this happens, the forensic scientist consultation system will suffer the same kind of breakdown that has happened because of managed care.

Many doctors refuse to see TennCare, Medicaid or Medicare patients because of the below-profitability fee schedule. The result has been that it is harder--or in some cases, impossible--for poor and indigent persons to access quality medical care.

I have thirty-five years experience working with the legal system. For the last eighteen years, my fees have been held at $150/hour. Since this is the case, there is no way I can justify taking less money. In fact, I was about to go up to $200.00/hour for my consultative work due to increased liability and increasing costs for operating expenses. The cost of psychological testing supplies and computerized scoring software has skyrocketed. Rent has increased dramatically. I don't want to be forced to work only with those defendants who can pay a reasonable fee, and leave State sponsored work to those who are willing to work for below standard pay. Forensic psychology provides an important and socially useful service. It would be too bad for it to go the way of managed care.

Finally, I close with an observation I have used with my clients for many years: When something is working reasonably well, don't change it. You risk running afoul of the Law of Unintended Consequences. This is almost never a good thing.

If you have any questions, or would like to talk to me about this, please feel free to call the number on this letterhead anytime.

Sincerely,

Charlton S. Stanley, Ph.D., ABPP
Forensic Psychologist

KEITH A. CARUSO, M.D., PLC
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BRENTWOOD, TENNESSEE 37027
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OCT 27 2003

October 24, 2003

Cecil V. Crowson, Jr.
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Interim billing in Non-Capital Cases

Dear Mr. Crowson:

It has come to my attention that the Administrative Offices of the Courts are considering abolishing interim billing in Non-Capital cases funded by the State. As an expert whose practice serves a great many indigent defendants in the State of Tennessee, I strongly petition to you not to allow the abolition of interim billing as proposed.

First of all, like everyone else, experts have monthly bills to pay. An expert will not be able to put off paying these bills. Experts will need to continue receiving compensation from the State for services rendered on a monthly basis. Most experts are either private practitioners, university employees, or employees of consulting firms. Private practitioners are small business owners. As small business owners, experts have business expenses and quarterly taxes that must be paid as well. The nature of this work already leads to receiving payments on an uneven schedule. Even for experts who work as employees for universities or in other consulting businesses, the additional income generated by this line of work is crucially important to supplement base incomes or to ensure the survival of employers' businesses.

I recognize that the Administrative Offices of the Courts may be flooded with bills for services and have heard that some individuals bill as frequently as every week, failing to realize the workload that this may generate for your staff. As State employees are paid on a monthly basis, it would certainly be reasonable to move to a practice of paying experts and attorneys similarly on a monthly basis.

Non-Capital cases may take from several months to several years to be entirely resolved. As a result, an expert may have to wait several months to several years before receiving payment. As my current practice has evolved to the point where a significant portion of

my income is derived from Non-Capital cases involving indigent defendants, this would have a catastrophic effect on my ability to practice in Tennessee.

Most other experts living and practicing in Tennessee would be similarly affected. Many of us would have to leave this line of work in favor of something else to support our families, possibly forcing us to relocate elsewhere as well. This would not just be an unfortunate outcome for the experts, but it would also be unfortunate for the defendants that we serve and the residents of the State of Tennessee.

Losing the currently available experts would not eliminate a defendant's need for the services of an expert. Most likely, several things would result. First, attorneys would seek the services of out-of-state experts, whose services would be more costly than the current in-state experts on the basis of travel cost alone. Most of these experts would not be licensed in the State of Tennessee, and thus the State would have no means of regulation, review, or quality assurance over the services offered. Furthermore, the State would not receive the licensing fees or associated taxes from these experts.

Secondly, some lesser trained and less experienced practitioners may step in to offer their services. As a result, the quality of the services would suffer. The consequences of a decrement in the quality of services may extend in several directions. For one, cases may be overturned on appeal, leading to re-trial and wasting of already limited financial resources. Thus, ultimately the use of the lesser trained experts would not be cost-efficient. In addition, there is nothing that would lead these lesser trained and less experienced individuals to work for lower fees or fewer hours than the current group of experts.

However, an even greater concern would also arise, that of injustice. Expert services are provided to ensure that the indigent citizens of Tennessee receive justice. I already hear from criminal defense attorneys in Tennessee that the State is underserved in many areas where experts are necessary. Driving out the few experts that we have in the State will only reduce the chances that our indigent citizens have of obtaining justice.

Sincerely,

Keith A. Caruso, M.D.

From: Susan Jones
To: Cecil Crowson
Date: 11/3/03 1:11PM
Subject: Rule 13

I have one suggestion that I think could save money. If there was a provision which allowed on a case by case basis to allow non-expert funds to lawyers with no support staff to handle certain tasks such as going to the courthouse and searching records. A non-lawyer expert could be paid about $50 less per hour at a minimum. Such a rule would require a clear showing of how the non-expert assistance would be judicially economical.

Kenny Myers Investigations

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Alcoa, TN 37701

Mailing: P.O. Box 6194
Maryville, TN 37802

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Toll Free (866) 379-8222
kmyerstn@aol.com

October 31, 2003

RECEIVED
NOV - 6 2003
By

Cecil V. Crowson, Jr.
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Rule 13 Comments

Dear Mr. Crowson:

These comments to Proposed Supreme Court Rule 13 are submitted to oppose the implementation of these rules, specially the following:

1. Hourly fees are capped at $50.00, which is substantially below my hourly rate of $65.00. (5)(d)(1)(E).

2. All travel time is restricted to billing at one-half the hourly rate. (5)(d)(2).

   A considerable amount of my time is spent in locating and interviewing witnesses, which requires that I spend time in my car knocking on doors. To reduce my time by 50% for this necessary activity is unfair.

3. Interim billing on non-capital cases is prohibited. (5)(f).

   I cannot afford to provide my services and wait for a substantial amount of time to be paid for these services. In many cases, my services will have been provided early in the case and the case will not be tried or settled for several months and sometimes years. I will have paid my employees and the expenses incurred during the investigation, but the implementation of this Rule will require me to wait for payment.

4. Particularized need cannot be established and funding requests should be denied where the motion contains only: (A) undeveloped or conclusory assertions that such services would be beneficial; (B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained; (C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or (D) information

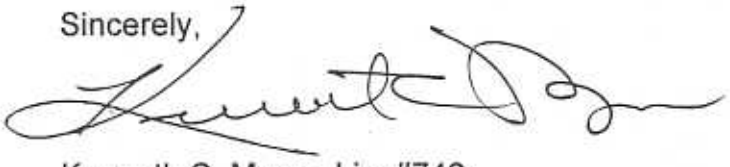
indicating that the requested services fall within the capability and expertise of appointed counsel, such as interviewing witnesses. (5)(c)(4).

If the attorney knew what was to be determined during the investigation it is unlikely that he would request my services.

I have been a licensed private investigator in the State of Tennessee for 11 years. I operate a small company, consisting of 9 employees. The Courts have ruled that indigent defendants are entitled to investigative services and a competent defense. If these Rules are implemented, I as well as many other private investigators will have to reassess the number of indigent defense cases I accept, if any.

Thank you for the opportunity to submit these comments.

Sincerely,



Kenneth C. Myers, Lic. #746
Kenny Myers Investigations
Company Lic. # 505

Administrative Office of the Courts

Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970
FAX 615 / 741-6285

CORNELIA A. CLARK
Director

ELIZABETH A. SYKES
Deputy Director

MEMORANDUM

TO: Members of the Tennessee Supreme Court

FROM: Connie Clark

DATE: October 13, 2003

RE: Supreme Court Rule 13 - ABA Standards

♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦

Today I received a letter from Robin Maher, Esquire, Director of the American Bar Association Death Penalty Representation Project. The text of the letter reads as follows:

> As you may know, in February 2003 the American Bar Association House of Delegates approved *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.* These Guidelines set forth the current national standard of practice and minimum effort required of jurisdictions and defense counsel in death penalty cases. In *Wiggins v. Smith*, the United States Supreme Court recently described the ABA Guidelines as prevailing norms of practice that are guides to determining what is reasonable.
>
> The ABA is now calling upon all death penalty jurisdictions to adopt the Guidelines. I enclose a CD Rom with the complete Guidelines and informative commentaries for your review. I hope they will prove useful as you contemplate proposed amendments to Tennessee Supreme Court Rule 13 concerning the appointment, qualifications, and compensation of counsel for indigent defendants.

Please do not hesitate to contact me if you have questions or if I can be of any assistance.

I am sending the original of the letter and the attached disk to Cecil Crowson and asking that it be treated as an official comment on the proposed amendments to Supreme Court Rule 13. With this memo I am sending electronic copies to each of you and to Lisa Rippy and Gloria Dale for review. The report is 436 pages long, so we are not attempting to send hard copies.

CAC:lah

cc: Cecil Crowson
Lisa Rippy
Gloria Dale
Libby Sykes
Rebecca Montgomery

PROFESSIONAL SECURITY AND INVESTIGATIONS

1010 Market Street, Suite 204
Chattanooga, TN 37402

Telephone/Fax: (423) 634-9159

Brian Hackett (423) 504-5792

Bill DiPillo (423) 488-7015

Marc Lawrence (423) 504-2949

NOVEMBER 12, 2003

Administrative Offices of the
Tennessee Supreme Court
511 Union Avenue
Nashville City Center
Suite 600
Nashville, Tenn. 37219

SENT VIA FAX: 615-741-6285
AND VIA REGULAR MAIL

In re: Review of Supreme Court Rule # 13
Public Comment

Dear Madam / Sir,

Please let this letter serve as our comment(s) regarding the proposal to rewrite Rule # 13. We are an investigative firm that works extensively in the criminal defense arena. We work for many local area attorneys and Public Defender offices in case matters throughout southeast Tennessee. We are very thankful to work for and learn from many of those attorneys. We are very thankful for the courtesy and guidance extended to us by the A.O.C. staff.

We have briefly reviewed the Court's proposed changes to Rule # 13 regarding the payment of expert services in re: indigent defense court approved investigation appointments. One of the proposed changes would not permit interim payments for expert investigative services. The basis for the proposal appears to be raised for administrative convenience . We would strongly object to such a proposal considering that court cases take years before they are disposed . We are a very small firm, we have limited resources and capital, we have monthly employee and creditor payments and the denial of interim payments would create a huge financial problem that would , in reality, exclude our investigative firm from continued work in indigent defense investigation and trial preparation. Doing so would not promote and protect the constitutional rights of the citizenry charged with crimes, but would make their convictions a foregone conclusion if they did not have a basic tool to prepare and present their defense.

To put this matter in simple and honest economic terms that anyone can ponder, we pose these questions: " Would anyone employed by the State of Tennessee agree to wait for years to be paid for their daily labor given on behalf of the state of Tennessee ?" " Would your creditors agree to wait on their payments based upon the pledge that they

will be paid in full for their services several years later ? " Please give your responses to these questions careful consideration when entertaining the proposal to deny interim payments.

Thank you for allowing us to interject our public input into your decision to amend Rule # 13. You are very welcomed to call me should you have any comments or questions regarding this matter.

Respectfully yours,

Bill DiPillo

THE SKAHAN LAW FIRM
ATTORNEYS AT LAW

PAULA SKAHAN
GERALD D. SKAHAN
MICHAEL LATIMORE

202 ADAMS
MEMPHIS, TENNESSEE 38103
TELEPHONE (901) 526-6476
FAX (901) 523-7622

NOV 10 2003

November 4, 2003

Mr. Cecil Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendments to Rule 13

Dear Mr. Crowson:

As attorneys in Memphis who accept appointments on both capital and non-capital cases, we have reviewed the proposed amendments to Rule 13, and would like to submit comments regarding several of the proposals.

Overall, many of the amendments sought will really have no effect on the way appointed cases are handled in Shelby County; however, there are several proposed amendments that we submit are either unfair, unconstitutional, or will create a larger burden on the attorneys and trial Judges handling the cases:

1. Proposed §2(e)(3)(c), to limit the current waiver of the $3,000 cap on homicide cases, will create situations neither trial Courts nor defense counsel will want to deal with. A voluntary manslaughter or second-degree murder case usually takes a tremendous amount of time to prepare, if it is done correctly; and we will create a situation where defense counsel will be in the midst of getting ready for trial and hit the $3,000 limit. Defense counsel then is faced with the difficult choice of continuing to work on the case for free or asking the Court to relieve him because he is not getting paid. For you to propose a situation that is potentially going to ask attorneys to try murder cases when they will not be compensated for the hours spent in trial is unfair to the defendant, to defense counsel, and the entire justice system. Would we ever consider looking at this issue from the other side and proposing a law that prohibits the State of Tennessee from spending more than $3,000 in salaries and expenses to prosecute a second-degree murder case? My point, of course, is that these rules should be implemented with the purpose of providing a fair and level playing field for both defense and prosecution.

2. Proposed §2(g), precluding compensation for attorneys driving to and from the Court Clerk's Office to file documents, seems trivial and we would suggest should be left out of the new Rule. How do we interpret a situation if the attorney is to *walk* to the Clerk's Office to file documents? Additionally, for some lawyers, how are the documents supposed to be filed with the Clerk's Office if they are not driven there? We submit that this is time spent on a case, and the attorney should be compensated for such time.

3. Proposed §3(j) seems unnecessary, unless there are actually trial Courts in the State approving hourly rates greater than the current Rule allows. The part of the proposed Rule declaring these limitations reasonable will probably create a situation in which private defense attorneys who do appointed capital work will challenge this Rule as to whether or not it is reasonable. The Supreme Court should keep in mind that most private lawyers who take appointed capital work do it because they think what they are doing is right, and it is not for the purpose of getting rich. In many of these cases, a private attorney, after he has been paid, does no better than break even due to expenses of running a private law office along with the time spent away from that private practice devoted to the particular capital case. We submit it would be interesting to compare the hourly rate paid to trial lawyers who agree to take time out of their private practices to represent indigent defendants against whom the State of Tennessee is seeking the death penalty with the rates paid by the State of Tennessee to other lawyers throughout the State who are doing legal work on a contract basis for the State.

4. Proposed §3(j) mandating an interim billing period on capital cases would create another unneeded burden on private attorneys handling appointed capital work. The fact that the proposed Rule would deem that compensation is waived by the attorney if, for some reason, he does not bill every 180 days is offensive. First of all, oftentimes these cases take several years to handle. When a bill is submitted to the trial Court, it becomes part of the Court record; therefore, you would be creating a situation where the Prosecutors who are handling the case can go review the bill as the case is pending to see what work the defense counsel is doing, what witnesses are being interviewed, what strategies are being prepared, and overall, giving them an unfair look at what the defendant is doing in preparing for his trial. It certainly could be interpreted as unconstitutional to mandate a defendant to inform the State of Tennessee what he is doing to prepare his defense before trial.

5. Proposed §4(a)(3), on its face, seems to reflect the intent of the Administrative Office of the Courts to micro-manage each indigent case throughout the State of Tennessee. If attorneys are submitting bills over the course of time that appear to have charges that are unnecessary in representing someone in a criminal case, then that should be addressed with each individual attorney and rectified. The proposed Rule will slow down cases in a system that is already backlogged by requiring attorneys to file requests and wait for approval for incidental expenses that are necessary and reasonable in those criminal cases. The proposed Rule goes on further to say that the attorney will not be compensated for the time spent obtaining approval from the trial Court for these expenses, which, in effect, is saying that we are creating a system in which we are requiring defense attorneys to do things but we are not going to compensate them for this. I don't know how anybody could see this as fair.

6. Proposed §4(a)(3)(F)(iv) stating that attorneys will not be reimbursed for the costs of copying a record is unfair. Is the private attorney who is breaking even, or losing money, on an appointed case be required to pay out of his or her own pocket the cost of copying a record on an appointed case? Most defendants want copies of their record. Since most of our clients are incarcerated in a Tennessee Department of Corrections facility and the record technically belongs to the defendant, if the appointed counsel is unwilling or unable to afford the cost of copying, her only option would be, then, to sit in the Department of Corrections with the defendant and review the record.

7. We have serious questions regarding the fairness of proposed Rule §4(b) requiring prior approval from the Administrative Office of the Courts for any expenses necessary in preparing a criminal case and then leaving this decision solely to the Director of the AOC. Where we practice, in Shelby County, the Judges closely scrutinize all requests for expenses in appointed cases. It is the trial Court that is most familiar with the case and what is necessary to provide the defense counsel and the defendant with what is fair and Constitutionally required to prepare an adequate defense. If a trial Court has all of the relevant information regarding the case and the request in front of him, and has deemed this to be a reasonable and necessary expense; it alarms us that we have a Director 200 miles away with virtually no information on the case that has the ability to unilaterally reject the trial Court's approval; in effect, telling the trial Court that they are wrong, and what they have stated in their Order is not Constitutionally required to provide the defendant with a fair trial. This Rule seems to provide no appeal process or review of the decision of the Director. What this proposed Rule, in effect, will do is create a slough of post-conviction proceedings and appeals to the Federal Courts regarding the way indigent defendants' rights are protected in the State of Tennessee.

8. Proposed §5(a)(3), allowing the trial Court to require defense counsel to make its request for services in open Court, is unfair. Once again, it is creating a system to allow the prosecution to observe, step-by-step, what a defendant is doing in preparing his defense. This is a situation which should remain unchanged and allow defense counsel the option of presenting requests for funding in an *ex parte* fashion.

Mr. Cecil Crowson, Jr.
100 Supreme Court Building

Re: Proposed Amendments
to Rule 13

November 4, 2003
Page Four

9. Proposed §5(b)(2) requiring efforts to obtain in-State experts or experts from contiguous States should be stricken from this proposed Rule. Depending on the type of case, many of the experts required are outside the proposed Rule requirement. Particularly in death penalty cases, which will be scrutinized by many other attorneys and Judges, it is imperative that defense counsel be allowed to obtain the experts necessary to prepare an adequate defense, regardless of where they are located. Once again, this is a situation that should be left to the trial Court, which is most familiar with the case at hand. If the trial Court makes a determination on the record that the defendant is in need of a certain expert, at a certain price, and that this need is constitutionally required, it should be granted. To limit the location of potential experts, or the amount to be paid to these necessary witnesses, is a decision that will, in all likelihood, lead to a conviction being remanded back by a Federal Court for violation of a defendant's Federal Constitutional rights. We submit that, particularly in the situation of death penalty cases, when cases are handled properly on the front end, and the defense counsel is provided adequate resources to defend his clients, the result is a beneficial verdict, or is more limited on appeal due to the fact that he was provided adequate defense. Regardless of which situation occurs, in the long run, it is a tremendous savings financially to the State of Tennessee.

10. Proposed §5(d)(1), regarding uniformity of rates to individuals for services provided, will create a situation that, again, will affect the quality of representation that is provided to an indigent defendant. Once again, we submit that this is a situation which should be left to the trial Court, which is most familiar with the case and what is reasonably necessary to protect the Constitutional rights of the accused. If a trial Court deems a particular expert's rates to be unreasonable, the Petition for Services will be denied; however, we are again creating a situation where a defendant will be able to prove a particularized need for a particular expert or service. The proposed Rule will prevent this necessary element of the defense from being provided. We believe this creates a Constitutional problem within the system, and again, potentially creates a situation where defendants are forced to go to the Federal Courts to seek Orders that the State of Tennessee adequately protect both the State and Federal Constitutional rights of an accused.

11. Proposed §5(d)(4) and (5), imposing maximum amounts to be paid on capital post-convictions is unfair. In ~~my~~ our experience with capital post-conviction proceedings, we have been in situations where we have been appointed on a capital post-conviction where, in our opinion, the original trial lawyer(s) did virtually nothing to prepare for trial or to represent the client. This essentially puts defense counsel in the position of starting from scratch and creating the case and the defense as it should have been done originally to present in a post-conviction hearing. This proposed Rule will again create a situation where, prior to the hearing, it is quite likely defense counsel will hit a cap and is either put in the position of withdrawing from the case or working for free. There should certainly never be any Rule created

by our Supreme Court mandating that a defense counsel on an indigent case work for free. These proposed caps are unnecessary, and will only create problems in the future.

12. Proposed §6(b), eliminating the opportunity to ask the Supreme Court to review a decision of the Director or Chief Justice, is fundamentally unfair and should be eliminated from the proposed Rule. As I have indicated in earlier paragraphs, the trial Court is in the best position to make a decision regarding what is fair compensation for an expert or an attorney preparing a case. To give an individual unilateral control to reject this without any appeal mechanism is unfair.

We hope these comments are helpful to some degree in making a determination on Rule 13. Although we are aware there is a budget crunch in the State of Tennessee, it is the consensus of many attorneys who agree to do appointed work that many of the proposed Amendments to Rule 13 are a way to nickel-and-dime the defense bar in an effort to rectify a budget mess. Although indigent defendants are not the most politically popular source upon which to expend revenue, it is our opinion that, if these cases are handled properly on the front end, and attorneys are provided with the necessary resources, then, in the long run, it is much cheaper. As private attorneys, we cannot control the amount of cases for which the Shelby County District Attorney's Office chooses to seek the death penalty; however, in agreeing to be appointed to represent several of these people, we would like to have some say to make sure that those accused have competent counsel and are provided with adequate resources to properly protect both the State and Federal Constitutional rights of the defendant.

Thank you for taking the time to review our opinions. If you have any questions, feel free to contact me at your convenience.

Sincerely,

THE SKAHAN LAW FIRM

Gerald D. Skahan Paula Skahan

GDS-PS/mt

JOHN E. APPMAN
ATTORNEY AT LAW
P. O. BOX 99
JAMESTOWN, TENNESSEE 38556

TELEPHONE 931-879-7619
FAX 931-879-5387

NOV 13 2003

November 12, 2003

Mr. Cecil Crowson
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219

IN RE: RULE 13 COMMENTS

Mr. Crowson:

If we must have caps they should be simply construed as guidelines. If we cannot allow Judges to properly exercise discretion, we should not have them having the power to incarcerated people.

Yours Truly,

John E. Appman

JEA/vg

CANDID Investigations
P.O. Box 9285
Jackson, TN 38314

NOV 13 2003

November 10, 2003

Cecil V. Crowson, Jr.
Re: Rule 13 Comments
100 Supreme Court Building
401 Seventh Ave. North
Nashville, Tn 37219-1407

Dear Mr. Crowson:

I am a sole proprietor and licensed private investigative in Tennessee. I have had the opportunity to assist on a few captial murder cases over the years. Fortunately, most of my work is in other areas of investigation which affords me to stay in business. Investigative work is not glamorous. Captial cases involve undesireable situations, locations, etc. The proposed limitations on rates and billing for capital cases is unreasonable. Forcing the defense to find the least expensive team is not the answer. Please consider some other solutions.

Sincerely,

Tammy Askew

Tammy Askew
Tennessee PI #0233
PI Company License #0318

INVESTIGATIVE OFFICE OF
MICHAEL J. COHAN
531 SOUTH GAY STREET
SUITE 900
P. O. BOX 1621
KNOXVILLE, TENNESSEE 37901
865-522-3351
FACSIMILE
865-522-3350

NOV 13 2003

November 10, 2003

Cecil D. Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219

Re: Rule 13

Dear Mr. Crowson:

As the owner of a company which employs both investigators and mitigation specialists, the following comments on the proposed Rule are hereby submitted:

Section 4(a)(3)(B)(C)(D) and (E): These Sections deal with reimbursement for travel. While I realize that there are three branches of State government, the fact of the matter is that there are State travel reimbursement guidelines used by State employees which are periodically updated. It seems only reasonable that these Rules should adopt those guidelines rather than attempt to set hotel rates in the Rule which over time will need to change. I would also note that the hotel rate quoted is for "State employees". Many hotels require identification. If we are required to request a State rate, then we need some sort of credential.

Section 5(d)(1)(E): Attached to this letter is a document entitled "Experts by Specialty", which bears a revision date of 11/30/99. It purports to show the compensation paid to experts and investigators four (4) years ago. Since the publication of this document, the Administrative Office of the Courts took the unprecedented step of setting a maximum rate for private investigators. In this proposed Rule, that rate is decreased by 23%.

As you know, we function under Orders signed by Trial Judges and often approved by the Chief Justice of the Supreme Court. Those Orders contain language required by the Administrative Office of the Courts that our $65.00 per hour rate for private investigators is reasonable. We have in our files perhaps as many as 100 such Orders signed by elected Criminal

Court Judges, many of which were approved by the Chief Justice. The latest of those Orders was received in this office two (2) weeks ago. If our rate in those Orders was reasonable, then the rate in this proposed Rule is unreasonable. I would note that the rate in those Orders was 86% of our otherwise usual and customary rate.

Section 5(d)(2): I fail to understand the reasoning for this Section at all. Much of our time is spent tracking down witnesses, which requires traveling from place to place. Even in those cases where the investigation is based in our home county, the witnesses may be anywhere in the state or anywhere in the country. In our business, travel is a necessity, not a luxury.

I have reviewed the latest available list of private investigators paid by the Administrative Office of the Courts in criminal cases. It shows that those private investigators reside in fourteen (14) counties in the State of Tennessee which, of course, means that none of them reside in eighty-one (81) other counties in the State of Tennessee. According to that list, there are no private investigators currently being paid by AOC in the Second, Fourth, Seventh, Eighth, Ninth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-eighth and Thirty-first Judicial Districts. In order for defendants in these areas to receive any type of service, travel is required. I also have been in capital cases in recent months where one of our defendants was housed at Northeast Penitentiary, a 312-mile round trip from our office and another was at Riverbend, which is almost a 400-mile round trip from our office. We would ask that this be removed from the proposed Rule. I would also note that the explanatory comment says that this reflects current policy. That is simply incorrect.

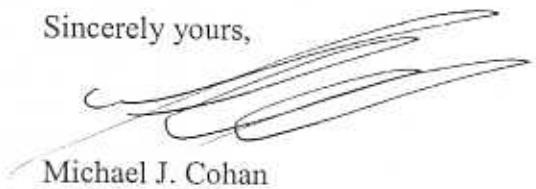
Section 5(f): Interim billing is necessary for small business. Many of our companies are one, two, three or four person operations. Their expenses are ongoing. Criminal cases take between six (6) months and three (3) years to resolve. It simply is not possible to do the work and wait three years to be paid.

The explanatory comment says this will reduce the administrative burden. I certainly have no information on that. I do know that we presently bill on a monthly basis. The turnaround time on those bills is something less than thirty (30) days. The most recent bills submitted to AOC were audited and sent on for payment in six (6) days. We actually received payment on those statements in two (2) weeks.

Section 5: This Section seems to contain a clear bias against private investigators. It seems to say that investigators are generally unnecessary in criminal cases. I believe that shows a general lack of understanding of the role we play as part of a criminal defense team. I would note that the Legislature has funded investigators for all the District Attorneys Offices as

well as all the Public Defenders Offices. It clearly seems that the Legislature understands the necessity for investigators in criminal cases.

Sincerely yours,



Michael J. Cohan

Enclosure

EXPERTS BY SPECIALITY

Expert	Address	Hourly Rate
ADDICTIONOLOGIST		
Peter Rogers	1304A Spencer Rd, Signal Mountain, TN 37377	$250
Murray Smith	3515 Stokesmont Rd, Nashville, TN 37215	$150
ARSON		
William Dewitt	322 Brown St, Lafayette, TN 37901	$95
David M. Smith	4257 W Ina Rd, Ste 101, Tucson, AZ 85741-2233	$150
James R. Stephens	1166 DeKalb Pk, Blue Bell, PA 19422-1853	$145
AUDIO		
Ralph Ohde	The Wilkerson Center, 1114 19th Ave S, Nashville, TN 37212	$150
BLOODSPATTER/BALLISTICS		
Michael Sweedo	P.O. Box 129, Sonoita, AZ 85637	$75
CLINICAL AND CONSULTING		
Edward Qualls, Psy.D.	1808 West End Ave, Ste 1100, Nashville, TN 37203	$150
CLINICAL PSYCHOLOGISTS		
Xavier F. Amador, Ph.D.	1150 Smith Rd, Peconic, NY 11958	$150
Pamela M. Auble, Ph.D.	2021 Church St, Ste 302, Nashville, TN 37203	$150
John V. Cicocca, Psy.D.	2026 Exeter Rd, P.O. Box 38374, Germantown, TN 38138	$100
Mark D. Cunningham	500 Chestnut, Ste 1735, Abilene, TX 79602	$180
Eric Roth, Ph.D.	Dept of Psychiatry, ETSU, P.O. Box 70567, Johnson City, TN 37614	$150
Lynne D. Zager, Ph.D.	68 Timberlake Dr, Jackson, TN 38305	$125

** Out of Court/In Court

**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
CLINICAL SOCIAL WORKER		
Bennie Fleming	6905 Quail Dr, Knoxville, TN 37919	$35
COMMUNICATIONS		
Deborah L. Curlee	9516 Briarwood Rd, Knoxville, TN 37923	$80
CONSULTANTS		
Carlton Trial Consulting	150 E Huron St, Ste 903, Chicago, IL 60611	$65
Simon Ford	2661 Market St, Box #634, San Francisco, CA 94114	$150
Benjamin W. Grunbaum	112 Turk Dr, Moraga, CA 94556	$150
Jury Services, Inc.	1009 Duke St, Alexandria, VA 22314	$100
Kay Kuczynski	508 E Unaka Ave, Johnson City, TN 37601	$60
Morris L. Lovejoy	1805 N Jackson St, Ste 14, Tullahoma, TN 37388	****
Mark W. Peterson	2200 Morris Hill, Box 23745, Chattanooga, TN 37412	$250
David F. Ross	411 Glenway Ave, Signal Mountain, TN 37377	$125
S. Paul Rossby	Vanderbilt Univ, Dept of Psychiatry, A2100 MCN, Nashville, TN 37232	$150
Robert Spangenburg	1001 Watertown St, West Newton, MA 02165	****
Preston M. Stein	913 Robin Hood Ln, Memphis, TN 38111	$150
Weber Trial Consulting	4734 All Spice Dr, Memphis, TN 38117-4001	$100
CRIMINALIST		
Paul Kish	Lab of Forensic Science, P.O. Box 1111, Corning, NY 14830	$150
CRIMINOLOGIST		
Michael Blankenship	327 Urbana Rd, Limestone, TN 37681	****
DEATH PENALTY CONSULTANT		
David Bruck	P.O. Box 11744, Columbia, SC 29211	****
DNA		
Ronald Acton	1215 Saulter Rd, Birmingham, AL 35209	$150
Lisa Forman	5811 Greentree Rd, Bethesda, MD 20817	$200
William Shields	7636 Rockfalls Dr, Richmond, VA 23225	$200

** Out of Court/In Court
**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
EMERGENCY MEDICINE		
Paul E. Kaugman, M.D.	803 Creswell Court, Knoxville, TN 37919	****
EDUCATION SPECIALIST		
Tom Moorehead	1746 Rays Gap Rd, Seymour, TN 37865	$60
ENTOMOLOGISTS		
M. Lee Goff	45-187 Namoku St, Kaneohe, HI 96744	$100
Neal H. Haskell, M.D.	425 Kannal Ave, Rensselaer, IN 47978	$250
EXPERT WITNESSES		
Michael Guinle	2 N Front, Ste 630, Memphis, TN 38103	$150
Philip Maxey	7707 Wild Horse Run, Hereford, AZ 85615	****
Robert B. Parker	UT Memphis, 26 S Dunlap St, Memphis, TN 38163	$250
William P. Redick, Jr.	P.O. Box 187, Capital Case Resources, Whites Creek, TN 37189	$40
E. William Rosenburg	6055 Sweetbriar Cove, Memphis, TN 38120	$200
Martin Shapiro	Dept of Psychology, Emory University, Atlanta, GA 30322	$150
South Arising	1215 Saulter Rd, Birmingham, AL 35209	$150
FIBER & MATERIAL ANALYSIS		
Wilfred A. Cote	207 Brookford Rd, Syracuse, NY 13224	$100
Stephanie L. Smith	43524 Jubilee St, South Riding, VA 20152	$125
FINGERPRINTS		
Larry Miller	1615 Strawberry Ln, ETSU, Johnson City, TN 37604	$50
Latent Print Consulting	4795 Bobbitt Rd, Moscow, TN 38057	$50
Michael J. Sweedo	P.O. Box 129, Sonoita, AZ 85637	$75
FIREARMS EXAMINERS		
Bob Goodwin	433 Huntington Ridge, Nashville, TN 37211	$50
Wayne Hill	P.O. Box 873, East Moline, IL 61244-0873	$95

** Out of Court/In Court

**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
FIREARMS AND TOOLMARK		
Lannie Emanuel	265 Valleyview Dr, Double Oak, TX 75067	$125
Larry Fletcher	113 Cherokee Path, Flower Mound, TX 75028	$125
FORENSICS		
C. Blake	401 McFarland, Morristown, TN 37814	$250
FORENSIC DENTAL CONSULTANTS		
Harold Cloogman, D.D.S.	2426 Mineral Springs Rd, Knoxville, TN 37917	$150
Steven Smith, M.D.	240 E Huron St, Chicago, IL 60611-2909	$175
FORENSIC DOCUMENT EXAMINER		
Hartford R. Kittel	4315 Adrienne Dr, Alexandria, VA 22309-2626	$150
FORENSIC PATHOLOGISTS		
C. Blake	401 McFarland, Morristown, TN 37814	$250
Joseph M. Burton	3550 Kensington Rd, Decatur, GA 30032-1328	$250
Forensic Pathology	620-B Davidson St, Nashville, TN 37213	$100/$150**
Brian Frist	150 N. Marietta Parkway, Marietta, GA 30060	$250
Frank J. Peretti	4719 Sugar Maple Ln, Little Rock, AR 72212-2092	$200
Bonita J. Peterson	4550 Warwick, Kansas City, MO 64111	$150
Kris Sperry	5797 Trotters Court, Stone Mountain, GA 30087	$250
FORENSIC PSYCHIATRISTS		
William Bernet	1601 23rd Ave S, Nashville, TN 37212	$250
Ben Bursten, M.D.	141 Claremont Rd, Oak Ridge, TN 37830	$200
Jonas R. Rappeport	106 Beech Hill Ln, Towson, MD 21861-6170	$250
David Shapiro	30 E Padonia Rd, Ste 208, Timonium, MD 21093	$200
FORENSIC PSYCHOLOGISTS		
Mark D. Cunningham	500 Chestnut, Ste 1735, Abilene, TX 79602	$180
John Filley	P.O. Box 6025, Englewood, CO 80155	$75
Diana McCoy	200 Midlake Dr, Ste C, Knoxville, TN 37918	$150
F. A. Steinberg, Ph.D.	763 Brookhaven Circle, Ste 203, Memphis, TN 38117	$150

** Out of Court/In Court

**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
FORENSIC SCIENTISTS		
Peter D. Barnett	3053 Research Dr, Richmond, CA 94806	$150
Forensic Consultants	2620 Bluefield Ave, Nashville, TN 37214	$100
Paul Kish	Lab of Forensic Science, P.O. Box 1111, Corning, NY 14830	$150
T. Paulette Sutton	P.O. Box 63076, 800 Madison Ave, Memphis, TN 38163	$100
HOMICIDE RECONSTRUCTIONIST		
Forensic Security Consultants	P.O. Box 654, Tallahassee, FL 32302	$100
INHALENT ABUSE		
Milton Tenenbein	Health Science Centre, 840 Sherbrook St, Winnipeg, MB	$250
INTERROGATION TECHNIQUES		
Daniel Sosnowski	3015 Canton Rd NE, Ste 6, Marietta, GA 30066	$75
INVESTIGATORS		
A & A Investigations	P.O. Box 21369, Chattanooga, TN 37424	$33
Alfonso and Associates	123 Franklin St, Jersey City, NJ 07307	$70
All Pro Investigations	1725 B Madison Ave, Ste 628, Memphis, TN 38104	$50
Arthur R. Anderson	P.O. Box 1182, Cordova, TN 38018	$50
Chris Armstrong	P.O. Box 41790, Nashville, TN 37204	$65
Tammy Askew	102 E Baltimore, #200, Jackson, TN 38301	$45
Charles C. Bebber	314 Brown Ave, Morristown, TN 37815	$90
Brewer Detective Service	2555 Poplar, Memphis, TN 38112	$50
Buchanan Corp. Security	119 Kendrick St, Kingsport, TN 37663	$35
Candid Investigations	102 E Baltimore, #200, Jackson, TN 38301	$45
Cardinal Investigations	P.O. Box 813, Millington, TN 38083	$45
CDA, Inc.	203 Beale St, Ste 305, Memphis, TN 38103	$50
Cheslock Investigations	4745 Poplar Ave, Ste 203, Memphis, TN 38117-4412	$40
Michael J. Cohan	P.O. Box 1621, Knoxville, TN 37901	~~$60~~ 65
Jonathan D. Cooper	550 W Main Ave, Ste 950, Knoxville, TN 37902	$50
William C. Curtis	P.O. Box 53, Chattanooga, TN 37401	$40
Don Q. Dinh	1309 Jefferson Ave, Memphis, TN 38104	$50
DiPillo Investigations	Rte 4, Box 368, Summerville, GA 30747	$38

** Out of Court/In Court

**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
INVESTIGATORS (CONT.)		
James E. Drinnon	11130 Kingston Pk, Ste 1-221, Knoxville, TN 37922	$65
Willie Durham Investigations	4999 Hillbrook Dr, Memphis, TN 38109	$30
Fowlers' Profile Links	P.O. Box 768, Hermitage, TN 37076	$50
Don Gandy	P.O. Box 2609, Murfreesboro, TN 37133	$60
Darrell L. Hamar	4014 General Bates Dr, Nashville, TN 37204	$50
Wallace B. Harrington	P.O. Box 3036, Memphis, TN 38173	$55
Hawkeye Investigative	P.O. Box 324, Cordova, TN 38088	$50
Inquistor, Inc.	Garden Level, Ste 1, 80 Monroe, Memphis, TN 38103	~~$60~~ 65
Investigations & Intelligence Services, Inc.	1678 Beaver Dam Rd, Smiths Grove, KY 42171	$40
IPS Investigations	P.O. Box 1572, Knoxville, TN 37901	$50
J.E.T. Investigations	P.O. Box 3682, Jackson, TN 38303	$40
Clarence M. Kelley & Assocs.	3217 Broadway, 4th Fl, Kansas City, MO 64111	$65
John Kelley	1315 Ridgeway, Ste 104-200, Memphis, TN 38119	$35
Stan Knight	1605 E 5th Ave, Knoxville, TN 37917	$30
Legal Investigative Services	802 Troy Ave, Dyersburg, TN 38024	$30
T. Lee McDowell	P.O. Box 34864, Memphis, TN 38134	$50
John M. Maddux	P.O. Box 1172, Greeneville, TN 37744	$55
Jeffrey Mellor	4204 Talliluna Ave, Knoxville, TN 37919-8363	$50
Larry S. Miller	1615 Strawberry Ln, ETSU, Johnson City, TN 37604	$50
Phillip J. Murray	1138 Rider Ave, Knoxville, TN 37917	$100
Kenney Myers	P.O. Box 6194, Maryville, TN 37802	$60
Navarre & Co.	448 N Cedar Bluff Rd, Ste 204, Knoxville, TN 37923	$60
Sarah L. Ottinger	2728 General Pershing St, New Orleans, LA 70115	$50
Scott Pratt	904 Woodland Ave, Johnson City, TN 37601	$20
Premier Investigations	100 N Main St, Ste 2304, Memphis, TN 38103	$60
Professional Investigations	P.O. Box 1993, Paducah, KY 42002-1993	$48
R & R Multistate	P.O. Box 70242, Nashville, TN 37207	$49
Kevin E. Reed	200 Jefferson Ave, Ste 850, Memphis, TN 38103	$50
Barry Rice	P.O. Box 642, Knoxville, TN 37901	$50
John E. Rucker	P.O. Box 27629, Knoxville, TN 37927	$50
Charles Scott	3866 Dickerson Pk, Nashville, TN 37207	$50
Sharp Fire Investigations	122 Harbor Isle Cr, Memphis, TN 38103	****
Mort Smith	954 W Washington Blvd, 6th Fl, Chicago, IL 60607	$75
Terry Sweat	802 Troy Ave, Dyersburg, TN 38024	$30
Larry F. Wallace, Jr.	423 Waldron Rd, Ste C, Lavergne, TN 37086	$25
Judith Whaley	2615 Barton Ave, Nashville, TN 37212	$50
Wheeler Investigative	207 3rd Ave N, #218, Nashville, TN 37201	$50
Wynne Investigations	247 Broad St, Ste 102, Kingsport, TN 37660	$35

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**** Hourly breakout not available.

Expert	Address	Hourly Rate
JURY CONSULTANTS		
Charles C. Bebber	314 Brown Ave, Morristown, TN 37815	$80
Carlton Consulting	150 E Huron St, Ste 903, Chicago, IL 60611	$65
Denise De La Rue	740 Lakeview Ave, Atlanta, GA 30308	$75
Marjorie Fargo	1009 Duke St, Alexandria, VA 22314	$75
Julie E. Fenyes	6641 Poplar, 102-145, Germantown, TN 38138	$65
Grant & Associates	4100 Todd Blvd, Mobile, AL 36619	$100
Jury Services, Inc.	1009 Duke St, Alexandria, VA 22314	$100
Patricia Maffeo	111 Westfield Dr, Knoxville, TN 37919	$75
Resource Associates	5455 Lance Dr, Ste 103, Knoxville, TN 37909	$125
David M. Smith	4257 W Ina Rd, Ste 101, Tucson, AZ 85741-2233	$150
Trial Dynamics	6641 Poplar, 102-145, Germantown, TN 38138	$50
Weber Trial Consulting	4734 All Spice Dr, Memphis, TN 38117	$100
Lori B. Winters	115 Trails Circle, Nashville, TN 37214	$75
Frank Wood	2164 15th Ave E, North St. Paul, MN 55109	$75
JUVENILE JUSTICE SPECIALIST		
David Richart	851 S Fourth St, Louisville, KY 40203	$150
LEGAL PHOTOGRAPHER		
Michael Sweedo	P.O. Box 129, Sonoita, AZ 85637	$75
LUMBAR PUNCTURE		
Benjamin Johnson	1211 21st Ave S, Nashville, TN 37212	****
MEDICAL EXAMINER		
Southeastern Forensic	P.O. Box 81700, Conyers, GA 30208-9423	$400
MEDICOLEGAL CONSULTANTS		
Southeastern Forensic	P.O. Box 81700, Conyers, GA 30208-9423	$250
MENTAL RETARDATION SPECIALIST		
George S. Baroff	417 Granville Rd, Chapel Hill, NC 27514	$100

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(Rev. 11/30/1999)

Expert	Address	Hourly Rate
MITIGATION SPECIALISTS		
Cessie Alfonso	123 Franklin St, Jersey City, NJ 07307	$70
Susan Birkelo	1133 N Sacramento Ave, Chicago, IL 60622	$85
Ann-Marie Charvat	2615 Barton Ave, Nashville, TN 37212	$60
James F. Crates	P.O. Box 580, Granville, OH 43023	$40
Mazie S. Curley	2486 Larose Ave, Memphis, TN 38114	$50
James E. Drinnon	11130 Kingston Pk, Ste 1-221, Knoxville, TN 37922	$65
Frank Einstein	P.O. Box 90213, Nashville, TN 37209	$65
Julie E. Fenyes	6641 Poplar, 102-145, Germantown, TN 38138	$65
Lynn Hampton	227 Keeble Ave SW, Knoxville, TN 37920	$80
Larry Miller	1615 Strawberry Ln, ETSU, Johnson City, TN 37604	$50
Meaghan Mundy	303 Sloan Rd, Nashville, TN 37209	$55
NCIA	3125 Mt. Vernon Ave, Alexandria, VA 22305	$50
Lee Norton, Ph.D.	1704 Thomasville Rd, Ste 179, Tallahassee, FL 32303	$85
William Ortwein	723 McCallie Ave, Chattanooga, TN 37403	$150
Ross Litigation	411 Glenway Ave, Signal Mountain, TN 37377	$125
Hans Selvog	3125 Mt. Vernon Ave, Alexandria, VA 22305	$50
Joel Sickler	3125 Mt. Vernon Ave, Alexandria, VA 22305	$75
Pamela Taylor	1409 Wingate Ln, Hixson, TN 37343	$40
Patsy Weber	4734 All Spice Dr, Memphis, TN 38117	$100
MOLECULAR NEUROBIOLOGIST		
Paul Rossby	Vanderbilt Univ, Dept of Psychiatry, A2100 MCN Nashville, TN 37232	$150
NEUROLOGISTS		
Richard Hoos, MD	395 Wallace Rd, Ste 201, Nashville, TN 37211	$200
Jack Scariano, Jr., MD	9333 Park West Blvd, Ste 205, Knoxville, TN 37923	$150
NEUROPHARMACOLOGIST		
Neuroscience Consulting	154 Brookhill Rd, Libertyville, IL 60048	$150
NEUROPSYCHOLOGISTS		
Pamela M. Auble, Ph.D.	2021 Church St, Ste 302, Nashville, TN 37203	$150
Daniel Martell	537 Newport Center Dr, Ste 300, Newport Beach, CA 92660	$300

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Expert	Address	Hourly Rate
NEUROPSYCHOLOGISTS (CONT.)		
Eric Roth, Ph.D.	Dept of Psychiatry, ETSU, P.O. Box 70567, Johnson City, TN 37614	$150
Jeffrey Smalldon	3796 Olentangy River Rd, Columbus, OH 43214-3455	$110
Michael G. Tramotana	1601 23rd Ave S, Nashville, TN 37212	$250
NEURORADIOLOGIST		
Robert M. Kessler, MD	1247 Saxon Dr, Nashville, TN 37215	$150
PATHOLOGIST		
Brian S. Frist	150 N. Marietta Parkway, Marietta, GA 30060	$250
Lakeway Pathology	850 W 3rd St, Ste A, Morristown, TN 37814	****
Southern Biographics	4200 Wade Green Rd, Ste 217, Kennesau, GA 30144	$250
PEDIATRIC NEUROLOGIST		
David A. Griesemer	2775 Stamby Place, Mt Pleasant, SC 29466	****
PHARMACIST		
Robert Parker	College of Pharmacy, UT Memphis, 26 Dunlap St, Memphis, TN 38163	$150
PHARMACOLOGY		
Murray Smith	3515 Stokesmont Rd, Nashville, TN 37215	$150
PHOTOGRAPHY		
Debbie Chessor	202 Corey Dr, Franklin, TN 37067	$100
Tracy Photography	P.O. Box 206, Knoxville, TN 37901	$55
POLYGRAPH		
Avery Puckett	P.O. Box 40062, Nashville, TN 37209	****
Charles R. Scott	3866 Dickerson Pk, Nashville, TN 37207	$50
Truth, Inc.	5119 Summer Ave, Ste 202, Memphis, TN 38122	****

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Expert	Address	Hourly Rate
PSYCHIATRISTS		
William Bernet	1601 23rd Ave S, Nashville, TN 37212	$250
Robert A. Brimmer	356 24th Ave N. Ste 402, Nashville, TN 37203	$175
Ben Bursten	141 Claremont Rd, Oak Ridge, TN 37830	$200
Phillip M. Coons	1232 W Michigan St, Indianapolis, IN 46202-5177	$150
Jon W. Draud	2021 Church St, Ste 302, Nashville, TN 37203	$250
Dan Goodkind	451 W 200 South, Apt 2-A, Vernal, UT 84078	$80
William D. Kenner	113 30th Ave N, Nashville, TN 37203	$200
Mental Health Associates	P.O. Box 40934, Nashville, TN 37204	$150
Barry Nurcombe	1601 23rd Ave S, Nashville, TN 37212	$150
J. Kirby Pate	310 25th Ave N, Ste 309, Nashville, TN 37203	$250
Margaret Robbins	P.O. Box 70308, ETSU Station, Johnson City, TN 37215	$150
Robert Sadoff	Ste 326, Benjamin Fox Pav, Jenkintown, PA 19046	$300
PSYCHOLOGISTS		
Ronald Allen	9217 Park West Blvd, Ste D-1, Knoxville, TN 37923	$150
Pamela M. Auble, Ph.D.	2021 Church St, Ste 302, Nashville, TN 37203	$150
Geraldine Bishop	5158 Stage Rd, Ste 110, Memphis, TN 38134	****
Gillian Blair	210 25th Ave N, Parkview Tower, Nashville, TN 37203	$150
Theodore H. Blau	213 E Davis Blvd, Tampa, FL 33606	$325
Kathleen G. Broughan	Westfield Cntr, 305 Westfield Dr, Knoxville, TN 37919	
Peggy J. Cantrell	5 Rambling Circle, Johnson City, TN 37604	$90
John V. Cicocca, Psy.D.	2026 Exeter Rd, P.O. Box 38374, Germantown, TN 38138	$100
Mark D. Cunningham	500 Chestnut, Ste 1735, Abilene, TX 79602	$180
Bethany K. Dumas	UT, 301 McClung Tower, Knoxville, TN 37996-0430	$125
Jon Ellis	206 Princeton Rd, Ste 21, Johnson City, TN 37601	$100
Eric Engum	9111 Cross Park Plaza, D266, Knoxville, TN 37923	$100
Jeffrey Erickson	2100 Clinch Ave, Ste 430, Knoxville, TN 37916-2221	$125
Dale Foster	7516 Enterprise, Ste 1, Germantown, TN 38138	$200
Dan Goodkind	451 W 200 South, Apt 2-A, Vernal, UT 84078	$80
M. Lee Goff	45-187 Namoku St, Kaneohe, HI 96744	$100
George B. Greaves	529 Pharr Rd NE, Atlanta, GA 30305	$135
Michael Guinle	2 North Front, Ste 630, Memphis, TN 38103	$150
Neal H. Haskell, Ph.D.	425 Kannal Ave, Rensselaer, IN 47978	$250
Health Management Services	2292 Chambliss Ave, #C-2, P.O. Box 2965, Cleveland, TN 37320-2965	$150
John Hutson	6563 Oaks Dr, Bartlett, TN 38134	$125
Allison Kirk	2021 Church St, Ste 302, Nashville, TN 37203	$150

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Expert	Address	Hourly Rate
PSYCHOLOGISTS (CONT.)		
Laurel J. Kiser	2205 Cross Dr, Memphis, TN 38112	$150
Knoxville Neurology Clinic	930 Emerald Ave #815, Knoxville, TN 37917	$135
Jerry Lemler	P.O. Box 1617, New Tazewell, TN 37824	$150
Marsha Little	6067 Apple Tree #5, Memphis, TN 38115	$150
William B. Little	756 Ridgelake Blvd, Memphis, TN 38120	$95
Diana McCoy	200 Midlake Dr, Ste C, Knoxville, TN 37918	$150
Daniel Martell	537 Newport Center Dr, Ste 300,	$300
Roger Meyer	6074 E Brainerd Rd, Chattanooga, TN 37421	$120
Larry Miller	1615 Strawberry Ln, ETSU, Johnson City, TN 37604	$50
Leonard M. Miller	4803 Lyons View Pk, Knoxville, TN 37939	$110
Tom Neilson	210 25th Ave N, Ste 607, Nashville, TN 37203	$150
Robert Pusakulich	1027 S Yates, Ste 613, Memphis, TN 38119	$150
Alexandra L. Quittner	Indiana Univ, Psych Bldg, Bloomington, IN 47405-1301	$125
Thomas Schacht	614 W Locust St, Johnson City, TN 37604	$125
Edith Sewell	5719 Raleigh Lagrange, Ste 2, Memphis, TN 38134	$90
David A. Solovey	105 Lee Parkway, Ste F, Chattanooga, TN 37421	$150
F. A. Steinberg, Ph.D.	763 Brookhaven Circle, Ste 203, Memphis, TN 38117	$150
Michael G. Tramontana	1601 23rd Ave S, Nashville, TN 37212	$250
University Physicians Practice	P.O. Box 2204, Johnson City, TN 37605	$125
H. W. Wagner	1640 W Clinch Ave, Knoxville, TN 37916	$125
Leah A. Welch	115 28th Ave N, Nashville, TN 37203	$120
West End Psychotherapeutics	1500 21st Ave S, Ste 320, Nashville, TN 37212	$150
Dennis Wilson	Route 5, Box 618, Bolivar, TN 38008	$110
Gary A. Wishart	601 Volunteer Parkway, Ste G, Bristol, TN 37620	$300
Peter Young	4709 Papermill Dr, Ste 202, Bldg 2, Knoxville, TN 37909	$125
Lynne D. Zager, Ph.D.	68 Timberlake Dr, Jackson, TN 38305	$125
RADIOLOGIST		
Robert M. Kessler, MD	1247 Saxon Dr, Nashville, TN 37215	$150
SEROTONIN		
Daniel Martell	537 Newport Center Dr, Ste 300,	$300
Dennis Schmidt, MD	Room 2127A, MCN, 21st Ave S, Nashville, TN 37232	$100
SPEECH PATHOLOGIST		
Patricia F. Allen	2507 Ashwood Ave, Nashville, TN 37212	$120

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**** Hourly breakout not available.

(Rev. 11/30/1999)

Expert	Address	Hourly Rate
STATISTICAL GENETICIST		
Martin Shapiro	Dept of Psychology, Emory University, Atlanta, GA 30322	$150
TIRE FOOTPRINT ID SPECIALIST		
Peter McDonald	345 Boston Mills Rd, Hudson, OH 44236	$100
TOXICOLOGISTS -		
Donna Seger	Vanderbilt Medical Center, 501 Oxford House, Nashville, TN 37232	$250
Jeannie Courtney	Vanderbilt Medical Center, 501 Oxford House, Nashville, TN 37232	$250

** Out of Court/In Court
**** Hourly breakout not available.

(Rev. 11/30/1999)

THOMAS H. MILLER
ATTORNEY AT LAW
P.O. BOX 681662
FRANKLIN, TENNESSEE 37068-1662

PHONE: (615) 790-9860

FAX: (615) 591-1937

NOV 13 2003

November 12, 2003

Appellate Court Clerk Cecil Crowson
100 Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

RE: COMMENTS ON PROPOSED SUPREME COURT RULE 13

Dear Mr. Crowson:

The attorneys who practice regularly in Davidson County Juvenile Court, both as parents' attorneys and guardians ad litem, have asked me to express our comments on certain aspects of proposed Rule 13.

- The 180-day limit on the filing of fee claims needs to be clarified to state exactly when the 180-day period begins to run. For example, the adjudication and disposition phase could be considered completed with the dispositional hearing. However, there would still be an order to draw and circulate and, perhaps, a motion to alter or amend. Also, if the client were absent from that hearing, the attorney would need to explain the order and its ramifications to his client, whether a parent or child. Our suggestion is to include a line on the claim form for "last activity related to the case," as was done on prior forms, and have the 180 days run from that date.

- We ask the Court to have a reasonable "grace period" before implementing the 180-day time limit.

- We object to the removal of a procedure to appeal an adverse decision by AOC on a fee claim. We understand the need to audit claims and to ensure that state funds are used judiciously. However, basic fairness requires the existence of a meaningful procedure for review of the denial or reduction of claims.

- Certain cases require an extraordinary amount of time to comply with our ethical obligation to zealously represent our clients. Examples are contested severe child abuse

and sex abuse cases. In guardianship cases, Rule 40 may require guardians ad litem to maintain a high level of involvement for many years. The limits on compensation need to be increased for these types of cases.

Thank you for your consideration of these comments.

Sincerely,

Thomas H. Miller

Thomas H. Miller

TENNESSEE PSYCHOLOGICAL ASSOCIATION

The State Affiliate of the American Psychological Association

November 13, 2003

Cecil V. Crowson, Jr.
100 Supreme Court Bldg.
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

NOV 14 2003

Re: Forensic Expert Evaluations, Rule #13 Comments

Dear Mr. Crowson,

I hope this letter finds you and yours well.

Our association is in receipt of a recent letter sent to you by Dr. Fred Steinberg expressing his concerns about providing quality forensic evaluations for those indigent persons in the criminal justice system. Our association shares many of the concerns raised by Dr. Steinberg. Unlike many types of mental health care, forensic expert evaluations are not generic-type evaluations that can be performed by just any licensed health care practitioner. In mental health care for example, psychotherapy can be provided by many different professions - psychiatrists, psychologists, social workers, senior psychological examiners, psychological examiners, professional counselors and many others. Fees structures for psychotherapy often reflect this type of professional diversity. Such is not the case with forensic evaluations. Those undergoing forensic evaluations necessarily require more extensive diagnostic tools to gather data substantially beyond what is possible to acquire in a direct clinical interview. Psychologists administer specialized tests to assess important issues such as ability levels, malingering, and other parameters critical to the case in question. Such complex diagnostic formulations necessarily require a certain amount of time and result a fee structure consistent with such specialization. It is critical to all concerned that these evaluations are objective and accurate.

We know you value the importance of ensuring the civil rights of all of our citizens, including those of little to no means. We hope this letter helps provide some useful information for decisions your office will be making shortly. If I can be of any further assistance on this matter, please do not hesitate to contact me.

Sincerely,

Lance T. Laurence, Ph.D.
TPA Legislative/Professional Affairs Officer

Office of Legislative & Professional Affairs
(865) 584-8547 E-mail: LANCETL@aol.com
fax: (865) 584-5932 or (865) 584-3578

The Westfield Center
305 Westfield Drive
Knoxville, TN 37919

MADDUX
Associates
P.O. Box 1172 • Greeneville, Tennessee 37744
423-638-9147 • Fax 423-638-3372

November 6, 2003

Administrative Office of the Court
511 Union Street
Suite 600
Nashville, TN 37219

RE: Proposed Rule 13 Changes

Sir:

I am a private investigator and have been for seventeen years. In that time, I have worked on two cases involving the AOC. One was as lead investigator in defense of a man charged with one of the most heinous crimes I had ever seen. The other was a post conviction relief of a death penalty case. In the first case, the accused was convicted, but because of the evidence I found and the expert testimony given regarding mitigating circumstances, the accused was given life without parole. In the second case because of the fine work of the attorney I was working with and the information discovered during the post conviction investigation, the convicted man's death sentence was reduced to life.

After having read the rule changes captioned above, I was compelled to write this letter. The changes, especially in the fee schedules and payment schedules, indicate strongly that the writers of these changes have an abysmal understanding of the cost of operating a business. The investigators and lawyers who provide services to those persons charged with criminal offenses are doing so to make a living and to make sure the product they provide to their clients is the very best it can be.

Their clients are usually poor and charged with very serious crimes. Failure to receive a vigorous defense using

every possible avenue to make sure the outcome is correctly reached perverts the justice system.

The writers of these rules have either never worked in private enterprise or they are simply ignorant of the expense level required to operate a business. They also cannot have any clear idea of how the defense of a client is conducted and the realities of the criminal justice system in this state and that has to include the Supremes or they would not allow such changes.

As an example, the writers would have investigators and others such as experts, only charge one-half of their normal hourly rate while traveling from one location to another in order to conduct an investigation. This is the height of arrogance on the part of the writer. They should know that all hours worked whether traveling, researching, or interviewing are equally precious. Do the writers take half their pay when they are walking from their desk to the copier then charge full time while at the copier, then charge half-time while returning to their desk? Do the Judges only charge half time while walking from their office to the courtroom and back again? Do they expect to make less money while writing opinions in chambers than while listening to arguments in the courtroom? If a Judge has to take a day to travel to another jurisdiction because of a change of venue is his pay docked by half to reflect this day of travel?

Do the writers of the rules changes pay rent for their office space? Did they have to purchase the desk they use, pay for the telephone, pay the electricity bill, and maintain the vehicle they might use in performing the State's business? Do the Judges or the writers pay the secretaries, clerks and maintenance people out of their pockets for performing these services in their offices? Of course not, they do not have to. These items are paid for by the taxpayers of the State of Tennessee. The legislature provides funds based on requests submitted by the Court and after deciding what is necessary and what is not. In private practice there is no guarantee of any funds or clients, but there is the expectation that the practitioner will charge those clients they do have a rate that will allow them to cover the necessary expenses and still allow them to make a living.

It would not surprise me if the State of Tennessee does not find it self defending this set of rules in front of the United States Supreme Court because the attorneys who are unfortunate enough to be appointed to these cases cannot find investigators, mitigation experts, handwriting experts, and others willing to work under these ridiculous rules and methods of compensation. Thereby providing a situation where a convicted felon in either a capital case or a serious non-capital case would prevail in Federal court because they were not given a vigorous defense.

Why would any of these professionals want to accept any of this kind of work when civil practice affords a much greater chance for making a living? The answer is that they won't. Attorneys may be forced to accept a case every now and then, but very few will actively seek appointments because of the lousy pay and shabby treatment by the courts in the matter of compensation.

Another issue that seriously needs to be addressed is the idea that defending someone not charged with a capital offense is somehow less valuable than defending someone so charged. If the writers were charged with a crime that would put him behind bars for the rest of his life without hope of ever getting out would he not want the same treatment as a death penalty case? Again this shows a weak intellect on the part of the writer or at best a very callous approach to the freedom or life of the accused.

I also find the 1995 ruling court in Davis v. State, 912 S.W. 2d 689 (Tenn. 1995) to be wrong. As many times as the criminal justice system gets it wrong I cannot believe that the state would deny a person the opportunity to prove error or innocence simply because they or their families could not pay for the necessary investigators or experts in a post conviction proceeding.

In section 5(d)(1) I was amazed to find that the writer had plucked $50.00 an hour from the air as the amount to be compensated for investigators. This is not even a breakeven amount for an investigator. Again the idea that travel time would only be compensated at $25.00 an hour guarantees that no one who can choose otherwise will ever take a state case! I know I would not want any investigator or expert working in my defense who would be willing to accept such compensation.

In section, 5(f) is an idea that obviously the writers did not think out at all. The idea that anyone would have to wait until the end of a case to be compensated is the most ludicrous of all the ideas. I am sure none of the employees of the court including the Judges would be willing to work and only be paid at the end of each case they worked with no idea when they would be paid. I am sure no employees of the criminal justice system are required to lend money to the State, but that is exactly what the writers of this set of rules would have the persons covered by this section do. This is the height of ignorance and arrogance and says to each of us who provide or have provided these services that the courts do not value these services and really wants to make sure that no one is given a decent defense if they are indigent. I am sure that the writers of these rules changes would not want to be defended under these conditions.

I would hope that the attorneys who comprise the bar even if they do not work in the criminal justice field would bring pressure to bear on the Supremes and their employees to quickly revamp these rules so that indigent defendants get a fair day in court. If not, my sincere hope is that no one would accept employment under these conditions that did not have to. Maybe then the court would come to its senses.

Sincerely,

John M. Maddux

TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

JAMES W. KIRBY
EXECUTIVE DIRECTOR

November 14, 2003

Honorable Cecil Crowson, Jr.
Clerk of the Supreme Court
100 Supreme Court Building
401 Seventh Avenue
Nashville, TN 37219-1407

Re: Comments to Proposed Amendment to Supreme Court Rule 13

Dear Mr. Crowson,

Please find enclosed the comments from Tennessee's District Attorneys General to the Proposed Amendments to Supreme Court Rule 13. We concur in the need to do so and all those involved with this project are to be commended.

I appreciate your filing these comments.

Sincerely,

James W. Kirby

JWK/adg

226 Capitol Boulevard, Suite 800
Nashville, TN 37243-0890

Tel. 615-741-1696 * Fax 615-741-7459
Internet: http://www.tndagc.com

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APPELLATE COURT CLERK
NASHVILLE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:

PROPOSED AMENDMENT TO TENNESSEE SUPREME COURT RULE 13	)	No. M2003-02181-SC-RL2-RL

TENNESSEE DISTRICT ATTORNEYS GENERAL COMMENTS TO PROPOSED AMENMENT RULE 13

The Tennessee District Attorneys General Conference by and through the office of the Executive Director hereby submits the comments of Tennessee's 31 District Attorneys General to the proposed amendment to Supreme Court Rule 13.

Introduction

Tennessee Supreme Court Rule 13, the rule governing indigent defense spending in Tennessee, is overly susceptible to abuse, causes unnecessary case delay and wastes state resources. While the proposed changes would restrict a few areas of obvious abuse and make incremental changes in other significant areas, the Supreme Court has not proposed the changes that would significantly curb the abuse, delay and waste that pervade the current indigent defense system.

To remedy current problems with Rule 13, the Court must further reform the following important areas: ex parte hearings, in-county appointment of counsel, expert witnesses, capital defense attorney qualifications, frivolous motions, co-payment for indigent defense attorney, and audits of indigent defense fund.

Ex Parte Hearings

Ex parte hearings are inherently evil. The continued existence of ex parte hearings constitutes perhaps the greatest outrage in the criminal justice system. One-sided hearings contradict the open court principle and the adversarial process and give one side free-reign without accountability. By their very nature (held in secret, one-sided), ex parte hearings undercut confidence in the criminal justice system and impact adversely not only on the administration of justice for the Defendant, but also on the rights of victims. The Court's current Rule 13 Section 5 that mandates ex parte hearings upon a threshold showing in the case of defense requests for experts is not only harmful in theory, but has resulted in unnecessary expenditures and unjustifiable delays. Although the Court's proposed change would attempt to limit the right to ex parte hearings in non-capital cases, the injustice of ex parte hearings would continue unabated in capital cases and would persist to a large extent in non-capital cases

In general, ex parte hearings (hearings between the judge and only one side to the litigation) are prohibited. Indeed, in Tennessee, a judge is prohibited "except as authorized by law," from considering ex parte or other communications concerning a pending or impending proceeding." Tenn.Sup.Ct.R. 10, Canon 3(A)(4). This is a result of the due process guarantee of notice and an opportunity to be heard that is found in both the Fourteenth Amendment to the federal Constitution and Article I, § 8 of the Tennessee Constitution.

Seemingly then, the only allowable instance of ex parte hearings is the ex parte hearing when an indigent Defendant requests funds for an expert or consultant. Ex parte hearings for an indigent defendant request for expert funds are justified under the idea

that an indigent Defendant should not have to reveal his theory of defense when the more affluent Defendant (or state) is not required to reveal its theory of defense (or prosecution), or the identity of experts who are consulted, who may not, or do not, testify at trial. However, as we will discuss in the following paragraphs, this premise is flawed, not required under Tennessee law, and has no Constitutional basis, whereas the rationale for prohibiting ex parte hearings is constitutionally supported as outlined in the paragraph above.

Fundamentally Flawed

Allowing a secret hearing under the theory of preventing defense strategy from becoming known is misguided. A criminal trial is a search for the truth and not a game of strategy. Furthermore we believe a Defendant can in fact have just three strategies of defense: 1) I didn't do it; 2) I didn't mean to do it, or I can't be held accountable and 3) I did it because I should have done it. Furthermore, the result of the case law is that instead of an indigent Defendant being placed on the same tier as a non-indigent Defendant, the indigent Defendant is often afforded many more resources and much more money than a non-indigent Defendant could ever afford. Certainly the indigent Defendant's right to a fair trial should not be impaired by cost considerations, but the current procedure fails to consider cost in the context of the basic tools of an adequate defense.

Waste and Delay

In many instances, particularly in capital cases, another police force is in operation. In part due to ex parte hearings, evidence is tested by the Tennessee Bureau of Investigations (TBI) or local law enforcement, but is then re-tested in far-flung locations

at huge expense and time delay only to often reach the same conclusion. The TBI crime lab, a state-of-the-art facility, is an independent investigative agency of the state and its results should be prima facie acceptable. The need to re-test evidence should be presented in open court in a contested hearing. In the event that the judge decides after a contested hearing that evidence ought to be re-tested, the evidence should be sent to one of the many in-state public facilities capable of testing evidence.

No Adequate Legal Basis

The proposed Section 5 would allow the submission of claims for all types of expert funding ex-parte, but in non-capital cases for non-psychological and/or psychiatric (hereafter referred to as psychiatric) experts the judge has the authority to require defense counsel serve the state with a copy of the funding request and to hold a contested hearing. Also in non-capital post conviction proceedings (as distinguished from direct appeals), expert funding will not be approved.

Why expressly permit the judge to hold a contested hearing in a non-capital case for non-psychological experts, but not in a capital case for non-psychological experts? The court has provided no adequate legal basis for this distinction. The Owens case stands for the proposition that capital case post-conviction proceedings are similar to capital case trials, triggering *the hearing must be ex-parte* language of section 5(b) of the old rule. State v. Owens, 908 S.W.2d 923 (Tenn. 1994).

The statutory authority to this proposed change contains a typographical error, referring to 40-14-217 and not §40-14-207, which says:

> (b) In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, *such court in an ex parte hearing may in its discretion* determine that investigative or expert services or other similar services are necessary to ensure that the

> constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part, and rules promulgated thereunder by the supreme court.

Tenn. Code Ann. §40-14-207 (with emphasis)

As is evident from the emphasized language, this statute only gives *discretion* to a judge in an ex parte hearing to grant expert funding and makes no distinction between capital and non-capital cases. Also, this statute does not *mandate* ex parte hearings in any instance.

The proposed change to Section 5 contemplates an ex parte hearing in one instance for non-capital cases: psychiatric expert funding. We have already presented the case that no distinction should be made between capital and non-capital cases, which would mean that when the Defendant requests non-psychiatric experts the judge should have discretion to hold a contested hearing, whether the case is capital or non-capital. We will now present the case for the abolition of ex parte hearings whether the case is capital or non-capital and the expert service requested is psychiatric or non-psychiatric.

Rule 12.2 of the Tennessee Rules of Criminal Procedure provides, in part, that:

> **(a) Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney general in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
> **(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of

> his or her guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
> **(c) Mental Examination of Defendant.** In an appropriate case the court may, upon motion of the district attorney, order the defendant to submit to a mental examination by a psychiatrist or the other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue respecting mental condition on which the defendant has introduced testimony.

Tenn. Sup. Ct. Rule 12.2

Tennessee law does not permit the introduction of an insanity defense without prior notice to the district attorney, and Rule 12.2 requires the Defendant to disclose as much information as does the threshold hearing for a Section 5 request for an expert.

The case of Ake v. Oklahoma, 105 S.Ct. 1087 (1985) stands for the following proposition:

> [W]hen a Defendant has made a preliminary showing that his insanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to psychiatrist assistance on this issue if the defendant cannot otherwise afford one.

Id. at 1091.

This case does not address non-psychiatric experts at all nor does it focus on ex parte hearings for psychiatrists, but merely establishes the right to a psychiatrist upon a proper showing. The only mention of ex parte hearing in the majority opinion does not have the power of a holding: "[W]hen the defendant is able to make an ex parte threshold

showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for assistance of a psychiatrist is readily apparent." Id. at 1096.

The court even goes on to add, "[T]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." Id. at 1096. We do not believe that the original concept was to place an indigent Defendant on the same level as a rich Defendant who could hire a complete staff of investigators and experts, hide those experts and investigators from the prosecutor, and then attempt to ambush the prosecutor with the fruits of these services at trial. However, Defendants receiving funds to hire experts of their own choosing is the common practice in the Tennessee Court system largely due to the fact that requests for such expert services are made in closed, one-sided hearings.

Section 5 goes beyond Tennessee law to the detriment of justice, contributing to the runaway expenses and delay in capital cases. Any provision providing for one-sided, secret, ex parte hearings should have no place in the Supreme Court Rules and the Court should remove them from Rule 13.

Let us reiterate, we are not trying to limit expert or investigative services to criminal Defendants who are in need of such services. We believe that such services, in an appropriate case, are a due process requirement. Our proposed change merely requires that the determination of the need be made in the light of day in open court. The advantage being that the judge making such determination would be able to determine the state's theory of the case and decide whether or not the services being requested were indeed necessary. Absent such a hearing, the judge is faced with the dilemma of having to decide whether or not services are necessary after only hearing from the defense

attorney in the case. We cannot determine what harm would occur from having this hearing in open court. The harm of having it secretly is evident. It is very difficult to explain to a victim that their case is being continued because of some unknown secret reason that only the defense attorney and judge are aware of.

In-county Counsel

Section 2(g) and its capital case companion Section 3(m); Section 3(b)(1); and Section 3(f) would make minimal attempts to curb abuse, delay and waste. The Supreme Court should consider a change to Section 1 and a companion capital case change to Section 3 that would limit appointment of counsel to attorneys within the venue county absent extraordinary circumstances.

Section 2(g) attempts to curb attorney expenses and travel by denying reimbursement for the hand filing of documents (absent extraordinary circumstances). Here and elsewhere the Court is acknowledging excessive travel expenses as a problem. However, travel and expenses for out-of-county attorneys will remain high. The out-of-county attorney will need to consult with the Defendant, prosecution, law enforcement, attend hearings, do investigative type work in-county, make long distance phone calls, all of which result in significant expense. Thus, lawyers could craft other rationale to justify travel, and in many instances because of the distance between lawyer and client, the lawyer's travel is necessary.

Not only would insistence upon in-county counsel cut back on some of the expense and delay, but arguably local, in-county counsel, such counsel being more on-hand and more familiar with local practice, better serves a Defendant. In any event as

stated in the proposed changes, the Office of Public Defender should be appointed to represent the indigent Defendant whenever possible.

In non-death penalty cases, in-county counsel is usually appointed to represent indigent Defendants, but in capital cases where expenses run the highest, counsel from over 50 miles away and conceivably hundreds of miles away are appointed to represent Defendants. Although the roster of death penalty qualified counsel is few in number for certain districts, the Administrative Office of the Courts (AOC) could increase the roster by requiring Public Defenders to certify its entire staff and by encouraging qualified defense lawyers to become death penalty qualified.

Section 3(f) would limit appellate counsel to members in good standing of the Tennessee bar who maintain law offices in the state of Tennessee. Capital case trial counsel is not required to maintain a law office in the state of Tennessee. Why does the rule for Capital Case Defendants' trial counsel not have the same limitations as capital case appellate counsel, member of good standing in Tennessee *who maintains a law office within the state*? And as discussed above, appellate counsel should be limited to counsel within the county, preferably the Public Defender, absent extraordinary circumstances.

Capital Defense Qualifications and Frivolous Motions

As servants of justice, District Attorneys have a wider interest in seeing that competent defense counsel are appointed to represent capital Defendants and that capital trials are not delayed unnecessarily through the filing of frivolous motions and stalling tactics.

To ensure that the most qualified, competent lawyers are appointed to represent capital case Defendants, Section 3 should be strengthened. The current practice of prospective indigent capital defense lawyers submitting a questionnaire concerning their qualifications should be changed. This questionnaire should become an application that should be notarized and include proof of qualifying cases. The Court should add a familiarity with forensics and expert witnesses requirement to put Tennessee in line with other death penalty jurisdictions. Also, the Court should increase the number of years of practice from three years to five years. The Court should make these requirements retroactive to demand that all present indigent capital defense attorneys submit the application.

The Court should also discourage the practice of the filing of hundreds of frivolous canned motions by refusing to compensate for time spent preparing these motions.

Co-payments for Indigent Defense Lawyer

In some of the counties, especially the larger counties, judges are not requiring that indigent Defendants make a co-payment for their appointed lawyer or Public Defender. Tennessee Code Annotated §40-14-103; 40-14-202(e) and 8-14-205 each require that a Defendant who is capable of defraying some of the cost of her defense make such a co-payment. If enforced according to law, the monies collected from co-payments could help to offset a significant amount of the cost of indigent defense. Requiring a co-payment in accordance with the judge's assessment of the Defendant's ability to pay would not impact the Constitutional right to a lawyer. Also the rule should

give discretion to the judge to charge from $50 to $200 in co-payment when necessary in accordance with the previously cited Tennessee Code Sections.

Independent Audits

A front-page article in the September 8, 2003 Tennessee Attorney's Memo outlined problems with the indigent defense fund. The state comptroller's office audited the indigent defense system for the period of July 1, 2000, through February 28, 2003. The audit found that the partially automated system that detects attorney overbilling, the Indigent Defense Daily Report System, is ineffective in key areas. Among the problems uncovered in the audit were almost 200 instances of attorneys billing for future or questionable dates. In difficult Tennessee state budgetary times as these, these fundamental problems with attorney billing are difficult to accept. To prevent further embarrassing problems, the indigent defense compensation fund should be audited by an independent agency such as the state comptroller's office on an annual basis. Independent audits could significantly cut back on the abuse and waste currently in the existing system as outlined in the Tennessee Attorney Memo piece.

The Tennessee District Attorney General's Conference cannot endorse the proposed rules as currently written because they simply do not remedy the problems with the existing rules. The necessary changes are fully discussed herein, but in short are as follows:

1) Abolish provisions allowing for ex parte hearings in all types of cases, whether capital or non-capital, for all types of experts, whether psychiatric or non-psychiatric.

2) Limit appointments of counsel and experts to in-county counsel absent extraordinary circumstances.

3) Increase required qualifications for capital case defense counsel and require prospective indigent capital defense attorneys to submit more complete, notarized application.

4) Discourage the practice of the filing of hundreds of frivolous motions by refusing to compensate for time spent preparing such motions.

5) Require co-payments for appointed lawyers whenever applicable.

6) Require that the Comptroller's office perform annual audits.

Further the Tennessee District Attorneys General Conference believes that these issues can best be addressed by oral argument and would therefore request a time for same.

Respectfully Submitted,

Tennessee District Attorneys General Conference

James W. Kirby
Executive Director
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COPE INVESTIGATIVE SERVICES, LLC
P. O. Box 1419, Collierville, Tn 38027 Telephone 901-861-4440 Fax 901-861-4413

November 11, 2003

RECEIVED
NOV 14 2003
By

Mr. Cecil V. Crowson, Jr.
Re: Rule 13 Comments
100 Supreme Court Building
401 Second Avenue North
Nashville, TN 37219-1407

RE: AOC - PROPOSED CHANGES TO RULE 13

Dear Mr. Crowson:

As an owner of Cope Investigative Services and a licensed pirvate investigator, I strongly oppose the proposed amendments to Rule 13. These changes would be detrimental to the cause of defense. To support such changes would prevent giving clients the defense to which they are entitled. In addition such action would impose a monitary hardship on those of us performing the investigative services for counsel.

Sincerely,

Charles C. Cope

Charles C. Cope, C.F.E.

RECEIVED
NOV 14 2003
By

iNQUiSiTOR inc.

INVESTIGATIVE SERVICES

364 SOUTH FRONT STREET
MEMPHIS, TN 38103
PHONE (901) 526-6576
FAX (901) 523-9281

November 11, 2003

Cecil V. Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Rule 13 Comments

Dear Mr. Crowson:

As an owner of a Tennessee private investigation company, I would like to express my opposition to certain provisions in Appendix A - Proposed Amendment to Supreme Court Rule 13.

I was first licensed as a private investigator in 1971; and I established Inquisitor, Inc., in 1978. I was appointed to the Tennessee Private Investigation & Polygraph Commission when it was first established in 1992 and was re-appointed for a second term in 1997. I am very much aware of the progress made by the private investigation industry over the years; but, to the point, I am also very much aware of needed improvements in the industry. At present, there are no educational requirements for either an individual private investigator's license or for a private investigation company license.

There are over 1,100 licensed private investigators in the State of Tennessee, and there are approximately 450 licensed private investigation companies. There is a considerable turnover of licensed investigators. The result is an industry of licensed private investigators that work part time in small one or two-person offices and who are often poorly trained and poorly educated.

The Proposed Amendment to Supreme Court Rule 13 will significantly reduce the number of competent investigators who will be able to provide investigative services to indigent defendants. This will result in either the absence of investigative services or the use of private investigators who are not adequately trained, educated, or experienced. This seems contrary to both the Supreme Court's Rules regarding the experience needed by attorneys who handle indigent defenses and to the recently published ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

Specifically, I would like to address four (4) issues in the Proposed Amendment to Supreme Court Rule 13.

1. Section 5 (c) (4)

   To investigate is to study known facts and information and to initiate inquiries to obtain additional facts and information that may or may not be beneficial to the defense. To limit an investigation into only the areas which are known would be counterproductive to a thorough and competent investigation. In many cases, the defense counsel does not know if his client is guilty or not. A competent investigation is needed not only to explore the defendant's innocence, but also to test the strength of the prosecution's case.

   Further, to state that interviewing witnesses falls within the capability and expertise of appointed counsel, suggests that the writer has not had a considerable amount of experience in criminal cases. The attorneys for the prosecution rely on the police detectives and the investigators in their office to locate and initially interview witnesses. The pertinent witnesses will then be brought into the District Attorney's office for further interviews. A defense attorney does not have that luxury. Many of the witnesses in a criminal case do not want to be involved. They are difficult to find and often are found in areas that require extreme caution be exercised. These are situations for which most defense attorneys are not properly trained.

   Finally, even if a defense attorney is successful in locating and interviewing a witness, there is a very real possibility that the witness may change his/her story at a later date, making the defense attorney a witness.

2. Section 5 (d)(1)(E)

   The hourly rates at Inquisitor, Inc., are $75.00 and $100.00, which have been in effect for three (3) years. We have continued to provide investigative services on behalf of indigent defendants in Tennessee at the approved State rate of $65.00. To further reduce this rate by 23% will have a significant negative effect, not only for Inquisitor, Inc., but for all private investigators who have been providing their services at an already reduced hourly rate.

   I felt the $50.00 per hour proposed rate was obtained arbitrarily, and I inquired as to the origin of this rate. I was told it was an average of the hourly rates of private investigators who were providing services on behalf of indigent defendants. I

obtained a copy of the list from AOC, which contained forty-five (45) names. The average rate charged by those forty-five (45) individuals is $55.89 per hour, almost $6.00 more per hour than the currently proposed rate.

I investigated further and found of the forty-five (45) names listed, three (3) are no longer in business; one (1) is not, and has never been, licensed by the State of Tennessee; and three (3) of the listed individuals, who had the lowest hourly fees, advised that they have not provided investigative services on behalf of indigent defenses in two or more years. They further advised that their current hourly fees are significantly higher than those listed on the AOC list. The average hourly rate after these adjustments is $57.68. This also does not address the fact that many of the investigators listed have had very limited experience in providing investigative services on criminal cases.

3. Section 5 (d)(2)

I have given considerable consideration to this proposed rule, and I am not sure I fully understand what is being proposed. Does it pertain simply to travel time from the private investigator's office to the vicinity where the alleged crime occurred, or does it mean all travel time involved in the investigation of the case (i.e. From place to place to locate and interview witnesses. From office to Medical Examiner's Office to review autopsy photographs.)?

I do understand the desire to obtain an expert (private investigator) from an area close to the vicinity of the alleged crime; however, even that is not always possible. This proposed rule would severely penalize private investigators and could result in a significant reduction in the competency of the services provided.

As written, this proposed rule is much too ambiguous.

4. Section 5 (f)

As a business owner, I fully understand and agree with the need to reduce administrative costs; however, this proposed rule would result in a significant reduction in the number of private investigators who could afford to accept cases for which they would not be paid for an indeterminate amount of time.

Many criminal cases move slowly through the courts and are not adjudicated for two or three years. Since a competent defense attorney will request the services of a

private investigator early in the case, the private investigator will have provided his services and incurred the necessary expenses many months prior to the case being settled or going to trial. This is an unfair burden on the private investigator.

I would suggest that interim billing be allowed on at least a quarterly basis.

In conclusion, it is my opinion that the adoption of these proposed rules would have a chilling effect on the adequate representation of indigent defendants. Although some competent private investigators will continue to take a limited number of cases, that number will be greatly reduced. The remaining cases will either be accepted by private investigators not adequately trained, educated, or experienced to handle the case or the defense attorney will simply not obtain investigative services. The result will be a number of cases in which the indigent defendant does not receive an adequate defense; and the conviction will be overturned by a higher court, requiring the expenditure of even more State funds.

I appreciate the opportunity to express my opposition to Proposed Amendment to Supreme Court Rule 13.

Sincerely,

INQUISITOR, INC.

Ronald L. Lax

PROFESSIONAL SECURITY AND INVESTIGATIONS

1010 Market Street, Suite 204
Chattanooga, TN 37402

Telephone/Fax: (423) 634-9159

Brian Hackett (423) 504-5792

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NOVEMBER 12, 2003

Administrative Offices of the
Tennessee Supreme Court
511 Union Avenue
Nashville City Center
Suite 600
Nashville, Tenn. 37219

SENT VIA FAX: 615-741-6285
AND VIA REGULAR MAIL

RECEIVED
TN Supreme Court Administrative
Office of the Courts

NOV 14 2003

In re: Review of Supreme Court Rule # 13
~~Public Comment~~

Dear Madam / Sir,

Please let this letter serve as our comment(s) regarding the proposal to rewrite Rule # 13. We are an investigative firm that works extensively in the criminal defense arena. We work for many local area attorneys and Public Defender offices in case matters throughout southeast Tennessee. We are very thankful to work for and learn from many of those attorneys. We are very thankful for the courtesy and guidance extended to us by the A.O.C. staff.

We have briefly reviewed the Court's proposed changes to Rule # 13 regarding the payment of expert services in re: indigent defense court approved investigation appointments. One of the proposed changes would not permit interim payments for expert investigative services. The basis for the proposal appears to be raised for administrative convenience . We would strongly object to such a proposal considering that court cases take years before they are disposed . We are a very small firm, we have limited resources and capital, we have monthly employee and creditor payments and the denial of interim payments would create a huge financial problem that would , in reality, exclude our investigative firm from continued work in indigent defense investigation and trial preparation. Doing so would not promote and protect the constitutional rights of the citizenry charged with crimes, but would make their convictions a foregone conclusion if they did not have a basic tool to prepare and present their defense.

To put this matter in simple and honest economic terms that anyone can ponder, we pose these questions: " Would anyone employed by the State of Tennessee agree to wait for years to be paid for their daily labor given on behalf of the state of Tennessee ?" " Would your creditors agree to wait on their payments based upon the pledge that they

will be paid in full for their services several years later ? " Please give your responses to these questions careful consideration when entertaining the proposal to deny interim payments.

Thank you for allowing us to interject our public input into your decision to amend Rule # 13. You are very welcomed to call me should you have any comments or questions regarding this matter.

Respectfully yours,

Bill DiPillo

ETSU

East Tennessee State University
James H. Quillen College of Medicine
Department of Psychiatry and Behavioral Sciences • Box 70567 • Johnson City, Tennessee 37614-1707 • (423) 439-8010 • Fax: (423) 439-2210
Chair's Office: (423) 439-2233 • Residency Program: (423) 439-2225 • Psychiatry Outpatient Clinic: (423) 439-8000

FILED
NOV 2 : 2003
Clerk of the Courts

November 20, 2003

Mr. Cecil Crowson
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219 - 1407

RE: Rule 13 Comments

Dear Mr. Crowson:

A colleague recently called my attention to the proposed Rule 13 changes. Having reviewed comments to-date posted on the Supreme Court Website, I would like to add my own.

First, as Dr. Auble noted in her comment, the court's database of expert fees may contain inaccurate or incomplete information that distorts any effort to calculate prevailing averages. I was not included among those reviewed by Dr. Auble, but according to the directory at the end of the Part A comments, I am also inaccurately listed. Fees for my services as a forensic psychologist are regularly billed through the ETSU College of Medicine at $175 / hour, not the $125 figure in the database. I have routinely discounted this fee to $150 for state-funded work. It has been quite a few years since my services were billed at $125.

Second, I often provide pro bono consultation, either on a preliminary basis or sometimes for entire cases. Such services do not appear anywhere on the court's expense ledger. In a number of cases, my preliminary services have determined that a threshold reasonable basis for a complete mental evaluation does not exist, and as a result no fee petition was ever submitted to the court. I do not know the extent to which other experts may provide similar pro bono services. However, it is not difficult to imagine that an hourly fee reduction would reduce ability to provide such free services and could self-defeatingly result in an overall increase in the number of requests for expert fees.

Third, although I realize that efficiency is difficult to measure and even more difficult to reward, in the course of my career it is clear that increased experience and skill has resulted in increased efficiency. As the court ponders how to best control its budget, it may be worth looking at not just hourly fees, but also at any pattern of total fees per case. A lower hourly fee is no bargain if the time is inefficiently applied to the case. This reasoning may also apply to the issue of travel time. An out-of-town expert at a lower hourly fee who bills for all travel time may still be less expensive than a local expert whose fee is substantially higher. The court may find that placing a

cap on total fees per case is more effective than placing a cap on hourly rates. I recently encountered this approach in a federal court case.

Fourth, there may be some inequity in the Rule 13 proposal to the extent that there are no caps on hourly fees for experts retained by the district attorney. In one case about which I have specific knowledge, the prosecution paid a distinguished out-of-state psychologist $350 / hour to evaluate and rebut a report that I submitted when I was retained by the defense.

Fifth, I have on more than one occasion proposed that an incarcerated defendant be moved to a facility nearer to me, so as to reduce travel expenses. In some cases this request has been granted, while in others the request has been denied for reasons explained to me as jurisdictional in nature. I do not pretend to understand the legal issues involved, but would suggest that increased flexibility in re-locating defendants would potentially have a positive impact on the court's bottom-line.

Sixth, the court might also consider the use of other resources for reducing travel expenses. For example, in one case a judge asked the local sheriff to fly me from Johnson City to Knoxville for my testimony in a trial. The sheriff employed a salaried officer and used a small plane that ordinarily serves other law-enforcement purposes. As a result of this plan, my travel time was substantially reduced and I was able to do other work while remaining available to the court on a beeper, rather than having to spend a day or more waiting at the courthouse.

Finally, please understand that the opinions expressed in this letter are my own and do not reflect any official position of the ETSU College of Medicine.

Sincerely,

/ Thomas Schacht

Thomas E. Schacht, PsyD, ABPP (Clin/Forensic)
Professor
Director, Psychiatry Department Forensic Service

AFFIDAVIT OF ANN-MARIE CHARVAT, Ph.D.

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Comes the affiant, Ann-marie Charvat, Ph.D., and affirms under oath the following which is true to the best of my knowledge, information, and belief:

1. I received a Bachelor of Science degree in psychology, sociology, and education from Western Illinois University, Macomb, Illinois, 1974; a Master of Education degree in counseling from Oregon State University, 1978; and a Doctor of Philosophy degree in sociology from Southern Illinois University, 1989. I have been employed for more than 16 years as a teacher, counselor, and social worker specializing in family, youth, and special needs populations. I was certified as a clinical sociologist by the Sociological Practice Association in 1994, and listed as a Rule 31 Family Mediator by the Tennessee Supreme Court in 1997. I have provided mediation for the Court Appointed Special Advocate program at the Juvenile Court of Davidson County and taught classes in conflict resolution for Metropolitan Public Schools Community Education Program in Davidson County, Nashville, Tennessee. I have provided mediation services for divorces through the mediator of the week program in Davidson County. I have over seven years experience in this field.

2. Upon completing my post-graduate education in 1989, I have worked professionally as a mitigation specialist. My major area of concentration is criminology. Between May 1989 and April 1994, I was in private practice as a mitigation specialist in capital cases throughout Kentucky and Tennessee. These cases include: State of Tennessee v. Darrell Hines (1989); State of Tennessee v. Elmer Carl Garton

(1989); State of Tennessee v. Kenneth Tubbs (1989); State of Tennessee v. Henry E. Hodges (1991); State of Tennessee v. Gary Collins (1991); State of Tennessee v. Michael King (1992); Commonwealth of Kentucky v. Mark Daniels (1993); State of Tennessee v. Jerry Mathis (1993); Commonwealth of Kentucky v. John Martinez (1993); State of Tennessee v. Steven Lewis (1993); State of Tennessee v. Walter Smothers (1994); State of Tennessee v. James Spann (1994). From April, 1994, until June, 1995, I was employed by the Capital Case Resource Center of Tennessee and provided investigation or consultation on the following cases: State of Tennessee v. Robert Campbell (1994); State of Tennessee v. William Tollett (1995); State of Tennessee v. Jon Hall (1995); State of Tennessee v. Victor Cazes; State of Tennessee v. Darrel Taylor; State of Tennessee v Donald Middlebrooks; State of Tennessee v. Timothy Morris; State of Tennessee v. Gary Caughron; State of Tennessee v. Edward Leroy Harris; State of Tennessee v. Ricky Thompson; State of Tennessee v. Gaile Owens; State of Tennessee v. Jeffery Dicks; State of Tennessee v. Byron Black; State of Tennessee v. Heck Van Tran; State of Tennessee v. Randy Hurley; State of Tennessee v. Terry Barber; State of Tennessee v. Sylvester Smith. Since leaving The Capital Case Resource Center in June, 1995, I have continued to provide mitigation services in the following cases: Commonwealth of Kentucky v. Matthew Olson; State of Indiana v. David Woods; State of Tennessee v. Phillip Workman; State of Tennessee v. Derrick Quintero; State of Tennessee v. Wayne Lee Bates; State of Tennessee v. Danny Lacy; State of Tennessee v. Gary Seeley; State of Tennessee v. Oscar Franklin Smith; Commonwealth of Kentucky v. Benny Lee Hodge; State of Tennessee v. Tommy Joe Walker; State of Tennessee v. Corey Kennerly; Commonwealth of Kentucky v. James Underwood; Commonwealth of Kentucky v. Charles Bussell; State of Tennessee v. David Brimmer; State of Tennessee v. Timothy Morris; State of Tennessee v. Hartwell Price; State of Tennessee v. Paul Lee Whited; State of Tennessee v. Anthony Walker; State of Tennessee v. Charles Dale Johnson; State of Tennessee v. Sidney Porterfield; State of Tennessee v. Corey Myers; State of Tennessee v. Gary Caughron; Commonwealth of Kentucky v. Outh Sananikone; State of Tennessee v. John Pickard; State of Tennessee v. Quintin Cantey; State of Tennessee v. Clarence Gaston; State of Tennessee v. Terrence Burnett; State of Tennessee v. Jay North;

Commonwealth of Kentucky v. George Vanover; Commonwealth of Kentucky v. Chad Whitlow; United States v. Carlos Wardlow; State of Tennessee v. Ronnie Ogle; State of Tennessee v. Stephen Lynn Hugueley; State of Tennessee v. Michael Rimmer; State of Tennessee v. Joel Schmeiderer. The purpose of my social history and mitigation evaluations has been to locate mitigating evidence to be presented at the sentencing phase of trial, and to identify mitigation factors that may influence the sentence. I have provided assessment of mitigation on a number of these and other cases, and have provided expert testimony when desired by the defense attorney.

3. I have researched the relationship between an individual's social background and violent behavior. Additionally, I have addressed the Annual Meetings of the Academy of Criminal Justice, the Society for Applied Sociology, the American Criminological Society, and the Sociological Practice Association about proper technique for mitigation investigation in capital cases. I have published an article in the peer reviewed journal *Clinical Sociology Review* on mitigation investigation methodology. I am an advisory council member of the Sociological Practice Section of the American Sociological Association, and a board member and chair of the certification committee of the Sociological Practice Association. I have served on the Tennessee Protection and Advocacy for Individuals with Mental Illness Advisory Council since 2001.

4. I am writing this opinion in response to the proposed amended Rule 13, section 5. The profession of "mitigation specialist" is a relatively new one which has been developed largely within the last 15 years. When I began practicing in Tennessee in 1989, there were only two other individuals providing this service, Dr. Frank Einstein and Ms. Glori Shettles, MSSW. As agents of defense attorneys, our practice was influenced by their needs, but our **academic disciplines and ethics governed our work**. I am not aware of prosecutors utilizing the services of mitigation specialists, but, clearly, the outcome of the work would not be compromised if I were to perform such an evaluation for the prosecution. The ethical considerations of my profession dictate my methodology, and limit my conclusions. It has long been my opinion that I defined the mitigation, and elaborated on the impact of this mitigation for the attorneys. My

work product is available to them, and is used according to their discretion, but is produced at my direction according to my ethical limitations as a practicing sociologist. As is true with psychological and psychiatric expert testimony, the work must be objective and defensible. It is my responsibility to translate the story of the client, identify the failure of social institutions to function as designed, and prove abuse and its impact in a manner which will be understood by a jury, and which may provide the foundation for psychological and psychiatric opinion when indicated.

A mitigation specialist is an individual with an advanced degree in psychology, sociology, social work, or a related field who has demonstrated competency in conducting research and who has practical experience with the social institutions requiring investigation. The individual should be capable of assessing the case, collecting the data or supervising the data collection, and drawing conclusions from the analysis of the data which can be presented to a jury as expert testimony in the event that it is desired by the defense attorney. Lay testimony is typically that provided by investigators, not mitigation specialists. I am concerned that individuals currently being funded as mitigation specialists could not be qualified as expert in the event that their testimony was necessary as a result of deficient academic achievement and the absence of professional involvement in a scholarly discipline. **I would consider minimum educational requirements for a mitigation specialist to include Ph.D.'s and those who have obtained Master's degrees with a thesis component.**

5. **ASSESSMENT:** Initially, attorneys contact me to complete an initial assessment of mitigation, which is an initial exploration of the possible mitigation factors which they will find as they further investigate the lives of their clients. When I began my practice, this service was provided to attorney at no charge. An adequate assessment, however, requires 30 to 50 hours to complete, and when done correctly, often results in successfully negotiated plea bargains. Consequently, the cost of assessment became prohibitive for the practitioner. When employed by the Capital Case Resource Center, I provided these services to defense attorneys as a responsibility of my employment.

During an assessment, I interview the defendant and a close family member or friend about the defendant's life prior to the commission of the crime. I do not interview the defendant about the crime at this stage of the evaluation. In addition, I collect the initial mitigation documents, namely those which are easy to obtain, such as school and hospital records. The initial reports generated at this point of the evaluation include but are not limited to: preliminary timeline, preliminary mitigation witness list, historical document collection list, and an affidavit specifying the need for additional investigation. I have obtained affidavits from witnesses at this stage. This step eliminates the possibility that a death penalty case will continue in the event that a defendant is mentally retarded, for example , but not identified as such by the defense. It requires that the defendant's involvement with agencies and institutions prior to the crime are identified. If previously identified as mentally retarded or mentally ill, this step will usually reveal it.

This assessment identifies potential mitigation factors which are suggested, but not proven, at this stage. An assessment indicates the direction of investigation and identifies what types of experts are needed to prepare the case for trial Examples of mitigation factors which emerge include: **early childhood trauma, dysfunctional family of origin, genetic predisposition to challenged functioning, community violence or indifference, institutional failure and/or abuse; emotional and cognitive disorders, and cultural distortion of perception.** These themes are developed through data collection, also known as investigation. To move to data collection without a thorough assessment is inefficient, and will result in needless attention to issues that are not pertinent.

5. **DATA COLLECTION**: Upon completion of the mitigation assessment, investigation is required to substantiate the suggested mitigation themes. It is necessary to collect all of the documents from all official agencies that have had contact with a client or his family. It is then necessary to compile a detailed and complete social history of the client. The statutory and non-statutory mitigating factors that require investigation include but are not limited to: physical, sexual, and/or psychological abuse and neglect in early childhood; inappropriate institutional response; ineffective juvenile intervention; brain

damage; head injury; mental illness; institutional violence; learning disability; past legal history; the developmental effects of familial transience and parental abandonment; drug and alcohol abuse and family history; and the cultural, social, psychological and emotional climate surrounding this offense.

Adequate preparation for a capital case includes but is not limited to securing the following types of information to substantiate mitigating factors in a client's life: information regarding birth and early childhood development; the composition of the family unit, including background information of birth parents (date and place of birth, educational attainment, health history, date of marriage, age at time of marriage), age and sex of siblings, prior marriages and children of parents; early health of client, including whether he suffered any serious accidents, illnesses or injuries; residential history of the family, including where they lived, for what periods of time, and under what conditions; employment history of the parents; educational history, including date at which the client entered school, schools attended, performance and behavior, any special services provided, level attained, activities in which the client may have participated, favorite subjects, and names of teachers; religious training, practices and beliefs; discipline in the home, including form of discipline, how administered, by whom, and for what; family relationships, including the nature and quality of the client's relationship with each parent, siblings, and other relatives, and the relationship between the parents; friends and leisure activities; other significant relationships; community activities; jobs held as a youth, including lawn work, newspaper route, babysitting, or other odd jobs; any significant childhood experiences, including death or serious injury of a family member or other significant person, divorce of parents, abandonment by parent, family violence, parental alcohol or drug use, or abuse of the client, including physical, sexual or emotional abuse; history of any alcohol or drug use; history of running away; and juvenile record. In addition, the client must be interviewed on how he perceived himself as a child, in terms of personality, behavior, feelings, responses to various events in life, and relationships with others. Additionally, all phases of the client's adult life including the events leading up to and surrounding the crime must be thoroughly investigated.

7. **CONCLUSIONS**: The testimony of a mitigation specialist must rise to the level of expert testimony. Conclusions must be drawn through analysis of the data which are defensible and objective. A mitigation evaluation is a case study of an individual and his or her family which considers factors identified in the literature as correlated with the outcome of lethal violence. **Unless a judge is willing to consider an individual an expert during trial, the court order should not be signed granting funds for a mitigation specialist. That individual instead should be referred to as a mitigation investigator working under the direction of a mitigation specialist**. In practice, of course, the prosecution might present evidence suggesting that the expert is suspect that was not known to the defense attorney, but these occasions should be rare. The mitigation expert should be able to provide testimony about opinions including but not limited to: the cultural context within which the crime occurred, the mitigation factors which have been substantiated in the investigation, the adequacy of previous professional involvement; the likelihood of future violence, and the adequacy of an institution to provide for alternatives to the death penalty. In short, the individual should be able to offer an opinion about the relevance of the mitigation to the commission of a crime and the ability of the prison system to provide an alternative to the maximum sentence available.

8. Compensation of the mitigation specialist in the proposed changes of Rule 13 suggests that the qualifications of the field have been compromised. Other professionals in the matrix with comparable qualifications have compensation at the rate of $125 an hour. Mitigation specialists have been listed at a rate typically paid investigators, $65 an hour. In that it was not uncommon for those of us involved in this work during the early stages to half our rates due to the fact that payment was made by indigent defense funds, the actual costs of practice may have been obscured as lesser qualified individuals sought and obtained court approval. **Individuals not qualified to provide expert testimony have recently been retained in post conviction cases to serve as mitigation specialists when in fact their actual qualification place them as mitigation investigators.** It is my opinion that the field of mitigation

specialist may have become blurred with that of a mitigation investigator, and that this may account for the confusion in pay scales. In addition, a distinction has made for guilt and sentencing investigators which suggests that both require licenses by the State of Tennessee Private Investigation Commission. **In fact, if my understanding is correct about T.C.A., Section 62-26-223(b), investigators in capital cases do not necessarily require licenses from that agency.**

9. In my practice, I require assistance to collect some of my data, but not all as a result of areas specific to a case. Some of the data must be collected by individuals less familiar with the science of mitigation but more familiar with the specific needs of the case or the community. This data collection, however, should be at my direction. The task of data collection may have been translated into the proposed matrix as investigation, or may have been distorted as a higher form of investigation identified in Section 5 as the work of a mitigation specialist. In fact, it is essential that these contributions to the understanding of a capital defendant remain distinct and unrestricted by state licensing. **In practice, the role of a research assistant or investigator in a capital case probably best fits the suggested role of non-credentialed interpreter. The role would be to provide social interpretation, as opposed to language interpretation identified in Section 4 (K). Rate of compensation for a non certified assistant would be $30 an hour.**

10. Adequate compensation of a mitigation specialist should follow the suggested rates for psychologists and forensic anthropologists, $125 an hour. It is my opinion that professionals working for indigent defense should discount their rates. The rate of pay for a mitigation specialist is adequately compensated at $95 an hour. All cases should be assessed initially by an individual capable of providing expert testimony. Data collection should be conducted by an assistant under the direction of the mitigation specialist, and should follow the guidelines of $50 an hour for licensed private investigators who are qualified to obtain data for a specific population, $40 an hour for private investigators working without license as an agent of the attorney, and $30 an hour for research assistants working under the direction of a qualified mitigation specialist.

FURTHER THE AFFIANT SAITH NOT.

DATED:

Ann-marie Charvat, Ph.D.

Ann-marie Charvat, Ph.D.

Sworn to me and subscribed before me on this the 3 day of Dec., 2003.

Margie Willis

NOTARY PUBLIC

My commission expires:
May 30, 2007

MARGIE WILLIS
NOTARY PUBLIC AT LARGE
DAVIDSON COUNTY, TENN.

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JAN 15 2004

January 13, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Ms. Rawls:

I've practiced in the Macon County Juvenile Court since shortly after my admission to the bar in 1993. I also worked for six months as DCS Assistant General Counsel for the Upper Cumberland Region during 2003. I was formerly an assistant Public Defender, and have also been appointed to criminal defendants when a conflict arose with the PD's office.

I have a strong feeling for juvenile court, but the time frames are so short, that it hampers me from working on my private cases as I should, for way less than half of what I'd earn working on private cases.

Under the old $100/day max I'd get stuck because there would be an all day hearing. No matter what the hourly rate I'm reimbursed, I had (until recently) staff that had to be paid. And they don't accept AOC rates.

Parents get appointed counsel and have no economic interest in the cost of attorneys. The child has to be represented. But I'm so torn because my juvenile court work means that I am unable to provide for my child as I'd like to. I work in a small town and for a while I was getting most of the appointments as Guardian Ad Litem.

Interpreters should not be paid more than attorneys for their work under the proposed rule. I spent four years going to night law school to earn my degree and

time and money for continuing legal education and fees. I can't decline acceptance of cases under ethical rules because they are not financially beneficial. Interpreters are sorely needed, but so are attorneys who actually are dedicated to providing good service in juvenile cases.

We regularly have multi-hours in preliminary hearing or adjudicatory hearing or both. Parents don't have the understanding necessary to do less than try a matter, which is why their children are in Juvenile court to begin with, often. These cases don't settle easily or without cost to the child.

I've also had cases where I had to try to attend all the Permanency Plan meetings, now there are family conferences, and so many meetings that an attorney other than one limited to juvenile matters can not go to them all. After adjudication, I may have several hours in the matter but can't bill for it unless the child goes back to parent, parental rights are terminated, or turns eighteen.

I'm not a wealthy woman. I'm in the middle of a devastating divorce. Not all lawyers are able to withstand the financial hardship of the current rules. I am thankful that I get paid something. These are also the clients that will stay in touch, sometimes more than once a day. I normally charge $125 and hour. That's not really enough but due to the economy overall and my area in particular, that's all I can charge. Putting in numerous hours for $40 and $50 an hour does create a hardship when one does a large number of these cases. and tries to do them well. These are the clients that need so much help, and an attorney does it out of their own pocket.

As to time limits for fee submissions: there have been months when I was so busy trying to meet deadlines, that billing didn't get done. I'm now practicing without a staff. Keeping the records required by the rules is very time-consuming: just filling out the forms makes me want to forget bothering with the simple ones, but I do need whatever money I earn.

I would be glad to discuss this matter further. Please forgive the scattered composition: I'd put off responding because I don't have time to do a well-written letter. I decided to write anyway.

Cordially,

Lisa Cothron Stinnett

Lisa Cothron Stinnett

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JAN 2 9 2004

January 12, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
401 Seventh Avenue North, Suite 100
Nashville, TN 37219-1407

Re: public comments concerning Tennessee Supreme Court Proposed Amended Rule 13 §1(d)(2)(D)

Dear Ms. Rawls:

I am a guardian *ad litem* in a contested adoption proceeding in which termination of the rights of the natural parents is being sought. Several questions have been raised in this proceeding, which are stated as follows:

1) Are the fees of a guardian *ad litem* for a child in a termination of parental rights case to be paid by the State at Rule 13 rates in all cases, or only in those cases in which the party which is liable for the court costs is indigent? (Note: Rule 54.04(2) of the Rules of Civil Procedure includes fees of a guardian *ad litem* as court costs.)

2) Are the fees of a guardian *ad litem* for a child in a termination of parental rights case to be paid by the State at Rule 13 rates when the parties settle the case and allocate payment of the court costs among themselves by agreement?

3) Does Proposed Amended Rule 13 §1(d)(2)(D) apply only to termination of parental rights cases in Juvenile Court, or in all courts? (This question arises because *Tenn. Code Ann.* §37-1-150(a)(3) appears to be the only explicit statutory authorization for the Tennessee Supreme Court to make rules concerning fees of guardians *ad litem* in termination of parental rights cases, and this section clearly only applies in Juvenile Court.)

4) Does Proposed Amended Rule 13 §1(d)(2)(D) apply only to termination of parental rights cases, or to all cases in which termination of parental rights is sought, such as contested adoptions?

5) Are the fees of a guardian *ad litem* for a child in a termination of parental rights case to be paid by the State at Rule 13 rates even if the child has sufficient assets out of which to pay the fees of that child's guardian *ad litem*?

I respectfully suggest that the Court clarify the Proposed Amended Rule to answer these questions. I also suggest that the hourly rates for compensation of counsel for indigent parties should be increased to more reasonable levels. Current compensation rates are insufficient to cover my office overhead.

Yours truly,

Stewart M. Crane

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January 14, 2004

JAN 20 2004

Mr. Cecil V. Crowson, Jr.
Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue, North
Nashville, Tennessee 37219-1407

RE: Proposed Changes to Rule 13

Dear Mr. Crowson;

I appreciate the opportunity to comment on the proposed changes to Rule 13. Three groups of Tennessee citizens are impacted significantly by the operation of this rule. First, are the indigent citizens accused of committing crimes. Second, are the private lawyers that agree to represent these individuals. Third, are the experts that agree to assist in the representing of the indigent citizens.

Rule 13 has always had an internal conflict as it sought to serve the above three groups but do so in an environment where state revenues were very tight. Drafting a rule that will satisfy all the competing interests is a real challenge.

It is my suggestion that the current, proposed rule not be adopted. Instead, I would suggest that a committee be appointed to draft a new Rule 13. This committee should consist of members of the private criminal defense bar, representatives from the expert groups normally employed in these case, a representative from the Administrative Office of the Court, and one or more private citizens.

I have carefully reviewed the proposed Rule 13. As I attempted to list all of the areas that caused me concern, the list quickly became unmanageable. Rather than list all my concerns, I have listed the areas below that seem the most troublesome.

*Certified as a Criminal Trial Specialist by the Tennessee Commission on CLE and Specialization and the National Board of Trial Advocacy

Some of the problems in the proposed rule are simply issues inherited from prior versions of the rule. For example, the hourly rates are inadequate and the per case caps are too low. The hourly rates were last raised almost a decade ago. There is a legitimate argument that the last increase was insufficient on the day it was enacted. The passage of ten years, without any increase, has simply exacerbated the problem. All the costs of running a practice have increased over the last ten years. The professional privilege tax has been imposed and doubled during that time period. New tangible personal property taxes have been levied against all law firms. This is another list that could go on and on.

The proposed changes contain a number of new provisions that seem to be a response to concerns by the staff at the AOC. Some of the changes make sense for everyone involved in this process. Some do not. The increased level of bureaucracy that is built into the proposed changes will not alleviate many of the perceived problems and will certainly not better serve the Tennessee citizens required to rely on appointed counsel.

One change in the proposed rule will cause significant constitutional and ethical problems for the appointed attorneys. This is the change that does not require the hearings on the request for funding of experts to be conducted *ex parte*. The possibility of confidential work product material being released to the prosecutors will have a chilling effect on the effective representation of indigent citizens. It is my sincere belief that if this part of the rule is adopted, there will be a significant number of cases remanded by the federal courts after they declare this procedure to be unconstitutional.

Another area of the proposed rule that is very troubling deals with expert services. There are a number of provisions that will negatively impact our ability to hire qualified experts. The hourly rates are too low for many experts, the one-half billing provision and the absence of interim billing in some cases are just three examples of problems in the proposed rule.

I respect the obvious hard work that has gone into the proposed changes to Rule 13. I humbly suggest that no workable version of the rule can be created unless all the affected parties sit down together and draft a rule that is fair to all.

Sincerely yours,

Kenneth F. Irvine Jr

KENNETH F. IRVINE, JR.

JAN 2 0 2004

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January 16, 2004

Janice Rawls, Chief Deputy Clerk
Re: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Ms. Rawls,

Having reviewed the Comments to the proposed amendments to Supreme Court Rule 13, I found all but one of the Comments to be irrelevant to my area of interest, which exemplifies the problem that I will address.

I represent children and, sporadically, parents in Juvenile Court. More than 95 % of my work is as a Guardian Ad Litem. Pragmatically, this requires my having my office in my home and doing all the uncompensated support work myself. So far, I have not had to pay too much for the privilege of helping these children. My essential observation is that Guardian Ad Litem work should not in any way be treated the same as the other types of work covered by Rule 13. It is not the same as defense work, expert evaluation for trial or investigation – although it does involve all of those, as well as prosecution theories and skills and an expertise in the area of child development and welfare.

I feel that it is important to state the obvious. What the Rule says it will pay for is what you will receive bills for. If you pay more for more hours in court, there will be more litigation. If you pay less overall, you will receive less work, however that concept is defined. Given a history of apparent abuse, which I was sorry to learn, and a complete inability to measure the necessity for – and quality of – the litigation for which you will pay, great wisdom is required.

I ask that the strategies and structures to be employed in arranging for the protection of our abused and neglected children be separated from all the other subject matter of Rule 13 and that they be studied, planned and implemented separately.

Sincerely,

Robert Bradshaw

Robert Bradshaw

Shelby County Government

A C Wharton, Jr.
Mayor

January 21, 2004 JAN 21 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Ms. Rawls:

In response to the Supreme Court's request for comments on the proposed amendment to Rule 13, I formulated a committee in my office to study the matter, and on behalf of the 68 attorneys in the Shelby County Public Defender's Office, I would like to submit the following comments for consideration by the Court:

Let me first say that we have studied the proposed draft submitted by the joint efforts of TBA, TACDL, and the District Public Defenders Conference, and generally speaking support their proposed new rule and the creation of the "Tennessee Indigent Representation Services" as an independent body. However, we make the following comments concerning both the Supreme Court's proposed Rule and the joint draft:

1. In § 1, 4(A) does the reference to "district public defender" include the two public defenders offices not in the District Public Defender Conference?

1. In § 1, 5(A) we believe it is important to specifically advise when a case has been "concluded." Is a writ of certiorari to the U.S. Supreme Court required?

2. In § 2, (e) we believe that "trial by jury" should be added as a factor indicating that the matter is worthy of additional compensation.

3. In § 3, (a) while we agree that it is necessary to begin preparing for a capital case at the earliest possible opportunity, as a compromise, we would suggest considering an amendment to Tenn. R. Crim. P. 12.3(b) to require notice to seek the death penalty within 30 days of arraignment in Criminal/Circuit Court.

4. In § 3, (c) we prefer to have separate qualifying conditions for "lead" and co-counsel" as suggested by the Supreme Court's proposal. However, we believe that "lead counsel" should have at least five years experience and that the

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required training be conducted within a specified period of time. As for (c)(4), we believe that these skills are difficult to measure and that (c)(4)(C) is impossible to achieve without prior death penalty experience.

5. In § 5, (b) the rule should clarify "where" the motion is to be filed.

6. In § 5, (b)(3) the language requiring specific facts suggesting the investigation will result in admissible evidence is too strict.

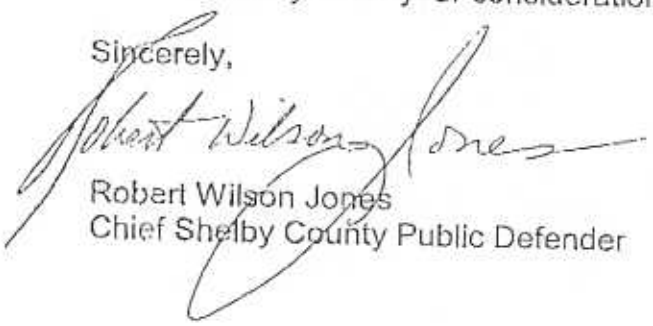
7. In § 5, (c) "significant issue in the defense at trial" should be clarified to include the mitigation phase of a capital case.

8. In § 5, (d) we believe that there should be some mechanism for exceeding the rates specified when it is not possible to obtain an expert at the stated rate. As far as the rates, they are too low. Psychologists should be raised to $175, etc. In addition, counsel should not be required to seek the lowest bidder.

9. In § 5, (e) there should be some requirement that the Director take prompt action on the request; perhaps within a specified period of time.

Thank you for your consideration.

Sincerely,



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January 19, 2004

JAN 2[illegible] 2004

Ms. Janice Rawls
Chief Deputy Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Rule 13 Comments

Dear Ms. Rawls:

I am an attorney in Crossville, Tennessee. I have been actively practicing in Crossville for almost eight (8) years. I am a member of a four (4) attorney firm with four (4) highly trained support staff members.

We are being bombarded with appointed cases from our local Juvenile Court regarding the removal of children by the Department of Childrens' Services. This is primarily due to a methamphetamine problem in Cumberland County. Certainly, I have no moral or ethical dilemma in representing these appointed clients and all the lawyers in my firm do so in a very zealous manner.

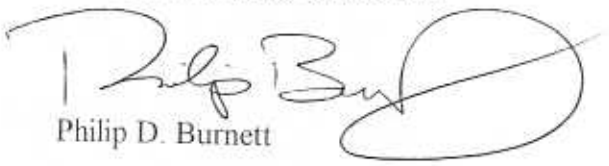
However, our overhead is typically more than the Forty ($40.00) Dollars per hour resulting in a financial net loss in many of these appointed cases. Although, this has been the case for sometime, we have not commented until the meth cases began to rapidly escalate in numbers.

For example, over the past forty-five (45) to fifty (50) hour work week, approximately ten (10) hours of my time was dedicated solely to DCS appointed cases. This is not uncommon.

As the meth problem escalates in my area, more attorneys will become more reluctant to accept these appointed cases, unless the per hour compensation is increased.

Sincerely,

BEAN, SMITH & BURNETT



Philip D. Burnett

PDB:cs

Chief Deputy Clerk, Rule 13 Comments

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January 19, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

JAN 21 2004

Re: Compensation of guardians ad litem and attorneys in dependency and neglect cases

Dear Ms. Rawls:

As an attorney who has been asked numerous times to serve as a guardian ad litem in cases of dependency and neglect and/or termination of parental rights, I write this letter in response to the proposed amendments to rule 13. I have been a child advocate for many years including those years prior to becoming an attorney. Very seldom are the cases that are given to me simple cases. More often they are complex and involve many long hours interviewing parents, children, relatives and friends of the family as well as time spent at court, in staffing and follow-ups on the children.

I understand that money is an issue and I have undertaken these cases at the rate which is currently allowed of $40 an hour out of court and $50 an hour in court, far below my usual attorney fee. The current rule caps the amount to be received on a case at $500 encouraging guardians ad litem of lesser quality to take the cases and forcing more experienced attorneys to bow out. There are several attorneys who have experience similar to mine that want to continue to do guardian ad litem work and who are very qualified. However, we have to look at the possibility of not serving as guardians ad litem because of the financial constraints. I have seen cases where children are not properly represented because of having an inexperienced guardian ad litem or a newly licensed attorney who takes cases because any income is better than no income. Either way, in my opinion, the person who gets hurt in this scenario is the child or children.

These children are our future adults and if we cannot do our best for them at this stage of their lives to help maximize their potential, then we will pay far more in the future. Any measures that can be taken to improve payment for guardians ad litem will benefit the children, the system and ultimately, the state.

Sincerely yours,

DOWDEN, SONGSTAD, WORLEY & RENO

Patricia Worley

Patricia M. Worley
Attorney at Law

PMW/bd

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2214 Claypool-Alvaton Road
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JAN 21 2004

January 19, 2004

Appellate Court Clerk Cecil Crowson
100 Supreme Court Building
401 Seventh Ave. North
Nashville, Tennessee 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee:

I am writing to express concerns about the proposed changes to Supreme Court Rule 13, and specifically the harmful impact the proposed changes would have upon the state of capital litigation in Tennessee. My three year (1999-2002) experience as the Deputy Counsel of the now-defunct Capital Division of the Tennessee District Public Defenders Conference, provides a unique perspective for the comments expressed herein since that position involved monitoring capital litigation, including the essential component of retaining and utilizing expert and investigative assistance.[1] The Capital Division was responsible for assisting attorneys statewide in the trial and appeal of death penalty cases by providing sample motions, research, referrals to available investigators and experts, and any other requested assistance which did not rise to the level of direct representation.[2] My duties at the Capital Division also included monitoring the progress of capital litigation statewide in order to identify training needs. We worked with TACDL and other groups to provide educational opportunities in an attempt to meet those needs.

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[1]Before accepting a position as Deputy Counsel at the Capital Division, I was a public defender in Kentucky with eight years of experience litigating capital cases at the trial and appellate level in the Capital Trial Unit and Stanton field office.

[2]The attorneys in the Capital Division requested permission to file pleadings on behalf of clients but the District Public Defenders Conference denied those requests.

I am very concerned that the proposed rule changes will exacerbate already serious deficits -- which I directly observed -- in the quality of representation afforded indigent capital defendants in Tennessee. Over a year ago, in a September 26, 2002 speech sponsored by the Tennessee Bar Association, Judge Gilbert Merritt of the U.S. Sixth Circuit Court of Appeals described the current Tennessee death penalty scheme as a "broken system." Judge Merritt identified "widespread" ineffective assistance of counsel, apparent from the records he has reviewed, as one of the main causes of the breakdown. He noted as factors in the crisis the following: the specialized nature of capital litigation and the insufficient number of lawyers with expertise in this area, the lack of adequate funding for counsel, failure of trial and state post-conviction lawyers to adequately investigate cases, and overzealous or deceptive police or prosecution actions.

After three years of observing the Tennessee system of providing counsel for indigent capital defendants at the trial and appellate levels, I am compelled to agree wholeheartedly with Judge Merritt's assessment of the intensity of the crisis, its root causes, and the necessity for extensive reform. The proposed Rule 13 changes only threaten further deterioration of a system which already fails to deliver competent counsel to capital defendants and, therefore, guarantees lengthy and costly litigation of death sentences which will ultimately be set aside. Even if the proposed changes are successful in limiting short term expenditures in the defense of capital cases, the failure to provide adequate resources and compensation at the trial level will ultimately result in further taxpayer expense when the built-in costs of sub-standard capital defense are reaped at a later date.

This is especially true in light of the U.S. Supreme Court's ruling in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), clarifying the standard of performance required of counsel in death penalty cases. The Supreme Court recognizes the ABA Guidelines for the Appointment and Performance Of Defense Counsel in Death Penalty Cases as "standards to which we long have referred as 'guides to determining what is reasonable.'" *Wiggins*, 123 S.Ct. at 2536-37. The ABA Guidelines now in place were adopted in February of 2003 and include the fundamentals from the 1988 version with some additions to reflect current death penalty defense practice. Unfortunately, it is my experience that in a startling number of cases currently being litigated at the trial, appellate, and post-conviction stages, the standards in the 1988 guidelines are not met, no less the 2003 version.

The proposed and current Rule 13 conflict with a number of provisions in the ABA Guidelines. The most dramatic conflict is rooted in Tennessee's failure to provide a high quality legal representation plan in death penalty cases. **Guideline 2.1 Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases** provides as follows:

A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").

B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.

C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

There is currently no legal defense representation plan in Tennessee and absolutely no quality control in the appointment and performance of counsel. The private bar is unsupervised and the District Public Defender Conference has chosen not to implement quality control mechanisms. This stands in contrast to the other state in which I practice – Kentucky – wherein the public defender agency requires capital defense counsel to meet ABA Standards and also to participate in a mandatory case review process. It would be very difficult to remedy the existing problems in Tennessee capital defense without altering the appointment process and establishing quality controls.

The ABA Guidelines, **Guideline 3.1–Designation of a Responsible Agency** states:

A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines, for:

1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and

2. performing all the duties listed in Subsection E (the "Responsible Agency").

B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.

The ABA Guidelines further provide for an oversight function to monitor counsel representing capital defendants and, if necessary, replace attorneys who fail to provide adequate representation. **Guideline 7.1– Monitoring; Removal** describes this process as follows:

A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.

B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.

C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.

E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

The current system in Tennessee does not include an independent Responsible Agency to conduct the numerous functions described above. There is no statewide capital trial unit, no statewide appellate system, and no statewide entity charged with ensuring the appointment of competent counsel and monitoring performance. Although from 1996 through September 2002, a two-lawyer Capital Division of the District Public Defenders Conference existed to consult with capital trial and appellate attorneys on a voluntary basis, the Capital Division

is now defunct. So, there is no statewide agency to provide even requested assistance[3] to capital counsel, no less to monitor appointment and performance of competent counsel. In the absence of a centralized, independent entity, there is inadequate assurance of the quality of capital counsel.

The qualifications for individual capital counsel in both the current and proposed Rule 13 fail to meet the standards in the ABA Guidelines. The current qualifications do not serve to encourage quality representation or continuing educational development of the skills necessary to competently defend capital defendants. **Guideline 5.1– Qualifications of Defense Counsel** states:

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

a. obtained a license or permission to practice in the jurisdiction;

b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each

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[3]Based on my experience in the Capital Division, it is clear that providing assistance upon request is a completely futile gesture toward improving the quality of capital representation in Tennessee. As of late August 2002 when I last gathered the statistics, there were 7 cases pending on direct appeal before this Court. None of the attorneys on those cases consulted with the Capital Division. Of the 16 cases in the Court of Criminal Appeals on direct appeal, the Capital Division was contacted by the attorneys on 3 of the appeals. There were 65 death-noticed murder defendants pending at the trial level (15 of which were represented by public defenders) and the Capital Division was consulted in only 11 cases, meaning that the Division was consulted in only 17% of pending trial cases.

capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross- examination of witnesses, and opening and closing statements.

The ABA Guidelines also provide for appropriate training of capital attorneys in **GUIDELINE 8.1--TRAINING.** The proposed and current Rule 13 both fail to meet these Guidelines for qualifications and training. The current and proposed Rule 13 do not provide a sufficient number of attorneys to form a pool of qualified counsel to provide high quality, or even adequately competent, representation of capital defendants in Tennessee. Given the crisis described by Judge Merritt, it is necessary to make changes in an to attempt to improve the quality of lawyers appointed to capital cases – not to limit the ability of the current

insufficient pool to provide a constitutionally adequate defense.[4]

One of the reasons for the lack of sufficient qualified counsel is the inadequate compensation provided. The compensation for capital counsel in both the current and proposed rule also conflicts with the ABA Guidelines. **Guideline 9.1 - Funding and Compensation** provides:

> *B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.*
>
> ...
>
> *3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.*

There should be no distinction in Rule 13 between services performed in court and out of court. The most significant efforts on behalf of a capital defendant usually occur outside a courtroom. Establishing a relationship of trust and respect with the client is a necessary beginning to effective representation, especially during the defense at the pretrial level. This relationship is also absolutely essential as a basis for understanding a client and forming a plea strategy. The **Commentary to Guideline 10.9.1** states "'Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible'; as a result, plea bargains in capital cases are not usually 'offered' but instead must be 'pursued and won.'" (footnote omitted) I absolutely agree with this principle and spent a considerable amount of effort while in the Capital Division advising attorneys how to go about forming a plea strategy and working with their clients to achieve a resolution of their case prior to trial.

A majority of the death-sentenced in this and most states which engage in executions were offered a plea bargain which was rejected. This is often a reflection of the inexperience or inadequacy of defense counsel in establishing a relationship with the client rather than a rational response by their client. It is yet another reason why the failure to adequately train and monitor the quality of capital defense representation results in increased expense and time-consuming, unnecessary efforts over the long term. Cases which are not "the worst of

---

[4]Among the proposed changes is a limitation or preclusion of appointment of out-of-state attorneys. Given the insufficient pool of qualified attorneys in Tennessee, I would submit that this limitation is both unnecessary and counterproductive to the meeting the standards contained in the ABA Guidelines.

the worst" – as evidenced by the state's decision to offer a plea bargain – end up in the system and are litigated for years when they could be resolved prior to trial.

Finally, the proposed changes in Rule 13 which provide for caps on payment of experts are in conflict with the ABA Guidelines. **Guideline 4.1(B)** states "[t]he Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings." The pool of available, qualified experts in many areas relevant to capital litigation is currently insufficient. The proposed changes are likely to further reduce the pool. Several experts and mitigation experts have already indicated an unwillingness to work under the compensation caps proposed. The inability to retain competent assistance at the state level will increase the possibility for reversal of convictions much later in the process.

In conclusion, I believe the current deficits in capital defense in Tennessee are a product of systemic problems as well as the inadequacy – whether due to insufficient training, skill, experience, caseload burden or other cause -- of individual defense attorneys. It is my hope that the Court will address these issues when considering potential remedies to the Court's concerns about Rule 13 expenditures. I encourage the Court to explore the systemic deficiencies and their implications in lieu of adopting the proposed Rule 13 changes. I would specifically encourage the Court to consider a solution that would lead to formation of a statewide capital trial unit, a capital appellate division, and increased resources for the Post-Conviction Defender Office. I would also encourage adopting changes which would maintain a role for those members of the private bar who are experienced, qualified, and dedicated in their defense of capital defendants.

Sincerely,

Kelly A. Gleason
BPR #22615

Executive Assistant District Public Defender
Karla G. Gothard

Assistant District Public Defenders
William A. Dobson, Jr.
Donna Robinson Miller
Mary Ann Green
Richard K. Mabee
Michael L. Acuff
Christian J. Coder
Edward T. Landis
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Sentencing Advocate
Anne-Marie Malone

January 22, 2004

Appellate Court Clerk Cecil Crowson
100 Supreme Court Building
401 Seventh Ave. North
Nashville, Tennessee 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee:

Thank you for the opportunity to comment on the proposed changes to Rule 13. I add my voice to those who have already written to you to ask that the proposed changes not be implemented and that a committee be formed *from those groups most affected by the rule to completely redraft the rule.* Should that not be your decision, I call your attention and ask for your consideration of the following.

The constitutions of both the state of Tennessee and the United States envision that a defendant in a criminal proceeding will have the same opportunities to prove his innocence as the state will have to prove his guilt. Rule 13 as it is currently administered and as it is proposed fails to take into consideration the fact that the state has virtually unlimited access to investigative and expert services through local law enforcement agencies, the Tennessee Bureau of Investigation, the FBI, and the state's mental health system. The state does not have to apply to the trial court and wait for approval from the Administrative Office of the Courts and the Chief Justice before initiating an investigation, consulting with an expert, or testing a piece of evidence. If the state wants to investigate a defendant's background in California, the state just sends a couple of police detectives to California to do that, not knowing what evidence they may or may not

find or whether it will be admissible at trial or not. They certainly do not have to notify the defense in a hearing in open court of their decision or of any strategy considerations which might justify the decision; and, their investigators' salaries are not reduced by 50 per cent during the travel.

Recently, in a capital case our investigation identified a witness who we believed could give us information to support our theory that the state's star witness had a motive to kill the victim and lay the blame on our defendant. The witness had been on the run since before the murder. The private investigator working on the case for us identified the location of the witness in Florida. A request for funding for travel was timely filed and approved by the trial court but the witness had moved before approval was obtained from the AOC for travel, even though the AOC approval was not unduly delayed.

Another area where the proposed rule fails to take into consideration not only the practical but also the ethical problems of representing indigent defendants is in the rule's suggestion that attorneys should interview potential witnesses without a third party investigator present. Admittedly I went to law school almost 25 years ago and the curriculum undoubtedly has changed much since then. However, I do not recall any courses on interview techniques and the only thing I recall being taught about interviewing witnesses was, criminal law 101, you never ever interview a potential witness without a third party present. A lawyer cannot be presumed to have good interviewing skills.

The proposed rule makes other presumptions that are not realistic or economical. The presumption that there will be lodging in all cities that will honor the state rate limitations and that it will always be more economical to stay at a location that charges the state rate. Those presumptions are wrong on both counts. They fail to take into consideration individual circumstances and geographic characteristics. For instance, in Chattanooga, the courthouse, the jail and our office are all in the downtown area. The airport and most of the hotels that offer the state rate without blackout dates are all 10 or more miles from the down town area. If we put an expert in one of those hotels he will have to rent a car, pay for parking and spend time in traffic to get to the downtown area. If we put an expert in one of the hotels downtown, the additional expenses of car rental, parking, etc. are not necessary. The rules fail to take into consideration that we can and do use common sense to lower overall expenses. If there are abuses in the system, those should be addressed on a case by case basis. But, don't add to the penalties already imposed by the rule on experts who agree to work on these cases for sometimes less than half of

what they make on private pay cases and in the process incur more expenses than are necessary for the state.

I would urge you also to consider rethinking the proposal that ex parte hearings involving requests for services in non-capital cases might not be necessary. For instance, in the process of preparing a case for trial in which the state has filed notice they are seeking life without the possibility of parole, it is necessary to prepare for a sentencing phase just as it is in a death case. It is our legal and ethical duty as the first step in preparing for the sentencing phase to secure the services of an experienced, qualified sentencing specialist to complete a psycho-social history on the defendant. This is not a psychologist or psychiatrist, but a skilled social history investigator. If the defendant has told me about instances of sexual abuse which I need a sentencing expert to investigate, I cannot divulge that in a non-ex parte request for funds without divulging client secrets and confidences. And, I cannot get the funds according to the proposed rule because I cannot tell the court what I expect the investigation to reveal. It is a catch 22 which only can result in an unfair and unconstitutional result and, ultimately, retrial.

As you can tell, I could go on and on. The bottom line is the proposed rule should not be implemented. The rule should be totally redrafted, hopefully by a committee that would have representation from attorneys who regularly represent indigent defendants and secure services for the defense of indigent defendants and can approach these problems with a common sense.

Sincerely,

Mary Ann Green

Mary Ann Green
BPR #9175
Assistant Public Defender
11th Judicial District

The Knox County Public Defender's
COMMUNITY LAW OFFICE

RECEIVED BY FAX
DATE: 1-22-04

January 22, 2004

Janice Rawls, Chief Deputy Clerk
100 Supreme Court Building
401 Seventh Ave., North
Nashville, TN 37219-1407

Re: Comments to Proposed Amendment to Supreme Court Rule 13

Dear Ms. Rawls:

I am an Assistant Public Defender at the Knox County Public Defender's Office. I am aware that you have received many letters from attorneys, experts, and other interested parties regarding the proposed changes to Rule 13. Because so many of these people have addressed concerns similar to my own, I would like to focus on only a few of the most vital issues of interest to me and the clients I represent.

I am most concerned about the elimination of ex parte hearings, a change which would place indigent defendants at a distinct disadvantage. I believe that in this area, as the rule currently reads, persons charged with crimes are already at a disadvantage in many cases where expert testimony is involved. As the keeper of the evidence, the District Attorney's office has liberal if not unlimited access to evidence in any particular case. District Attorneys can use this access to arrange any number of experts to examine the evidence, without the knowledge of the person charged or his or her counsel. A person charged with a crime, however, must make arrangements for his or her expert to view or examine the evidence and at times, the knowledge of these arrangements in themselves, give the State an advantage. To include the District Attorneys in the initial request for expert services would increase the State's advantage because although their trial strategy and use of experts would be secret, the strategy and work product of defense counsel would be revealed to the State. This procedure would also draw a distinction between indigent defendants, whose strategy and work product would be revealed to the State, and Defendants who are able to hire experts, about whom the State would not know.

I am also concerned about the rate caps for expert service. I believe an exodus of experts would result from the proposed rate cap. One expert I have used on occasion has announced he will no longer be available for indigent defendants due to problems he has had with the Administrative Office of the Courts in getting his fee for work completed. The limitation on fees and the proposal to abolish interim billing will not only take away any financial incentive for expert services for indigent defendants, but experts will likely view these cases as financial

MARK E. STEPHENS Public Defender 1101 Liberty Street Knoxville,TN 37919 PH 865-594-6120 Fax 865-594-6169 www.pdknox.org

liabilities. It will become difficult if not impossible to obtain competent experts in indigent cases, and without competent experts, persons charged with crimes will be unable to obtain a fair trial.

As an Assistant Public Defender, I will not be financially affected by the cap of fees for appointed attorneys; however I am concerned that that the inadequacy of the hourly fee for attorneys will drive competent attorneys away from the practice of taking appointed cases. I have seen good attorneys turn down appointments on complicated cases due to low caps and a fear that their efforts will not be compensated, and I am concerned that more and more attorneys will follow suit. I do not believe it is in anyone's best interest, including the State, to have a pool of lowest-common-denominator attorneys representing clients. I have seen judges, prosecutors and defendants equally frustrated by inadequate representation.

I want to thank you for your time and consideration in these matters. I am confidant that the financial and administrative concerns of the Tennessee Supreme Court and the Administrative Office of the Courts can be addressed by rules or procedures that will not so adversely effect the rights of the indigent accused.

Sincerely,

Jamie Niland
Assistant Public Defender

JN/rw

WILLIAM J. ELEDGE
ATTORNEY AT LAW

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Licensed in Tennessee & Mississippi

JAN 2 2 2004

January 22, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
VIA Fax # 615-532-8757

RE: Proposed Supreme Court Rule 13 Comments

Dear Ms. Rawls,

As an attorney who handles a significant number of court-appointed indigent defense clients and Guardian Ad Litem cases, I would respectfully offer the following comments regarding the proposed changes to Supreme Court Rule 13:

The hourly rate of $40.00 or $50.00 per hour is less than a third of the typical hourly rate charged to most non-indigent "paying" clients, even those in largely rural areas such as here in the 22nd Judicial District. More importantly, the maximum fee caps for each case are far too low, even for Complex & Extended cases. As an example, my last "A" Felony jury trial was an Attempted 1st Degree Murder case which was certified by the Trial Court as a Complex & Extended case. My compensation for this case (which involved a three day Jury Trial with 18.9 In-Court hours and 77 Out of Court Hours, which does not include the Sentencing hearing and Motion for New trial currently scheduled for February 2004) is limited to a Maximum of $3,000.00 dollars. I dare say it would be impossible to find a qualified attorney anywhere in this state who would willingly agree to accept such an "A" Felony jury trial case for this amount from a non-indigent "paying" client. **If the hourly rate is to remain at $40.00 or $50.00 per hour, then the maximum fee caps should at least be raised to a level comparable to that of similar non-indigent "paying" client cases, perhaps on a "sliding scale" based on the category of the underlying Felony.**

The proposed Rule 13 rule changes will make it more difficult to get qualified experts to assist in the defense of court-appointed indigent client cases, as it adds an increased level of review once the Trial Court Judge has already approved the Ex Parte Order Granting Expert Witness Funds. Submission of the approved Trial Court Ex Parte Order to the Administrative Office of Courts and then to the Tennessee Supreme Court is an intrusion into the independence of Petitioner's Post-Conviction Relief claim by essentially requiring prior approval of Petitioner's Post-Conviction Relief Court strategy (by the approval or disapproval of expert witness funds) by the same Appellate Judiciary which will ultimately review the appeal of Petitioner's Post-Conviction Relief claim if he is unsuccessful at the Circuit/Trial Court level. Such a procedure thereby denies discretion to the Trial Court to Order state funded expert witness assistance based upon the facts and circumstances of the case when Defense counsel has shown to the satisfaction of the Trial Court Judge "an adequately particularized need that said expert would be of material assistance to the defense theory of the case, and that failure to provide said expert would prejudice Defendant", in violation of *State v. Williams*, 929 S.W.2d 385 (Tenn. Crim. App. 1996); *State v. Edwards*, 868 S.W.2d 682 (Tenn. Crim. App. 1993); and *State v. Evans*, 838 S.W.2d 185 (Tenn. 1992).

WILLIAM J. ELEDGE
ATTORNEY AT LAW

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Licensed in Tennessee & Mississippi

The proposed Rule 13 rule changes will also continue the practice of denying Expert Witness Funds in Non-Capital Post-Conviction Relief claims, even in complex homicide cases in which **said expert witness funds would have been available in the Trial Court level to Trial Court counsel.** In cases such as these, if Petitioner had the constitutional due process right to the assistance of expert witness funds at the original Trial Court level during a Non-Capital case, Petitioner's constitutional rights to the assistance of expert witness funds do not and should not suddenly vanish at the Post-Conviction Relief level.

Please do not misunderstand the intention of these comments. My solo law practice consists primarily of court appointed indigent defense work because I truly enjoy such work, particularly actual trial work. **I simply believe that the Tennessee Court system would be far better served if significant changes were made to Rule 13 beyond those contained in the Proposed Changes which are currently under consideration.**

Sincerely,

William J. Eledge
Attorney at Law

National Association of Sentencing Advocates

JAN 2 3 2004

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January 23, 2004

Mr. Mike Catalano
Clerk of the Tennessee Court of Appeals
and the Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue, North
Nashville, Tennessee 37219

Dear Mr. Catalano:

The enclosed document is the comment of the National Association of Sentencing Advocates on the Supreme Court's proposed changes to Rule 13. Please deliver it to the appropriate persons. Thank you very much.

Sincerely,

Lisa Rickert

Lisa Rickert
President
Governing Board

Harmon L. Wray

Harmon L. Wray
Executive Director

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Comments of the National Association of Sentencing Advocates on the Proposed Amendments to Tennessee Supreme Court Rule 13

The National Association of Sentencing Advocates (NASA), begun in 1991, is a membership association of approximately 250 persons who work in sentencing advocacy as members of defense teams in criminal cases. Some are staff members of public defender offices, non-profit community agencies, or other government offices. Some are in private practice. Some NASA members work exclusively on death penalty cases as Mitigation Specialists. Others work exclusively on other types of criminal cases. Many do both. Some members work on defense teams for affluent clients, but most work primarily or exclusively with indigent defendants. NASA is a program of The Sentencing Project, based in Washington, DC. In 2003 there were thirteen NASA members in Tennessee.

NASA has serious concerns with much of the substance of the proposed changes in Rule 13, but at another level is concerned with the overall tone and tenor of the proposals. A general observation is that the changes appear to be motivated by one overriding goal: to save some money in the short run, and to do so by further exacerbating the already sizeable gulf between the substantial resources and the broad discretion available to the prosecution and the severely limited resources and discretion enjoyed by the defense. NASA believes that if enacted, many of the proposed changes will have the effect of being penny-wise and pound-foolish, especially in death penalty cases, since they will raise issues which will provoke more challenges from the defense, more reversals by federal courts, a protracted appeals process, and -- in the long range -- greater outlays of taxpayers' money.

NASA is also concerned that some of the proposed changes will have the effect of discriminating against indigent defendants, and in favor of those affluent clients who can afford to pay for private lawyers, experts, investigators, and sentencing advocates or mitigation specialists.

NASA believes that the adoption of the proposed changes would grant more power to individuals and entities whose experience does not include the actual litigation or serious criminal cases, especially death penalty cases, and who may be brought into a conflict of interest between their role as decision makers on defense funding requests in particular cases and their role as decision makers on those same cases.

Finally, NASA is concerned that the proposed changes, as a whole, evidence (or, at least, are likely to lead to) a profound isolationist tendency. The pressure towards the appointment of state public defender staff or in-state (or contiguous states) defense counsel, and of in-state (or contiguous state) experts, seem to exhibit a sense that we will just do things the Tennessee way, or at most, the Southern way, and pretend that we do not have to concern ourselves with the wider nation in structuring and implementing our state's indigent defense system and death penalty litigation system. The fact that the proposed rule changes demonstrate no awareness

of, or interest in, the revised 2003 version of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, is telling. Similarly, there is in the Rule 13 proposed amendments no apparent familiarity with the recent United State Supreme Court ruling in Wiggins v. Smith. The reason we cite these documents is that the proposed Rule 13 changes are at many points inconsistent with them, and that they are very likely to have great influence on death penalty jurisprudence throughout the United States, especially on the minimal standards for mitigation work at the sentencing phase.

Having summarized NASA's overall concerns with the proposed changes, let us now turn to some more targeted concerns relative to specific sections of the proposed new Rule 13. Here we will limit our comments to those sections with which we have particular experience and expertise due to the nature of our work in the criminal justice system, Sections 4 and 5.

Section 4 -- Payment of expenses incident to representation

(a)(3)(C) -- For this restriction to the $70 state rate for lodging to work for sentencing advocates and mitigation specialists who are in private practice or work for non-profit organizations, it would seem to be necessary for them to be issued some kind of ID to make it possible for them to be charged at the state rate. This would also seem to apply to private counsel, experts, and investigators who are not state employees.

(a)(3)(D) -- Why are not meals during the course of in-state trips to be reimbursed? This exclusion only sets up an incentive to make most trips overnight, which costs more money than it would to reimburse for meals in all cases of travel.

(a)(3)(L) -- This provision constitutes an instance of discrimination against individual defendants who need such services in order for members of the jury not to be prejudiced against them because of some deficiency or irregularity in their appearance. Such items should be reimbursable at the discretion of the trial court.

(b) -- Why it is necessary to obtain prior approval for out-of-state travel on a case, when it is not required to do so for in-state travel? Whether a destination is or is not within Tennessee is not necessarily determinative of the need for it (in order to provide a constitutional defense for the defendant) or of its cost. The burdensome procedure of gaining approval by both the trial court and the Administrative Office of the Courts needlessly complicates the work of investigation and trial preparation, and lengthens the time required for the case to proceed to final disposition, which costs more for the taxpayers.

Section 5 -- Experts, investigators, and other support services

(a) -- This should be revised to clarify that such services may be required at any stage after the appointment of counsel, including pre-trial, not just at trial, on direct appeal, and in post-conviction proceedings.

(a)(3) -- This provision has at least two serious problems. First, it requires indigent defendants who cannot afford to pay for investigative, expert, and sentencing advocacy services to disclose elements of defense strategy to the prosecution and to have to fight for them in a contested court proceeding, neither of which is necessary to more affluent defendants who can pay for them without going to the court. Second, it sets up a potential problem in cases which become death penalty cases only very late in the game, after the opportunity for an ex parte hearing to seek expert, investigative, and mitigation services has passed.

(a)(4) -- Defense counsel in post-conviction proceedings in non-capital cases should also have the possibility of seeking funds from the government for investigative, expert, and/or sentencing advocacy services, since such resources are available to the prosecution in such proceedings.

(b)(1)(C) and (D)-- This provision is especially troubling from NASA's standpoint because it betrays a lack of understanding of the work that our members do. The nature of sentencing advocacy and mitigation work in criminal cases necessitates that such specialists often do not know in the beginning of working on a case the "means, date, time, and location" of the work that must be done in a particular case. It becomes sheer guesswork to be forced to itemize such factors in advance in the effort to obtain necessary funding for the work to proceed. The essence of this work is an exploration of witnesses, documents, patterns, and themes in an evolving search to understand the defendant's life, family, and interaction with various social institutions (school, military service, social service agencies, medical facilities, community of faith, etc.). This sort of work differs greatly from the other services provided by other investigators and experts, such as crime scene investigation or conducting a battery of psychological tests on a defendant.

(b)(2) -- The requirement to first do a search for needed experts in-state, and then in tennessee's nine contiguous states, is very burdensome and time-consuming, and, thus, costly. It also betrays a "one-size-fits-all" view of experts that does not conform with reality. Finally, once again, it discriminates against those defendants too poor to be able to go out and hire the best (even if farthest away) expert that more affluent defendants can do as a matter of course.

(b)(3)(B) and (C)-- For NASA members and others in the field of defense-based sentencing advocacy, this is a most troubling part of the proposed Rule 13 changes., assuming that our field is included as "investigative or other similar services." Unlike most investigative work and other forensic expert work per se, much of this work goes more toward assisting counsel framing a theory and a strategy of defense than it does toward yielding "specific facts" that constitute "admissible evidence." Moreover, as in the comment on (b)(1)(C) and (D) above, this requirement to

itemize in advance with such specificity flies in the face of the very nature of this work, which is impossible to predict at the outset of the case.

(c) -- This whole "particularized need" portion of the proposal is fraught with problems from the perspective of sentencing advocacy. Again, it exhibits a total lack of understanding of the kind of work that mitigation specialists and sentencing advocates do. It requires such professionals and defense counsel to get the cart before the horse, in effect, to know what they are going to find before they set out on the exploratory journey. These provisions are a set-up for abuse by a hostile trial court.

(c)(4)(D) -- This point appears to be rooted in an assumption that a lawyer can be as good a mitigation specialist as a professional mitigation specialist is, since the former is able to interview witnesses. If this interpretation is correct, it amounts to a gratuitous insult to professionals who have spent many years developing the insight and skills to interview defendants' family members about vulnerable information (which often requires repeated visits to build trust and a sense of safety on the part of the witness).

(d)(1)(A) through (K) -- In this portion of the proposal, seemingly arbitrary maximum hourly rates for a number of types of professionals who might be on a defense team or called as experts are established. NASA's research on payments for mitigation specialists in a number of states indicates that the maximum rate proposed here -- $65/hour -- is lower than the rates which seem to prevail in a number of other states. This will have the effect -- indeed it is already having the effect of persuading some highly skilled mitigation specialists, some of whom live in Tennessee, to no longer take Tennessee cases. It also discriminates against those indigent defendants who are unable to pay the asking fee of the best professionals available.

(d)(2) -- The requirement that experts, investigators, mitigation specialists, and the like bill and be reimbursed for travel time at only one-half the already low hourly rates in (d)(1) will further exacerbate the problem.

(d)(4) and (5) -- The arbitrary caps on expert and investigative services for post-conviction in capital cases, which probably are intended to encompass mitigation specialists as well, are insufficient for many death penalty cases. This practice of setting such caps also is inconsistent with the 2003 ABA Guidelines (see Commentary on Guideline 9.1).

Section 6

(b)(2) -- The reference to "due consideration of state revenues," in the context of this document as a whole, is a clear message that if this Rule is adopted, whenever revenues are low, even pre-authorized claims in which the work has been completed are at risk of going unpaid or only partially paid.

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January 18, 2004

JAN 22 2004

Cecil Crowson, Jr.
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Mr. Crowson:

This letter concerns the proposed amendments to Supreme Court Rule 13.

By way of introduction, I am a neuropsychologist, currently employed by Vanderbilt Forensic Psychiatry. I am an assistant professor at Vanderbilt University School of Medicine, holding appointments in the Psychiatry, Neurology, and Psychology departments.

Since my move to Nashville in 1998, I have seen several defendants for evaluation and submitted charges under Rule 13. I am very concerned about the proposed changes. At the least, the proposed fee schedule cap will greatly limit my ability to serve as a consultant in most cases.

In my opinion, the changes will have the unwanted effect of discouraging many psychologists from providing consulations for the court. This will especially be true for psychologists, like myself, who are trained as neuropsychologists and/or who practice in a medical school setting.

Neuropsychologists are lumped, according to the proposed rule, along with all other psychologists. However, by nature of our unique discipline, neuropsychologists receive much more training and experience in brain disease and its assessment. The length and intensity of our training is very similar to that of a physician. For example, in my case, I completed an internship in neuropsychology in a medical school setting. I took the same clinical neurology classes as medical school students. I attended brain surgery rounds and observed surgery sessions. I am one of only two or three psychologists in the state of Tennessee certified by Medicare to bill for certain medical procedures involving direct brain manipulation under anesthesia. I have served as the director of neuropsychology at a brain injury hospital. After completing internship and becoming licensed, I then received an additional three years of supervision and training, more than two years of which were specifically in the area of forensic neuropsychology. In my opinion, the remuneration of neuropsychologists should be commensurate with that of physicians, since there is no difference in the length and intensity of our training.

The rule will also have an adverse impact on which neuropsychologists will be willing and able to undertake consulations for the court. Those of us who practice in a medical school setting are

accustomed to having our income taxed by our universities at a rate of 30% or more, in addition to our overhead expenses. In my case, more than 62% of my collections go to overhead and the university's taxes, making the proposed rate of $125 per hour simply unsustainable.

While many fine psychologists in private practice will no doubt continue to provide services at the reduced rate, the state should consider that the proposed changes will reduce or even remove any incentive for many experienced and well-trained psychologists to provide services for the state.

As you are well aware, the cases that are referred for psychological and neuropsychological evaluations often involve the severest penalties, and are often very complicated cases. In the last few years, I have seen cases involving serious brain diseases such as Huntington's chorea, cases of mania and psychosis, and cases involving suspected faking of many disorders. It is surely in the state's interest to assure that quality services are rendered, whether by physicians or psychologists.

I urge you to reconsider these proposed changes. Do not hesitate to contact me if I can provide any further information about my concerns.

Very truly yours,

James S. Walker, Ph.D.
Assistant Professor, Psychiatry and Neurology
Clinical Neuropsychologist

MIKE WHALEN
Lawyer
905 Locust Street
Knoxville, TN 37902

Member:
National Lawyers Guild
National Association of Criminal Defense Lawyers
Tennessee Association of Criminal Defense Lawyers
Knoxville Association of Criminal Defense Lawyers

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RECEIVED
JAN 23 2004
Clerk of the Courts
Rec'd By

January 20, 2004

Appellate Court Clerk Cecil Crowson
100 Supreme Court Building
401 Seventh Ave. North
Nashville, Tennessee 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee

Where to begin. The most disturbing thing about the proposed changes to Rule 13 is the part in 6(b)(1) and (2) that says the claims shall be reviewed and keeping in mind the revenues of the state . . . Are the rules not intended to help do justice within the justice system? While an hourly rate of $40 out of court and $50 in court for non-capital cases might seem "reasonable", once the caps are taken into consideration, there is no way that a private lawyer such as myself can afford to take many appointed cases if I intend to pay my bills, my secretary and my taxes.

I cannot believe that any member of this Court or the AOC would feel that $1000 would be sufficient to spend in the defense of one of your loved ones accused of child rape, aggravated assault, rape, burglary, etc., etc. To try any felony case requires so much more. For that matter the trial of a misdemeanor case would normally require more. While I recognize that all expenditures must be seen in the context of state budgets, it cannot be true that something as fundamental as the rights to a fair trial can be so squeezed by financial constraints as to make its provision a matter of form over substance.

It would appear that to try and get approval of an investigator in an attempted murder case would require the expenditure of more time than I could be paid for trying the case. I'm told that there are those within the AOC that believe that counsel don't need investigators in most cases because we can interview our own witnesses. That may be true but that $1000 cap is going to be gone before the first prospective juror sits down. And what happens when that witness changes her testimony? How is the cross examination done without halting the trial, appointing a new lawyer so that the first one can now testify about the prior inconsistent statement?

This is not merely a what if. Last April I tried an attempted second degree murder case in Knox County. The testimony of the mother of the alleged victim was crucial. I had the investigator interview her, I interviewed her. Her story was always the same. Then she takes the stand and changes her story in a significant way. She even denied having ever spoken with my

investigator. I had a tape of her conversation with my investigator which showed that she clearly understood that he worked for me and why he was there and I had a transcript of that tape in my hand as I cross examined her. This was at the time when there was great debate over whether it was unethical for a lawyer to have a witness statement taped by another. So I faced the dilemma of having my client face a long sentence if convicted against being disciplined for having protected his rights by following the regular practice of having the investigator tape the interview just like the police do when they talk to my clients. In the end I called the investigator to the stand to tell how he came to talk to this woman and what she said. My client was acquitted. Had I not had that investigator the cross would have been:

Ms. X didn't we talk about this case?
Yes.
And didn't you talk to my investigator Mr. Z?
No.
You didn't talk to investigator Z on January 12, 2001 at 5 p.m.?
No.
Didn't you tell me he said A.
No.
And in fact you told investigator Z, he said A too didn't you?
No.
Are you sure?

There's a winner!

My client might well be serving a sentence for a crime he did not commit! Now the state might have a few more dollars in the coffers but would justice be served? Of course not! We all know better and we know that our system is big enough to protect the citizens of this state whether they or rich or poor. The only question is will we? Will you?

I can sleep with a small bank account due to my representation of a lot of indigent folks. Can this Court and the people of this state rest well with more wrongful convictions and justice denied? I hope not. I urge you not to restrict the rights of our fellow citizens nor to cheapen our justice system to the point that it is justice in name only. If the current system is being abused then lets be judicial in addressing the abusers and not add to the abuse by diminishing constitutional rights.

Sincerely,

Mike Whalen

METROPOLITAN PUBLIC DEFENDER'S OFFICE
404 James Robertson Parkway
Parkway Towers, Suite 2022
Nashville, TN 37219

Ross Alderman
Public Defender

(615) 862-5730
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RECEIVED
JAN 23 2004
By

January 23, 2004

Janice Rawls, Chief Deputy Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

IN RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13

Dear Ms. Rawls:

I write, on the behalf of the 38 attorneys in the Davidson County Public Defender's Office, to respond to the Supreme Court's request for comments on the proposed amendments to Rule 13.

I have reviewed and support the joint comments and proposals filed by the Tennessee Bar Association, the Tennessee Association of Criminal Defense Lawyers, the Tennessee Public Defender's Conference and the Tennessee Post-Conviction Defender.

Sincerely,

Ross Alderman
Public Defender

JULIE A. RICE
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RECEIVED
JAN 22 2004
By

January 23, 2004
Via Facsimile

Ms. Janice Rawls, Chief Dep. Clerk
Re: Rule 13 Comments
100 Supreme Court Bldg.
401 Seventh Ave. North
Nashville, TN 37219-1407

Re: Comments on Proposed Changes to Supreme Court Rule 13

Dear Ms. Rawls:

Over the last 12+ years, I've worked in turns as an assistant district public defender, a solo practitioner of indigent criminal defense, and a contract appellate attorney working on behalf of the Public Defenders' Conference. I have reviewed the proposed Rule 13 changes, and based upon my years of experience in this field of law, I urge the Supreme Court not to adopt the proposed changes as written. While I agree there are abuses in the current system which must be addressed and changes which probably should be made, any such changes in either the indigent defense fund system or Rule 13 should be proposed by a committee made up of practitioners in the area of criminal defense, experts who routinely do appointed work for either defense counsel or at court request, law professors in the areas of criminal law/procedure and constitutional law, and perhaps a few trial judges who oversee criminal trials. Any and all abuses of the system would be more appropriately addressed on a case-by-case basis after an up-to-date and more thorough accounting computer system is devised and implemented for the billing side of Rule 13.

General comments:

First, I suggest that abuses by attorneys be resolved by a combination of formal ethics charges as well as an additional period of time, e.g. six months to a year, during which the attorney is banned from accepting appointed cases. The same solution would work as well for experts who are caught abusing the system. It is my understanding that the State is in the process of finding a new computer system to more accurately track indigent defense billing. I believe that this step will go a long way in curbing billing abuses, and it should be put into place before any more changes are made in the whole process.

Second, whoever wrote the proposed rule should be sanctioned for ethical violations as he or she has used incorrect and inappropriate case law in an attempt to justify the changes. See R. 3.3(a)(1), Code of Prof. Resp. As just one example , I would note specifically that under "Section

5, Subsection (A)(3)," footnote 4 of State v. Barnett, 909 S.W.2d 423 (Tenn. 1995) specifically declines to address the point for which the case is being cited in the proposed rule. If any real practicing attorney were to try this type of shenanigans in a brief to one of the appellate courts of this state, he or she would be called to answer for this deceitful behavior. Moreover, I would point out our system of funding is completely different from that of North Carolina, and therefore, North Carolina law is neither controlling nor persuasive authority. The writers of this proposed rule need to return to law school for a refresher course and should be very ashamed to present this work product as a rule for Tennessee's highest court.

Trial Judges' Decisions, Etc.

As to specific comments on how the actual process will work, although I'm perfectly aware that the AOC has already instituted this new process, I'm of the opinion that the duly-elected trial judges of this state have a duty and obligation to act like judges and do their job which includes making the actual decisions on the appointment of counsel and the provision of expert and other services for the defense. No trial judge should be permitted to shirk his or her responsibility for making these decisions. The free-wheeling, sign-anything judges should be brought to heel, and the fearful, sign-nothing judges should be properly taught and forced to make the hard choices. As a voter in Knox County, I want the trial judges here held accountable to me. While I believe a central authority should have a role in setting standardized rates for experts and things like travel or other expenses, the AOC or other centralized authority should merely administer the actual payment of the funds rather than decide who gets approved for funding.

Moreover, regardless of the Chief Justice's personal declaration, according to Ms. Clark, that he has no more of an ethical dilemma in denying or approving claims than a trial judge, I believe he is incorrect as his ethical problems in the current system arise because he represents the last stop in the criminal justice process in this state, not the first step. Clearly, the power to appoint and approve indigent defense requests should reside in the trial judges whose mistakes can be corrected at the appellate level rather than in the Chief Justice above whom there is no other state authority. It is no answer to say that Ms. Clark is a buffer to this problem since she is appointed by the Supreme Court, serves at the Court's leisure, and can have her decisions overridden by the Chief Justice. See Canon 2, Code of Judicial Conduct, section A. and commentary (the test for an appearance of impropriety is whether the conduct would create in reasonable minds a perception the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired).

Personnel Reviewing Claims:

If the Supreme Court is determined to micromanage the indigent defense funding, appropriate steps should be taken to provide competent, experienced personnel within both the

AOC and the Supreme Court to review the funding requests and claims for fees. Inexperienced non-legal personnel, no matter how well educated, should not be put in charge of reviewing funding requests under any circumstances. These same persons should not be used as "screeners" either because they simply don't have the knowledge and experience required. It is abhorrent as well as a gross waste of time for experienced criminal defense attorneys to continually be required to justify their legal decisions to a non-lawyer. The same holds true for staff lawyers who've never gotten practical experience in criminal defense by actually making a living at it. Having to continually explain legal theory and strategy over and over to these types of personnel is especially frustrating for those attorneys practicing before conscientious and competent trial judges who've already made an informed decision on the initial request. If you're going to make the criminal defense attorneys jump through more hoops, at the very least you can get personnel who have worked as criminal defense lawyers to hold the hoops.

Providing Investigators:

It is my understanding from some current trial attorneys that one of the problems arising lately is a denial of funds for investigators which the proposed rule exacerbates. I certainly recognize not every case requires funds for an investigator to assist the attorney, and I personally haven't employed one in each and every case. However, the ABA Defense Function Standard 4-4.3 clearly suggests using an investigator to assist in the defense is a requirement for providing an adequate defense since the attorney could be required to become a witness for his or her client. And as an attorney, I've been given training to interview clients, but I don't know how to do everything a licensed and trained investigator does on my cases. I don't interview people all day long; I'm not skilled in wringing the facts and truth out of witnesses like a good investigator; and I don't have the time or skill to track down witnesses who are homeless, work the streets in the projects, or who've moved. The State needs to pay me for my legal expertise as a trial or appellate attorney while paying an investigator for his or her investigative skills. It's also unfair and unreasonable to require indigent defense attorneys to do all their own investigative work when the district attorneys general do not. The DAGs have the police as well as in-house investigators to do their case investigations as well as bring the witnesses in for interviews. Indigent defense counsel do not have the luxury of those resources, and it is often the appointed investigator who uncovers evidence the prosecutor and/or police have been withholding from defense counsel in the first place.

Moreover, while it appears that some staffers at the AOC believe there is no realistic expectation that a problem could arise if an attorney interviews witnesses in a criminal case, I'm just one of many who's had to withdraw because I personally interviewed a victim who subsequently changed her story. I don't ever want to have to do it again. Another attorney here in Knoxville likely wouldn't have been able to win an acquittal for his client if he'd had to act as both attorney and investigator. In a trial here in Knox County, a witness named "Mary" whose

last name was unknown was found and interviewed by the investigator who taped the conversation. At trial this witness changed her story and denied any prior conversations with either the attorney or the investigator. Without the investigator to proffer the taped conversation at trial, the attorney would've been required to withdraw in the middle of trial to testify on behalf of Mr. Saylor, and he might not have been acquitted in the retrial. If an investigator hadn't been provided on the front end, the indigent defense fund would've been unnecessarily depleted further by the cost of a retrial. This is just one example of why people who have actually tried criminal defense cases should be the ones making the decisions on Rule 13 requests.

Further, the refusal to appoint an investigator to assist the defense attorney when such has been requested puts the attorney in an ethical bind. Such attorney is being forced to violate the ABA Standards as well as R. 3.7(a) of the Rules of Professional Conduct wherein attorneys are to decline representation in cases where the attorney is likely to become a witness. It is my understanding that AOC and Supreme Court staff personnel believe this to be an unlikely scenario for criminal defense attorneys; however, as already discussed above, it is a potential pitfall which defense attorneys ignore at the peril of ourselves and our clients.

I applaud the proposed change which requires investigators be licensed by the state in order to do appointed work. Those attorneys who abused the system by having themselves appointed as investigators in each other's cases were fools to try to work the system that way. However, Ms. Clark was wrong in her comments at the Public Defenders Annual Training Seminar that these attorneys were just trying to get around the rule prohibiting more than one attorney on the case. Being somewhat familiar with these instances in Knox County, I feel confident these attorneys were just out to make more money for themselves than any of them would as an attorney on a particular case. I don't believe this scheme had anything to do with getting more than one attorney working for the client.

Interim Billing:

The complete elimination of interim billing is an overreaction to problems facing the AOC in terms of staffing and manpower. While I understand that some people are billing on a weekly interim basis, which certainly would put strain on even the most efficient staff, monthly or even quarterly billing is a more appropriate response to the difficulties being encountered. I'm quite certain the AOC staff gets paid at least monthly, and I assume the justices do too. Why should attorneys and experts who consent to working in the indigent defense system be required to wait years for payment on their cases? At the very least, taxes for the self-employed must be paid quarterly, and I would suggest that even quarterly billing would be a less draconian means of relief for AOC personnel. Some compromise solution on interim billing should be possible without overtaxing the AOC's staffing resources.

Half-fee Travel:

The proposal to approve only half-fee amounts for travel is unfair. Such a cut fails to recognize that an attorney's or expert's rent and operating expenses remain constant in most cases regardless of whether or not the attorney or expert is out of the office. Moreover, half-fee travel pay fails to reflect any understanding that the attorney or expert cannot generate other income while he or she is out of the office working on a specific case. I've often been able to work on cases while my husband drives on lengthy trips, and I'm working just as hard in the car while he drives as I would be if I were sitting in my office. There is no reason I should be penalized for using my time efficiently. If an attorney or expert is able to dictate, read case law, or do research while mobile, there is no logical or reasonable rationale to cut the pay rate for this time especially as we now have the cyber tools to do these jobs on the road without difficulty.

Standardized expert fees and in-state experts

The procedures being used to determine how much to pay a particular expert are not working. Moreover, the AOC's insistence on a particular method of billing and the refusal to make timely payments are forcing defense counsel to seek out-of-state experts, which the Court doesn't want in the first place, because the in-state experts don't want the hassle. Here in East Tennessee, Dr. Larry Miller of ETSU was regularly used as a hand-writing and fingerprint expert until last year when he began refusing indigent casework because the AOC insisted he use its specific billing method when his regular practice is a flat fee per case which includes all time for analysis, consultations, and courtroom testimony. By trying to force Dr. Miller to bill in a manner contrary to his normal practice, the AOC has eliminated one local, convenient, and cheap expert for indigent defense appointment.

While it is a laudable goal to seek uniformity in compensation for experts across the state, it is the height of arrogance to try to force experts to change their billing methods when a flat fee option is available. The Court should provide alternatives to the fee schedule which permit those experts who charge a flat fee per case to continue to work indigent defense cases especially in-state experts. It's a simple matter to poll the in-state experts listed by the AOC and TACDL to determine a suitable flat rate if needed for a particular specialty. Polling the experts in different specialties state-wide would also be the best means to ensure an adequate pay rate for each type.

Another area of contention is the fees being paid for investigators versus mitigation specialists. In many instances, an investigator works in the role of a mitigation specialist, and there appears to be no reason to discriminate in pay depending on which role is being fulfilled. Moreover, the hourly rate for investigators is rather low, and it will likely lead to the more experienced investigators refusing to work indigent defense while the unproven and inexperienced investigators get their experience at the expense of indigent clients facing serious charges.

Perhaps, a sliding rate based on experience, which can easily be evidenced by the number of years since first licensed as an investigator or proof of cases worked, would be a more efficient yet protective means of insuring uniformity across the state. For example, the hourly rate for an investigator licensed for 1-5 years could be set at $50; the rate for one licensed 6-10 years could be set at $55; and the rate for one licensed 11+ years could be set at $60-65. This type of pay scale would recognize and encourage the efforts of more experienced investigators accepting indigent appointments, promote uniformity statewide, and still protect the rights of the indigent accused to have a competent investigator on the more serious cases. Using a sliding scale such as this would also prevent unduly penalizing the more experienced investigators who have already been working at the $65 per hour rate.

Ex Parte Hearings

Ex parte hearings should remain in place for ALL indigent funding requests, capital and non-capital alike. The district attorneys don't have to justify their funding requests in public, and they have absolutely no right to call on defense attorneys for indigent defendants to give any clue whatsoever to defense strategies or theories. (We also shouldn't have to justify them to AOC personnel once a judge has approved funding.) The DAGs don't have a right to make private defense counsel tell them who is being hired for defense and why, and they have no right to that information for an indigent defendant. It's bad enough that making a request for the expenditure of indigent defense funds has to be explained ad nauseum to AOC personnel after an ex parte hearing just to get the basic help required on appropriate cases. The DAGs may have a job to do, but it isn't their job to ride herd on indigent defense counsel or the indigent defense fund.

If, however, the Supreme Court believes ex parte hearings should not be allowed except in capital cases, the Supreme Court should put forth a rule requiring all district attorneys general to immediately institute open file policies wherein the DAGs are to give all evidence of whatever nature to defense counsel upon arraignment with a continuing duty to turn over material gathered from any source immediately. Concurrently, the DAGs should also be required by rule to ensure law enforcement personnel immediately begin sending information to counsel of record whenever the same information is forwarded to the DAGs. If the DAGs are so interested in a search for truth and openness in this system, they should have no problem turning over their files for review by defense counsel. These "open file" rules could also help prevent some of the miscarriages of justice which occur. (See e.g., the recent Knoxville News-Sentinel account of the rape suspect freed after exonerated by DNA evidence the prosecutor "misfiled.") Amazingly enough, some enlightened DAGs already follow a similar procedure which permits the criminal justice system to work more efficiently in those counties.

Stating What an Investigation Will Reveal in Motions

This portion of the proposed rule for obtaining an investigator is truly ridiculous on its face. The reason one hires an investigator is to find out what one doesn't already know. If I as defense counsel already know the State's "star" witness has told six different stories to six different people whose names and current addresses/phone numbers I possess, there might not be a need for an investigator for that particular aspect of the case. However, this is not a scenario likely to be played out in the real world, and with prosecutors routinely playing fast and loose with discovery, the chances of defense counsel finding out information relevant to the defense without the assistance of an investigator can be slim to none.

Reliance on Facsimiles in 21st Century

The proposed rule's reliance on doing things by facsimile is somewhat outdated as many law offices, including my own, no longer have that equipment. Other attorneys I know have the equipment available but must be present to turn it on or switch the phone line over to receive faxes. Such situations make communication via facsimile almost impossible for both the AOC and defense counsel.

The rules and AOC should not insist on sending approved Orders only to the attorney on a case by facsimile. In these days of scanners and the internet, sending signed and approved Orders via email should also be provided as an option. Personally, I don't have a facsimile machine and rely on the local Kinko's for one in the rare event I need it. Under the current situation, if I get an investigator or other expert appointed for a case, I have to traipse down to the Kinko's each time the AOC decides to send me an approved Order. Since the investigator/expert isn't going to start work until he or she has an approved Order in hand, I then have to forward the facsimile of the approved Order to whichever expert is waiting for it. And then the AOC probably isn't going to approve money for the time I spent forwarding the Order to my expert in the first place. The rule should require the AOC to send approved Orders directly to the expert named in it, especially if so requested in the Motion and Order, and to send it by whatever method is requested by counsel.

Conclusion

I could go on and on about the practical and ethical problems generated by Rule 13 and the proposed changes; however, I believe the point has been made that it is unworkable. These proposed changes should not be implemented, and a complete revision of Rule 13 needs to be done by a committee of professionals actually affected by and/or practicing under Rule 13. (I don't believe any such committee should have DAGs as members, however.) I appreciate the Supreme Court's willingness to extend the comment period and the opportunity to be heard.

Sincerely,

Julie A. Rice

/jar

r13ltr.wpd

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January 23, 2004

Ms. Janice Rawls, Chief Dep. Clerk
Re: Rule 13 Comments
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401 Seventh Ave. North
Nashville, TN 37219-1407

Phone No.: 615-741-2681
Fax No.: 615-532-8757

A TOTAL OF NINE (9) PAGES INCLUDING COVER SHEET ARE BEING SENT

J A Rice

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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NASHVILLE

IN RE:

PROPOSED AMENDMENT	)	No. M2003-02181-SC-RL2-RL
TO TENNESSEE	)	
SUPREME COURT RULE 13	)	

AMENDED COMMENTS OF THE STATE OF TENNESSEE'S THIRTY-ONE DISTRICT ATTORNEYS GENERAL ON PROPOSED CHANGES TO SUPREME COURT RULE 13

Supplement to previous comments filed on November 14, 2003. Submitted on January 23, 2004 by and through the Office of the Executive Director, The Tennessee District Attorney General's Conference.

Introduction

The Tennessee District Attorneys General Conference (TDAGC) applauds and supports the Tennessee Supreme Court's proposed changes to Supreme Court Rule 13. TDAGC agrees with the Court that change is needed in order to avoid unnecessary expense while still providing needed services to indigent defendants.

TDAGC believes that the Rule 13 changes proposed by the Court will help improve the quality of justice, curb protracted litigation and prevent abuse. The TDAGC, in support of the Court's objectives respectfully submits additional comments and proposals that we believe would further support the Court's goal.

Rule 13 Working Group

Unfortunately, after working closely with the Rule 13 Working Group, TDAGC representatives were compelled to withdraw from that group on January 15, 2004. Initial drafts

of the Working Group's comments made clear that their intentions were to enact radical changes to Rule 13, which failed to include recommendations of the TDAGC and that were inconsistent with the Court's goals and objectives. The TDAGC, therefore, elected to submit these separate comments. The TDAGC cannot endorse the Working Group's recommendations or proposals.

Ex Parte Hearings

The TDAGC is convinced that the single largest cause of waste, abuse and runaway spending is our current ex parte procedure. TDAGC urges the Court to adopt TDAGC's proposed rules and abolish or narrowly restrict ex parte hearings. Our belief is that the Court is on firm constitutional ground in this regard, and that such action would result in the fair and reasonable granting of funds for experts and services. Open hearings would allow the trial judge to make an informed decision as to need based upon relevant information provided by each party.

TDAGC believes that it is unfair for either party in a criminal case to meet privately with the trial judge and discuss the facts of the case. Victims of crime, their families, and other interested parties quickly lose faith in the criminal justice system when attorneys representing a defendant meet secretly behind closed doors with the judge that is trying the case. Citizens in Tennessee are finding their common sense notions of fairness and justice offended by this procedure. Ex parte hearings, by their very nature, create an appearance of impropriety. In addition, the ex parte process is in conflict with statutory guarantees to victims of crime authorizing them to be present in court and to be informed of motions, hearings and reasons for continuances. The purpose of victim's rights legislation is that victims will always be notified concerning any matter that affects the case. Ex parte hearings violate these rights.

Ex parte hearings are also ripe for abuse since they allow one party to the case to present uncontested "facts". Victims of crime and prosecutors fear that even the most prudent jurist would have difficulty disregarding "facts" presented during an ex parte hearing. Faced with uncontested facts it is almost impossible for a jurist not to reach conclusions that may be erroneous and which might ultimately affect the just resolution of the case. These pitfalls are easily avoided through the process of open hearings.

The apparent premise behind ex parte hearings and current indigent spending seems to be that indigent defendants ought to be provided with the same resources available to the wealthiest of defendants. TDAGC believes that indigent defendant ought to be provided, instead, with the resources that are necessary for an adequate defense. It is true that the wealthiest defendants may possess the resources to hire exotic experts and a cadre of investigators. It is also true that the wealthiest of defendants may be able to hide their resources and surprise and ambush the State sufficiently to insure that their client, through such tactics, avoids justice. Attempts to avoid justice through such tactics and procedures should not be supported by the Court or funded by the State of Tennessee.

Records of indigent spending available through the Administrative Office of the Courts indicate, in many cases, that much more is spent on the indigent defendants than an average, or even wealthy, non-indigent defendant could ever bear. Ex parte hearings are generating delay, financial excess and concern about the fairness of proceedings. By requiring open hearings the Court honors the spirit of the justice system, avoids the appearances of impropriety and reaps the practical benefits of curbing delays and costs.

This concept is reflected in the Court's proposal to allow trial judges discretion to hold contested hearings for non-psychological experts in non-capital cases. This proposal alone would

result in a reduction of needless delays and wasted resources. [Please find attached a re-draft of Section 5 for the Court's Consideration.]

The Commission Approach

Draft comments from the Rule 13 Working Group show that the group will recommend that the Court create a commission to decide requests for experts and services - similar to North Carolina's Indigent Defense Services (IDS), created in 2001. The TDAGC respectfully urges the Court to reject authorizing such a commission.

A commission would take discretion away from the trial judge and put it in the hands of a body that would make ex parte decisions with no accountability. All aspects of a criminal trial should be under the control of the trial judge and not some distant commission. Inserting an independent administrative body into the proceedings will only create more expense and additional delay and remove all accountability.

Our research of IDS reflects that it has created greater problems than it has cured in North Carolina:

- Rather than a neutral judge, a defense attorney composed commission has given carte blanche approval to most requests for experts even recommending experts that were not requested.
- Indigent defense expert spending increased by 19% last year in North Carolina.
- Lawsuits have been filed in North Carolina claiming IDS violates attorney/client confidentiality and challenging the constitutionality of IDS.
- The roster of qualified capital defense attorneys has declined. Attorneys are traveling further distances to try cases, handling too many capital cases to be effective and creating serious scheduling problems.
- Loss of local control by the trial judge has significantly slowed case adjudication.
- Some defense attorneys claim IDS approvals are disproportionate – favoring some attorneys and excluding others.

In the end, IDS is untested. Only in existence for two years, IDS's viability and legality is still in question. Also, IDS was created to repair an indigent defense system much different from Tennessee's current system.

Call for More Capital Qualified Defense Attorneys

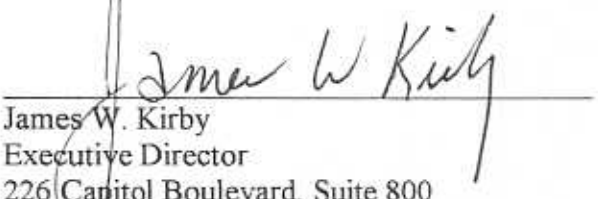
Please note that the TDAGC believes that justice is served by providing indigent defendants competent, capital case-qualified representation. The Administrative Office of the Court (AOC) should increase its recruitment efforts to increase its roster of qualified attorneys to accept appointments. Please find attached redraft of Section 3.

Conclusion

The TDAGC urges the Court to implement all its original proposals and to consider the attached redrafts of Section 3 and 5 as well as the comments filed by TDAGC on November 14, 2003 for implementation. TDAGC also requests that the Court reject the commission approach, e.g. North Carolina's IDS.

Respectfully submitted,

Tennessee District Attorneys General Conference



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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.

(a)(2) The court in conjunction with the appropriate bar organizations including but not limited to Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers shall make on-going efforts to increase the number of qualified capital defense attorneys available for appointment in Tennessee, including but not limited to:

i) active recruitment efforts statewide to increase the number of qualified attorneys available to accept capital defense appointments

ii) sponsorship of capital defense training sessions that satisfy the educational requirements of this rule

iii) requiring all Public Defenders become capital defense qualified and eligible to accept capital defense appointments

(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. 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) When appointing counsel to represent a defendant in a capital case, the court shall appoint a qualified attorney who has an office within the venue county. If no qualified attorney who has an office within the venue county can be appointed then the court shall appoint a qualified attorney who has an office located closest to the venue county.

(3) 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 judge may grant the defendant, upon motion, a reasonable continuance of the trial.

(4) 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;

(2) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases

(3) have regularly represented defendants in criminal jury trials for at least five years;

(4) have trial experience in:

(i) the use of and challenges to mental health and forensic expert witnesses;

(ii) the use of scientific and medical evidence including, but not limited to, mental health and pathology evidence;

and

(iii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;

and

(5) have completed a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(6) have at least one of the following:

(A) served as lead counsel in the jury trial of at least one capital case tried to a verdict or hung jury;

(B) served as co-counsel in the trial of at least two capital cases tried to a verdict or hung jury;

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

(D) experience as lead counsel or sole counsel in at least three murder jury trials tried to a verdict or hung jury or one murder jury trial and three felony jury trials tried to a verdict or hung jury.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar;

(2) Have regularly represented criminal defendants in jury trials for at least 3 years

(3) have trial experience in:

(i) the use of and challenges to mental health and forensic expert witnesses;

(ii) the use of scientific and medical evidence Including, but not limited to, mental health and pathology evidence;

and

(iii) Investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;

and

(4) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases

(5) have completed a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and

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

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

(B) served as sole counsel, lead counsel, or co-counsel in a murder jury tried to a verdict or hung jury

(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, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee.

(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, familiarity with the practice and procedure of the appellate courts of the jurisdiction, have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants In capital cases; and they must have at least one of the following qualifications: 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) A prisoner who seeks relief from a conviction or sentence in a state trial or appellate court when the prisoner's execution is imminent is entitled to the representation of no more than two attorneys, at least one of whom is qualified as a post-conviction counsel as set forth in section 3(h). For purposes of this rule execution is imminent if the prisoner has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the conviction and sentence and the Tennessee Supreme Court has set an execution date.

(j) Notwithstanding the proceeding provisions, a judge may appoint a qualified lawyer to represent a defendant in a capital case pending submission of an application to the Administrative Office of the Courts and listing of that lawyer on the list of capital case qualified attorneys.

(k) An attorney who seeks to be appointed as lead counsel or co-counsel in a capital case shall submit to the Administrative Office of the Courts a notarized application on a form prescribed by the Administrative Office of the Courts and approved by the Supreme Court. The application shall require the attorney to attach proof of his or her qualifications to the application.

(l) 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 to the Administrative Office of the Courts interim claims for compensation as approved by the court in

which such services are rendered. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered.

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

(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).

(n) 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.

(o) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

Section 5. Experts, investigators, and other support services.

(a) In the trial and direct appeals of all criminal cases involving indigent defendants and in the trial and direct appeals of post-conviction proceedings in capital cases involving indigent petitioners, counsel may seek investigative, expert, or other similar services.

(1) When requesting funding for expert or investigative services or other similar services in the trial and direct appeal of all criminal cases involving indigent defendants, counsel must serve a copy of the motion seeking such funding on the District Attorney General in advance of a contested hearing on the motion. At the request of counsel, the judge may hold the hearing in camera.

(2) In non-capital post-conviction proceedings, funding for investigative, expert, or other similar services shall not be authorized or approved. See Davis v. State, 912 S.W.2d 689 (Tenn. 1995).

(b)(1) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, and qualifications, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(2) Every effort shall be made to obtain the services of an in-state expert, or if an instate expert is not available, an expert from a contiguous state. If the person or

entity proposed to provide the service is not located in Tennessee or a contiguous state, the motion shall explain the efforts made to obtain the services of an expert in Tennessee or a contiguous state.

(3) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation will result in admissible evidence;

(C) an itemized list of anticipated expenses for the investigation;

(D) the name and address of the person or entity proposed to provide the services; and

(E) a statement indicating whether the person satisfies the licensure requirement of this rule.

(4) If a motion satisfies these threshold requirements, the trial court shall conduct a hearing on the motion. The District Attorney General must be present at the hearing for a motion requesting funding for expert or investigative services.

(c)(1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

(2) Particularized need in the context of criminal trials and appeals is established when a defendant shows by reference to the particular facts and circumstances that

the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial. See Barnett, 909 S.W.2d at 423.

(3) Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows by reference to the particular facts and circumstances of the petitioner's case that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See Owens, 908 S.W.2d at 928.

(4) Particularized need cannot be established and funding requests should be denied where the motion contains only:

(A) undeveloped or conclusory assertions that such services would be beneficial;

(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;

(C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or

(D) information indicating that the requested services fall within the capability and expertise of appointed counsel, such as interviewing witnesses. See, e.g., Barnett, 909 S.W.2d at 430; Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985); State v. Abraham, 451 S.E.2d 131, 149 (N.C. 1994).

(d)(1) The director and/or the chief justice shall maintain uniformity as to the rates paid individuals or entities for services provided to indigent parties. Individuals or

entities currently providing services at a rate below the maximum shall continue to be compensated at the lesser rate. Appointed counsel shall make every effort to obtain individuals or entities who are willing to provide services at an hourly rate less than the maximum. Although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:

(A) Accident Reconstruction $115.00

(B) Medical Services/Doctors $250.00

(C) Psychiatrists $250.00

(D) Psychologists $125.00

(E) Investigators (Guilt/Sentencing) $50.00

(F) Mitigation Specialist $65.00

(G) DNA Expert $200.00

(H) Forensic Anthropologist $125.00

(I) Ballistics Expert $ 75.00

(J) Fingerprint Expert $ 75.00

(K) Handwriting Expert $ 75.00

(2) Time spent traveling shall be compensated at no greater than fifty percent (50%) the approved hourly rate.

(3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee, except when an investigator licensed in another state is authorized by a court in Tennessee to conduct an investigation in that other state.

(4) In a post-conviction capital case, a trial court shall not authorize more than $20,000 for investigative services. See Tenn. Code Ann. § 40-30-218.

(5) In a post-conviction capital case, a trial court shall not authorize more than $25,000 for the services of experts. See Tenn. Code Ann. § 40-30-218.

(6) Expert tests whose results are not admissible as evidence shall not be authorized or compensated.

(e)(1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the authorization shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).

(2) The order shall include a finding and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).

(3) The court may satisfy the requirements of this subsection by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.

(4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director for prior approval.

(5) If the director denies prior approval of the request, or the request exceed five thousand dollars ($5,000) per expert, or the hourly rate exceeds one hundred and fifty dollars ($150), the claim shall also be transmitted to the chief justice for disposition and prior approval.

(f) Interim billing is not permitted for services provided in non-capital cases.

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January 23, 2004

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Clerk of the Courts
Rec'd By

The Honorable Cecil Crowson
Appellate Court Clerk
100 Supreme Court Building
Nashville, TN 37219-1407

IN RE: PROPOSED RULE 13 AMENDMENT
NO. M2003-02181-SC-RL2-RL

Dear Cecil:

Attached please find an original and six copies of the Joint Comments on the Proposed Amendments to Rule 13.

Recent communications from your office request that the parties present a plan for oral argument. Those who have been involved in the joint effort to develop a comprehensive proposal believe that more than the usual one hour should be set for such arguments.

As a suggestion , may we propose the following:

Joint commentors presentation on their recommendations -30 minutes.

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221 Fourth Avenue, North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
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www.tba.org

Pro/Con Argument with respect to contested case /*ex parte* hearings on requests for investigative, expert and related services- 20 minutes each with representatives from the Tennessee Association of Criminal Defense Lawyers and the Tennessee District Attorneys General Conference taking the opposing positions.

Argument by the Tennessee District Public Defenders Conference- 20 minutes

Argument by any other parties from whom the Court wishes to hear-10 minutes each

Rebuttal/Closing

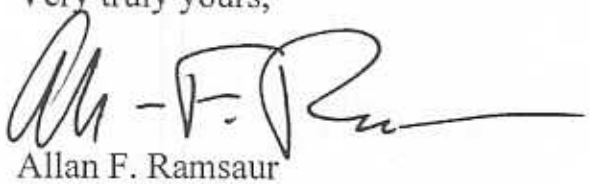
Tennessee District Attorneys General Conference-10 minutes

Joint Commentors -10 minutes

We will review this plan with you or a representative from the Court at your convenience.

As always, thank you for your cooperation. I remain,

Very truly yours,



Allan F. Ramsaur
Executive Director

Copy to:
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Connie Clark, Director, Administrative Office of the Courts
John R.Tarpley, President, Tennessee Bar Association
Gail Vaughn Ashworth, General Counsel
John Henderson, President, Tennessee District Public Defenders Conference
Donald E. Dawson, Post-Conviction Defenders Office

Criminal Defense Lawyers
William Andy Hardin, Tennessee District Public Defenders Conference
Jeffrey Henry, Tennessee District Public Defenders Conference
Mark E. Stephens, Public Defender, Knox County
Jerry P. Black, Jr., Tennessee Association of Criminal Defense Lawyers
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Rule 13 Group
David Bosch, Member, TBA Criminal Justice Section
Bill Cox, Tennessee District Attorney General's Conference
Susan Kay, Vanderbilt University Legal Clinic
James Wallace Kirby, Tennessee District Attorney General's Conference
William Ramsey, Tennessee District Attorney General's Conference
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	)	
	)	
PROPOSED AMENDMENTS TO TENN.S.CT.R. 13	)	M2003-02181-SC-RLS-RL
	)	
	)	

JOINT COMMENTS ON THE PROPOSED AMENDMENTS TO TENN.S.CT.R. 13 BY THE TENNESSEE BAR ASSOCIATION, THE TENNESSEE PUBLIC DEFENDERS CONFERENCE, THE TENNESSEE POST-CONVICTION DEFENDER, AND THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

I. INTRODUCTION

On November 3, 2003, the Tennessee Bar Association, the Tennessee District Attorneys General Conference, the Tennessee Public Defenders Conference, the Tennessee Post-Conviction Defender, and the Tennessee Association of Criminal Defense Lawyers ("Joint Commentors") filed a joint motion to extend the period for commenting on the proposed amendments to Tenn.S.Ct.R. 13. The purposes of this request were to enable discussions among representatives of the moving entities and to further investigation, as detailed in the motion. Joint commentors' aim was to prepare and submit joint comments as to the ways in which the proposed rule could better address not only the just, speedy and economical disposition of criminal actions and post-conviction proceedings but also the provision of counsel and services to indigent persons in other proceedings described in the proposed rule.

On November 13, 2003, the Court extended the comment period and directed the joint commentors to consider particularly and comment on: (1) the compensation of guardians ad litem and attorneys in dependency and neglect cases; (2) the feasibility and desirability of restructuring the indigent defense system so that requests for services are decided by a central administrative entity rather than by trial courts; and (3) the proposed fee schedule and monetary caps for investigators, experts, and interpreters.

Representatives from the present groups and representatives of the District Attorneys General Conference met on five separate occasions. The careful, professional devotion of all involved has been noted in more than one instance. The group also held an extended, three hour meeting with representatives of the Administrative Office of the Courts and Lisa Rippy on behalf of the Chief Justice. The insight which they provided to the group was invaluable. Regrettably, the District Attorney's General Conference ultimately decided that they could not join in the final work product of the group. Several of the suggestions from the District Attorneys General Conference are incorporated into the proposals. The present groups express their appreciation for the professional demeanor and cooperative attitude of the District Attorneys' representatives.

II. THE COURT SHOULD ESTABLISH AN INDEPENDENT BODY WITHIN THE JUDICIAL DEPARTMENT TO ADMINISTER REPRESENTATION AND OTHER SERVICES FOR THE INDIGENT PARTIES.

The joint commentors strongly believe that establishing a centralized administrative agency is crucial to the proper final resolution of many concerns raised by, and presumably animating, the proposed Rule 13. Review of the ABA standards and guidelines, studies of Tennessee's indigent defense system, information from other states, and discussions about problems and abuses of the present system all have indicated that the economical and efficient

resolution of these problems demand the creation of a centralized agency charged not only with the promulgation of meaningful standards but also with the efficient and economical management and supervision of those standards.

Although the relatively recent enactment of the District Public Defender system and the Tennessee District Public Defenders Conference has gone a very long way toward improving indigent representation in Tennessee, significant issues relating to the administration and operation of the complex and ever-growing system of indigent representation are not within the power of the Conference to address or resolve. The independent body approach, if adopted by the Court, would satisfy this long overdue, and much needed supplement; provide the foundation for principled, incremental improvements in the system; offer a mechanism for providing substantial savings, which is not to say limiting what appears to be unavoidable growth; and relieve the courts, not only of the burden of administering the system on a day-to-day basis but eliminate the dual roles of administering and enforcing the administration of the system by the courts.

The first proposal annexed hereto as Exhibit A outlines the creation of Tennessee Indigent Representation Services (TIRS), an independent agency within the Supreme Court to administer indigent representation services. Joint commentors strongly believe that TIRS is the more workable of the two proposals. The adoption of the proposed rule at Exhibit A creating TIRS would permit the active management of a true system rather than the fragmented, rules-based, reactive scheme in place now. Creating TIRS would substantially enhance the administration of and further promote the economic and efficient delivery of indigent services in Tennessee.

TIRS would completely remove any appearance of conflict between the courts role as administrator, on the one hand, and their role as the final adjudicator of closely related legal claims and issues, on the other. TIRS would also, among other things, (1) develop uniform, state-wide standards for the appointment, performance, and compensation of counsel and service providers; (2) prescribe, administer, and monitor uniform, cost-effective procedures and rates for state-wide support services; and (3) relieve the Court of the day-to-day oversight of these matters.

III. IF THE COURT CHOOSES NOT TO ESTABLISH THE OFFICE OF TENNESSEE INDIGENT REPRESENTATION SERVICES AT THIS TIME, THE COURT SHOULD ADOPT SUBSTANTIAL AMENDMENTS TO PROPOSED RULE 13.

The present rule and the rule proposed by the Court in September each provide a framework for dealing with indigent representation and related services. This framework administered by the trial courts, this Court and the Administrative Office of the Courts is a rules-based, locally administered, ad hoc non-system for administration of indigent defense services. The joint commentors reiterate that they believe the far preferable system is one which brings active standards- based management and resources to the problems presented. However, should the court decide to stay with the present system, the groups' jointly recommend several changes, represented in the attached Exhibit B draft of the proposed rule. The highlights of the changes we recommend, in order of inclusion in the draft, include:

- Explicit provisions for the appointment and compensation for experts, investigators and other support services in parental rights termination proceedings, dependent and neglect proceedings and delinquency proceedings.

- Clarifying that the determination of indigence for a juvenile must be made independently of the parents' willingness to ask for representation for their child.

- Inclusion of standards established under the Tennessee Rules of Professional Conduct for conflicts of interest and withdrawal.

- Establishment of a single hourly rate for all compensation.

- Inclusion of a different cap for post- dispositional dependency and neglect and parental rights termination cases.

- Inclusion of skills oriented standards for counsel in capital cases.

- Establishment of a flat rate overhead for lawyers to be paid in lieu of detailed telephone, research and copying expense record- keeping and auditing.

- Re-establishment of a review mechanism for decisions of the director of the Administrative Office of the Courts.

A few of these changes require some additional explanation. The joint commentors fervently believe the present rates of compensation and caps on compensation place an extreme financial burden on the lawyer who wishes to do a competent, thorough job in representing an indigent party. See TRPC 6.2. With the different rates of compensation for in court and out of court time, the rule diminishes the investigation and preparation that effective counsel should do. The different compensation rates, rather emphasize and encourage "seat of the pants" in-court behavior.

Because the rate of compensation is so low, a lawyer in a fully- staffed and effectively run law office could spend all of the money received from representing an indigent party on staff, office equipment and library and research capabilities. We believe that offering an hourly overhead rate and eliminating the detailed record- keeping required for long distance telephone, research, local travel and the like will be a step in the right direction.

IV. THE COURT SHOULD REQUIRE PROCEDURES THAT PERMIT DEFENSE COUNSEL, WITHOUT CONSULTATION, NOTICE AND PARTICIPATION OF THE PROSECUTOR, TO REQUEST AND OBTAIN NECESSARY EXPERT, INVESTIGATIVE AND RELATED SERVICES AND TO BE REIMBURSED FOR THOSE SERVICES.

Among the most fundamental duties of a lawyer to a client are loyalty, independence of professional judgement, confidentiality and competency. Counsel for an indigent party who seeks to have services provided should not have to compromise loyalty, independence and confidentiality to fulfill that duty. In order to maintain confidentiality, independence of judgement and loyalty, counsel must be permitted to seek necessary expert, investigative, and related services without the intervention of another party in the matter, namely the state. TRPC 1.7[14] and TRPC 1.8(f).

The proposed rule has attempted to parse those areas in which ex parte hearings on request for services have been held to be constitutionally required. We recommend that the issue be resolved in all cases by a blanket rule.

This issue generated the clearest and cleanest line of departure with the District Attorneys General Conference. The District Attorneys believe hearings on these matters should be open and the state should be able to contest such requests.

V. THE RATES OF COMPENSATION AND EXPENSES FOR THOSE APPOINTED TO PROVIDE SERVICES TO INDIGENT PARTIES SHOULD BE ADEQUATE TO ALLOW THE INDIGENT PERSON TO OBTAIN NECESSARY SERVICES.

Many of the comments filed by others in the comment process have focused on the question of rates and other allowances for experts and investigators. The joint commentors have

little more than an anecdotal basis on which to determine the adequacy of such compensation. It is also quite difficult for the lawyers, who are the lowest paid out of any of the experts in the proposed system to make a recommendation with respect to increased rates.

One of the strongest motivations of the establishment of Tennessee Indigent Representation Services is the joint commentors' belief that the Office of Tennessee Indigent Representation Services, with its mandate to actively manage the system, can perform the necessary studies and reviews to determine levels of compensation which are necessary to provide adequate services. It is contemplated for example, that defense counsel who needs a DNA expert might call the office to inquire about the availability and possible cost of such an expert in her geographic area. This kind of active front-end involvement may yield great benefits.

IV. CONCLUSION

The joint commentors have invested more than 450 hours in reviewing, drafting, and refining proposals. The commentors humbly believe that "TIRS" is both highly desirable and feasible. If the Court is not yet ready to establish this independent body within the Judicial Branch, substantial improvements in Rule 13 can and should be made.

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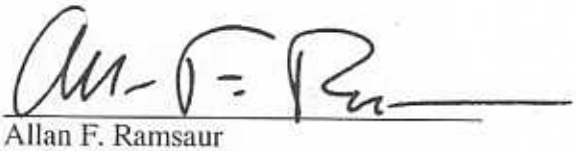
By: 
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Certificate of Service

I hereby certify that a true and exact copy of the foregoing Comment and all annexed Exhibits has been served on the attached list by placing a copy in the United States Mail, postage prepaid, this 23rd day of January, 2004

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EXHIBIT A

Rule 13- Tennessee Indigent Representation Services

§ 1. Title.

This Rule shall be known and may be cited as the "Tennessee Indigent Representation Services" Rule.

§ 2. Purpose.

Whenever a person is determined to be indigent and entitled to counsel, it is the responsibility of the State under the federal and state constitutions to provide that person with counsel and the other necessary expenses of representation. The purpose of this Rule is to:

(1) Enhance oversight of the delivery of counsel and related services provided at State expense;

(2) Improve the quality of representation and ensure the independence of counsel;

(3) Establish uniform policies and procedures for the delivery of services;

(4) Generate reliable statistical information in order to evaluate the services provided and funds expended; and

(5) Deliver services in the most efficient and cost-effective manner without sacrificing quality representation.

§ 3. Office of Tennessee Indigent Representation Services.

(a) The Office of Tennessee Indigent Representation Services, which is administered by the Director of Tennessee Indigent Representation Services and includes the Commission on Tennessee Indigent Representation Services, is created within the Judicial Department. As used in this Rule, "Office" means the Office of Tennessee Indigent Representation Services, "Director" means the Director of Tennessee Indigent Representation Services, and "Commission" means the Commission on Tennessee Indigent Representation Services. "Public Defender" means a district public defender, the state post conviction defender or the public defender selected in Metropolitan Nashville and Davidson County or Shelby County. "Appointed

counsel" means an attorney other than a public defender appointed to represent an indigent party under this rule.

(b) The Office shall exercise its prescribed powers independently of the director of the Administrative Office of the Courts. The Office shall have all powers necessary and proper to fulfill its duties under this Rule including, but not limited to, entering into contracts, owning property, and accepting funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The director of the Administrative Office of the Courts shall provide general administrative support to the Office. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office shall be a part of the Judicial Department's budget. The Commission shall consult with the director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office or use funds appropriated to the Office without the approval of the Commission.

§ 4. Responsibilities of Office of Tennessee Indigent Representation Services.

(a) The Office shall be responsible for establishing, supervising, and maintaining a system for providing legal representation by appointed counsel and related services for all indigent parties in the following cases:

(1) Cases in which an indigent person is subject to a deprivation of liberty or other constitutionally protected interest and is entitled by law to legal representation;

(2) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;

(3) Contempt of court proceedings in which the party is in jeopardy of incarceration;
(4) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;
(5) Proceedings initiated by a petition for post-conviction relief;
(6) Parole revocation proceedings pursuant to the authority of state and/or federal law;
(7) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;
(8) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34; and
(9) 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;
(10) Cases in which a juvenile is charged with juvenile delinquency for committing an act which would be a misdemeanor or a felony if committed by an adult;
(11) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;
(12) Guardian Ad Litem for the child in cases of reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411.
(13) Guardian Ad Litem for the child in proceedings to terminate parental rights.
(14) Cases in which a juvenile is charged in court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).
(15) Any other case in which an indigent person is entitled to legal representation under the laws of this state or the federal or state constitution.

(b) The Office shall develop policies and procedures for determining indigence in cases subject to this Rule, and those policies shall be applied uniformly throughout the State. The court shall determine in each case whether a person is indigent and entitled to legal representation, and counsel shall be appointed.

(c) In all cases subject to this Rule, appointment of counsel, determination of compensation, appointment of experts, and use of funds for experts and other services related to legal representation shall be in accordance with rules and procedures adopted by the Office.

(d) The Office shall allocate and disburse funds appropriated for legal representation by appointed counsel and related services for all indigent parties in cases subject to this Rule under rules and procedures established by the Office.

§ 5. Establishment of Tennessee Commission on Indigent Representation Services.

The Commission on Tennessee Indigent Representation Services is created within the Office of Indigent Representation Services and shall consist of 9 members. To create an effective working group, assure continuity, and achieve staggered terms, the Commission shall be appointed as provided in this section.

(a) The members of the Commission shall be appointed as follows:

(1) The Chief Justice of the Tennessee Supreme Court shall appoint one member, who shall be an active or former member of the Tennessee judiciary.

(2) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the Senate.

(3) The Chief Justice shall appoint one member upon the recommendation of the Speaker of the House of Representatives.

(4) The Tennessee District Public Defenders Conference shall appoint one member.

(5) The Post Conviction Defender Commission shall appoint one member.

(6) The Tennessee Bar Association shall appoint one member.

(7) The Tennessee Association of Criminal Defense Lawyers shall appoint one member.

(8) The Tennessee Lawyers Association for Women shall appoint one member.

(9) The Tennessee Association of Black Lawyers, or by mutual agreement, the Ben Jones and the Napier-Looby chapters of the National Bar Association shall jointly appoint one member.

(b) The terms of members appointed under subsection (a) of this section shall be as follows:

The initial appointments of the Chief Justice shall be for (3) three years. The initial appointments of the Tennessee Bar Association, the Tennessee District Public Defender's Conference and the Post Conviction Defender Commission shall be for (2) two years. The initial appointments of the Tennessee Association of Criminal Defense Lawyers, Tennessee Lawyers Association of Women and Tennessee Association of Black Lawyers (or the person appointed under Section (a)(9)) shall be for one (1) year.

At the expiration of these initial terms, appointments shall be for three (3) years and shall be made by the appointing authorities designated in subsection (a) of this section. No person shall serve more than two consecutive three-year terms plus any initial term of less than three years.

(c) Persons appointed to the Commission shall have significant experience in the defense of criminal or other cases subject to this Rule or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission. No active judicial officials, employees of the District Attorney General's Conference, Attorney General and Reporter or Administrative Office of the Courts, or active employees of such persons, may be appointed to or serve on the Commission, except as provided in subsection (a)(1) of this section. No employees of the Office of the Executive Director of the Tennessee District Public Defenders Conference, Post Conviction Defenders Office, or other active employees of the Office of Indigent Representation Services may be appointed to or serve on the

Commission. In making appointments the appointing authority shall do so with the conscious intention of selecting a body which reflects a diverse mixture with regard to geography, race, and gender.

(d) All members of the Commission are entitled to vote on any matters coming before the Commission unless otherwise provided by rules adopted by the Commission concerning voting on matters in which a member has, or appears to have, a financial or other personal interest.

(e) Each member of the Commission shall serve until a successor in office has been appointed. Vacancies shall be filled by appointment by the appointing authority for the unexpired term. Removal of Commission members shall be in accordance with policies and procedures adopted by the Commission.

(f) A quorum for purposes of conducting Commission business shall be a majority of the members of the Commission.

(g) The Commission shall elect a Commission chair from the members of the Commission for a term of two years.

(h) The Director shall attend all Commission meetings except those relating to removal or reappointment of the Director or allegations of misconduct by the Director. The Director shall not vote on any matter decided by the Commission.

(i) Commission members shall not receive compensation but are entitled to reimbursement in accordance with the comprehensive travel regulations.

§ 6. Responsibilities of Commission.

(a)The Commission shall have as its principal purpose the development and improvement of programs by which the Office of Tennessee Indigent Representation Services provides legal representation and related services to indigent persons.

(b) The Commission shall appoint the Director who shall be chosen on the basis of training, experience, and other qualifications. The Commission shall consult with the Chief Justice and Director of the Administrative Office of

the Courts in selecting a Director, but shall have final authority in making the appointment.

(c) The Commission shall develop standards governing the provision of services under this Rule. The standards shall include:

(1) Standards prescribing minimum experience, training, and other qualifications for appointed counsel;

(2) Standards for appointed counsel caseloads;

(3) Standards for the performance of appointed counsel;

(4) Standards for the independent, competent, and efficient representation of clients whose cases present conflicts of interest, in both the trial and appellate courts;

(5) Standards for providing and compensating experts and others who provide services related to legal representation;

(6) Standards for qualifications and performance in capital cases; and

(7) Standards for determining indigence and for assessing and collecting the costs of legal representation and related services.

In setting these standards the commission shall consider and mindful of the ABA Standards for Criminal Justice: Providing Defense Services; ABA Standards for Criminal Justice: Defense Function; ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases and any other recognized standards.

(d) The Commission shall determine the methods for delivering legal representation under this Rule other than the provision of counsel by a public defender. The Commission shall establish in each judicial district or combination of districts a system of appointed counsel, contract counsel, other methods for delivering counsel services, or any combination of these services.

(e) In determining the method of services to be provided in a particular judicial district, the Director shall consult with the bar association(s) and

judges of the district under consideration. The Commission shall adopt procedures ensuring that affected local bars have the opportunity to be significantly involved in determining the method or methods for delivering services in their districts. The Commission shall solicit written comments from the affected local bar and the presiding judge.

(f) The Commission shall establish policies and procedures with respect to the distribution of funds appropriated under this Rule, including schedules of allowable expenses, appointment and compensation of expert witnesses, investigators, interpreters, and other support services and procedures for applying for and receiving compensation.

(g) From time to time the Commission shall evaluate, study and make recommendations about the rates of compensation for appointed counsel, including the impact of rates on the availability of counsel both in terms of numbers and in terms of quality.

(h) The Commission shall approve and recommend to the General Assembly a budget for the Office.

(i) The Commission shall adopt such other rules and procedures as it deems necessary for the conduct of business by the Commission and the Office.

§7. Director of Tennessee Indigent Representation Services.
(a)The Director of Tennessee Indigent Representation Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and

standards for the delivery of services under this Rule;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office;

(6) Apply for and accept on behalf of the Office any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Representation Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Rule and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs and assist in development of and promotion of continuing legal education programs for attorneys and others involved in the legal representation of persons subject to this Rule; and

(9) Perform other duties as the Commission may assign.

§8. Procedure for Appointment.

(a) Whenever a party to any case in Section 4(a) requests the appointment of counsel, the party, except in the case of a juvenile, shall be required to complete and submit to the court an Affidavit of Indigence Form provided by the Office.

(b) Upon inquiry, the court shall make a finding as to the indigence of the party pursuant to the provisions of Tennessee Code Annotated section 40-14-202, which finding shall be evidenced by a court order.

(c) If the court finds the party indigent, the court shall appoint the public defender subject to TCA section 8-14-201 et seq. If the public defender can not represent the party because of unavailability, conflict or otherwise, the court shall appoint counsel in accord with the plan established by the Office under Section 6.

(d) The appointment of the guardian ad litem under Section 4(a)(12) shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

(e) The child who is or may be the subject of proceedings to terminate parental rights under Section 4(a)(13) shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian.

§9. Procedure for Application for Related Services.

(a) If the court finds a party indigent under Section 8(b), counsel may request reimbursement for services related to representation.
(b) Such request shall be in a form and with such specificity as may be prescribed by the Office.
(c) The request shall be made addressed to the Director who shall determine whether the request shall be granted.
(d) The Commission shall by rule or regulation establish the standards for granting requests and rules for appeals from such determinations, which shall include appeal of the director's decision to the full commission.
(e) The request for reimbursement, the decision of the director and the decision of the commission shall be filed under seal with the court in which the proceeding is being heard and shall become part of the record upon application for new trial or appeal.
(f) Confidentiality. All requests for services, approvals of services, requests for payments of services, and payments for services provided pursuant to this Rule are deemed to be non-public records. All such information

shall be kept and remain confidential and privileged unless and until, it becomes pertinent to a disciplinary or malpractice proceeding.

§ 10 Rates and Maximum Amounts of Compensation for Legal Representation.

The following shall be the rates of compensation, expense reimbursement and maximum compensation to be allowed for legal representation.

(a) The hourly rate for appointed counsel in non-capital cases is fifty dollars ($50) per hour for time reasonably spent.

(b) The maximum compensation allowed shall be determined by the original charge or allegations in the case. The compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the following amounts:

(1) Five hundred dollars ($500) for:

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

(B) 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;

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

(D) 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;

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

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

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

(H) 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;
(I) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);
(J) 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;

(2) Seven hundred fifty dollars ($750) for:
(A) Dependent or neglected child cases, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews and permanency hearings;

(B) 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;

(C) 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, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

(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 trial courts in which the defendant is charged with a felony;

(C) Direct and interlocutory appeals;

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

(E) Non-capital post-conviction and *habeas corpus* proceedings;

(F) Probation revocation proceedings;

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

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

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

(J) 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;

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

(c) (1) An amount in excess of the maximum, may be sought by filing a request with the Office . The request shall include specific factual allegations demonstrating that the case is complex or extended in accordance with Tennessee Code Annotated section 40-14-207(a)

(2) The Office shall enter a decision which evidences the action taken on the request. 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 witness;

(C) the case involved multiple protracted hearings;

(D) the case involved novel and complex legal issues.

(3) Upon approval of the complex or extended claim 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 fifty dollars ($750),
(C) Except as provided in section (2)(e)(3)(C), 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.
(E) The Office may waive the three thousand dollar ($3,000) maximum if the request demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

(d) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the Office 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 to the Office interim claims for compensation. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the services were rendered.

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

(1) Lead counsel--one hundred dollars ($100);

(2) Co-counsel--eighty dollars ($80);

(3) Post-conviction counsel--eighty dollars ($80).

(f) (1)Appointed counsel, shall be reimbursed for overhead expenses directly related to the representation of indigent parties at a rate of twenty dollars ($20) per hour reasonably spent and reasonably necessary without limitation.
(2) The following expenses for appointed counsel will be reimbursed without prior approval if reasonably necessary to the representation of the indigent party:

(A) Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities;
(B) Lodging at actual costs, not to exceed the current authorized state rate ($70), if supported by a receipt, where an overnight stay is required;
(C) Meals in accordance with the Judicial Department travel regulations is supported by a receipt, where an overnight stay is required;

(g) Expenses not listed in section 10(f), including travel outside the state and copying expenses in excess of five hundred dollars ($500), will be reimbursed only if prior authorization and prior approval is obtained from the director.
(h) The director is hereby authorized to reimburse the Department of Children's Services at the Judicial Department rate for the expense of transcripts in termination of parental rights appeals without obtaining prior approval by court order in each case.

EXHIBIT B - PROPOSED AMENDED RULE 13

§1. Right to counsel and procedure for appointment of counsel.

(a)(1) The purposes of this rule are:

(i) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;

(ii) to establish qualifications and provide for compensation of appointed counsel

(iii) to provide for payment of expenses incident to appointed counsel's representation;

(iv) to provide for the appointment and compensation of experts, investigators, and other support services for indigent parties in criminal cases, parental rights termination proceedings, dependency and neglect proceedings, delinquency proceedings and petitioners in post-conviction proceedings;

(v) to establish procedures for review of claims for compensation and reimbursement of expenses; and

(vi) to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(2) The failure of any court to follow the provisions of this rule shall not *per se* constitute grounds for relief from a judgment of conviction or sentence. The failure of appointed counsel to meet the qualifications set forth in this rule shall not be deemed conclusive evidence that counsel did not provide effective assistance of counsel in a particular case.

(b) Each trial court exercising criminal jurisdiction shall maintain a roster of attorneys from which appointments will be made. However, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule.

(d)(1) In the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

(A) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;

(B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;

(C) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;

(D) Proceedings initiated by a petition for post-conviction relief, under Tennessee Code Annotated sections 40-30-201 et seq.;

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

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

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

(H) 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.

(2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C) and (D) below, requests appointment of counsel.

(A) Cases in which a juvenile is charged with juvenile delinquency for committing an act that would be a misdemeanor or a felony if committed by an adult;

(B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;

(C) Reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37-1-401 through 37-1-411. The court shall appoint a guardian ad litem for every child who is or may be the subject of such report. The appointment of the guardian ad litem shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(D) Proceedings to terminate parental rights. The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(E) Cases in which a juvenile is charged in court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a).

(E)(1) Except in cases under Sections 1(d)(1)(F) Proceedings under the Mental Health Law, 1(d)(1)(G), proceedings for guardianship under Title 34 and 1(d)(2)(A), juvenile delinquency proceedings, whenever a party to any case in section 1(d) requests the appointment of counsel, the party shall be required to complete and submit to the court an Affidavit of Indigency Form provided by the Administrative Office of the Courts.

(2) Upon inquiry, the court shall make a finding as to the indigency of the party pursuant to the provisions of Tennessee Code Annotated section 40-14-202, which finding shall be evidenced by a court order.

(3) Upon finding a party indigent, the court shall enter an order appointing counsel unless the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection.

(4) (A) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender's office, the state post conviction defender's office, if qualified pursuant to this rule and no conflict of interest exists. Appointment of public

defenders shall be subject to the limitations of Tennessee Code Annotated sections 8-14-201 et seq.

(B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7, the ABA Standards for Criminal Justice: Defense Function 4-3.5 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).

(C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.

(D) The court shall not make an appointment if counsel informs the court that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards. Counsel should be guided by ABA Standards for Criminal Justice: Defense Function, the ABA Guidelines for Appointment and Performance in Death Penalty Cases and other recognized standards in making such a declaration.

(E) When the court appoints counsel pursuant to this subsection, the order of appointment shall assess the nonrefundable administrative fee provided by TCA § 37-1-126(c)(1) or § 40-14-103(b)(1). Additionally the court shall consider the financial ability of the indigent party to defray a portion or all of the cost for representation by the public defender or a portion or all of the costs associated with the provision of court appointed counsel as provided by TCA § 8-14-205(d)(1), § 37-1-126(c)(2) or § 40-14-103(b)(2). If the court finds the indigent party is financially able to defray a portion or all the cost of the indigent party's representation, the court shall enter an order directing the indigent party to pay into the registry of the clerk of such court such sum as the court determines the indigent party is able to pay as specified by TCA 40-14-202(e).

(5)(A) Appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court under Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Criminal Appeals) or Tennessee Rules of Professional Conduct 1.16

(B) For the purpose of determining when appointed counsel for the parents or the appointed Guardian ad Litem's obligations cease in Dependency and Neglect or Termination of Parental Rights proceedings in which the Tennessee Department of Children's Services initiates proceedings through the filing of a petition, the conclusion of the case occurs when:

(1) An order dismissing the State's Petition is entered, or
(2) When the minor child or children in question have been placed and the Department of Children's Services is no longer party to the action.

(f)(1) Indigent parties shall not have the right to select appointed counsel. If an indigent party refuses to accept the services of appointed counsel, such refusal shall be in writing and shall be signed by the indigent party in the presence of the court.

(2) The court shall acknowledge thereon the signature of the indigent party and make the written refusal a part of the record in the case. In addition, the court shall satisfy all other applicable constitutional and procedural requirements relating to waiver of the right to counsel. The indigent party may act pro se without the assistance or presence of counsel only after the court has fulfilled all lawful obligations relating to waiver of the right to counsel.

§ 2. Qualifications and 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, 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 shall be compensated subject to one cap per case.

(c) The hourly rate for appointed counsel in non-capital cases is fifty dollars ($50) per hour for time reasonably spent.

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

(1) Five hundred dollars ($500) for:

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

(B) 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;

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

(D) 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 through37-1-411, 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;

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

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

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

(H) 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;

(I) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly as defined in Tennessee Code Annotated section 37-1-126(a);

(J) 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;

(2) Seven hundred fifty dollars ($750) for:

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

(B) 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;

(C) 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, for all post-dispositional proceedings, including foster care review board hearings, post-dispositional court reviews, and permanency hearings.

(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 trial courts in which the defendant is charged with a felony;

(C) Direct and interlocutory appeals;

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

(E) Non-capital post-conviction and *habeas corpus* proceedings;

(F) Probation revocation proceedings;

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

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

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

(J) 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;

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

(e) (1) an amount in excess of the maximum, 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 in accordance with Tennessee Code Annotated section 40-14-207(a)

(2) 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 witness;

(C) the case involved multiple protracted hearings;

(D) the case involved novel and complex legal issues. If the motion is granted, an order shall be forwarded to the Director of the Administrative Office of the Courts (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.

(3) 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.

(4) 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 fifty dollars ($750),

(C) Except as provided in section (2)(e)(3)(C), 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.

(E) The director or chief justice may waive the three thousand dollar ($3,000) maximum if the order demonstrates that extraordinary circumstances exist and failure to waive the maximum would result in undue hardship.

(f) Claims for compensation shall be submitted no later than 180 days after disposition of the case in each court in which representation is provided. Claims for compensation submitted after the 180-day period will be deemed waived and will not be paid.

(g) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

§ 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 until the District Attorney General declares, on the record, that the state will not seek the death penalty.

(b) (1) The court shall appoint two attorneys to represent a defendant in a capital case. Both attorneys appointed must be licensed in Tennessee or admitted under Tenn. Sup. Ct. Rule 19 (pro hac vice) and have significant experience in criminal trial practice. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, consistent with ABA Guidelines for Appointment and Performance in Death Penalty Cases, a public defender shall serve as and be designated "lead counsel."

(2) If the notice of intent to seek the death penalty is withdrawn or the District Attorney General declares, on the record, that the death penalty will not be sought, the trial court may enter an order relieving one of the attorneys

previously appointed subject to TRPC Rule 1.16 or Tenn. Sup. Ct. Rule 14.

(c) Counsel must:

(1) be a member in good standing of the Tennessee bar or admitted under Tenn. Sup. Ct. Rule 19;

(2) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases

(3) have regularly represented defendants in criminal jury trials for at least five years;

(4) have demonstrated skill in:

(A) the use and challenges to mental health and forensic expert witnesses;

(B) the use of scientific and medical evidence including, but not limited to, mental health and pathology evidence; and

(C) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;

(D) in oral advocacy;

(E) familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology and DNA evidence;

(F) in the investigation, preparation and presentation of mitigating evidence; and

(G) the elements of trial advocacy, such as jury selection, cross-examination of witnesses and opening and closing statements.

(5) in the twenty-four months preceding appointment, have completed a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(d) 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.

(e) If new counsel are appointed to represent the defendant on direct appeal, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee or admitted *pro hac vice* under Tenn. Sup. Ct. Rule 19.

(f) 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, familiarity with the practice and procedure of the appellate courts of the jurisdiction, have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases, and they must have at least one of the following qualifications: 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.

(g) 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.

(h) A prisoner who seeks relief from a conviction or sentence in a state trial or appellate court when the prisoner's execution is imminent is entitled to the representation of no more than two attorneys, at least one of whom is qualified as a post-conviction counsel as set forth in section 3(h). For purposes of this rule execution is imminent if the prisoner has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the conviction and sentence and the Tennessee Supreme Court has set an execution date.

(i) An attorney who seeks to be appointed as lead counsel or co-counsel in capital cases shall submit to the Administrative Office of the Courts a sworn application on a form prescribed by the Administrative Office of the Courts and approved by the Supreme Court. The application shall require the attorney to attach proof of his or her qualifications to the application.

(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 to the Administrative Office of the Courts interim claims for compensation as approved by the court in which such services are rendered. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered.

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

(1) Lead counsel--one hundred dollars ($100);

(2) Co-counsel--eighty dollars ($80);

(3) Post-conviction counsel--eighty dollars ($80).

(l) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

§ 4. Payment of expenses incident to representation.

(a) (1) Appointed counsel, shall be reimbursed for overhead expenses directly related to the representation of indigent parties at a rate of twenty dollars ($20) per hour reasonably spent and reasonably necessary without limitation.

(2) The following expenses for appointed counsel, experts and investigators will be reimbursed without prior approval if reasonably necessary to the representation of the indigent party:

(A) Mileage for travel within the state in accordance with Judicial Department travel regulations, if supported by a log showing the mileage, the purpose of the travel, and the origination and destination cities;

(B) Lodging at actual costs, not to exceed the current authorized state rate ($70), if supported by a receipt, where an overnight stay is required;

(C) Meals in accordance with the Judicial Department travel regulations is supported by a receipt, where an overnight stay is required;

(b) Expenses not listed in section 4(2), including travel outside the state and copying expenses in excess of five hundred dollars ($500), will be reimbursed only if prior authorization is obtained from the court in which the representation is rendered and prior approval is obtained from the director.

(1) Authorization of expenses shall be sought by motion to the court.

(2) The motion shall include both an itemized statement of the estimated or

anticipated costs and specific factual allegations demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party.

(3) The court shall enter an order that evidences the action taken on the motion. If the motion is granted, the order shall either recite the specific facts demonstrating that the expenses are directly related to and necessary for the effective representation of the indigent party or incorporate by reference and attach the defense motion that includes the specific facts demonstrating that finding.

(4) The order and any attachments shall be submitted to the director for prior approval before any expenses are incurred.

(c) The director is hereby authorized to reimburse the Department of Children's Services at the Judicial Department rate for the expense of transcripts in termination of parental rights appeals without obtaining prior approval by court order in each case.

§ 5. Experts, investigators, and other support services.

(a) At all critical stages of a criminal prosecution, in the trial and direct appeals of all criminal cases involving indigent parties, in the trial and direct appeals of post-conviction proceedings involving indigent petitioners, in trial and direct appeals of parental rights termination cases, in trial and direct appeals of dependency and neglect, and juvenile delinquency proceedings involving indigent petitioners, counsel, including public defenders, may seek investigative, expert, or other similar services.

(b) When requesting funding for expert or investigative services or other similar services, counsel may file *ex parte* the motion seeking such funding.

(1) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, and qualifications, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location, if known, at which the services are to be provided; and

(D) a statement of the anticipated itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(2) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) an itemized list of anticipated expenses for the investigation;

(C) the name and address of the person or entity proposed to provide the services; and

(D) a statement indicating whether the person satisfies the licensure requirement of this rule.

(3) If a motion satisfies these threshold requirements, the trial court must conduct an *ex parte* hearing on the motion.

(c) (1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

(2) Particularized need in the context of criminal trials and appeals is established when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial.

(3) Particularized need in the context of post-conviction proceedings is established when a petitioner shows by reference to the particular facts and

circumstances of the petitioner's case that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See TRPC 3.7

(d) (1) The director and/or the chief justice shall maintain reasonable uniformity as to the rates paid individuals or entities for services provided to indigent parties, although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:

(A) Accident Reconstruction $115.00
(B) Medical Services/Doctors $250.00
(C) Psychiatrists $250.00
(D) Psychologists $125.00
(E) Investigators (Guilt/Sentencing) $50.00
(F) Mitigation Specialist $65.00
(G) DNA Expert $200.00
(H) Forensic Anthropologist $125.00
(I) Ballistics Expert $ 75.00
(J) Fingerprint Expert $ 75.00
(K) Handwriting Expert $ 75.00

(2) Time spent traveling shall be compensated at no greater than fifty percent (50%) the approved hourly rate.

(3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee, except when an investigator licensed in another state is authorized by a court in Tennessee to conduct an investigation in that other state.

(4) Polygraph tests whose results are not admissible as evidence shall not be authorized or compensated.

(e) (1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the authorization shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).

(2) The order shall include a finding and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).

(3) The court may satisfy the requirements of this subsection by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.

(4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director for prior approval.

(5) If the director denies prior approval of the request, or the request exceeds five thousand dollars ($5,000) per expert, or the hourly rate exceeds the presumptive rate in section 5(d)(1), the claim shall also be transmitted to the chief justice for disposition and prior approval.

§ 6. Review of claims for compensation and reimbursement of expenses.

(a) (1) Claims for compensation and reimbursement shall be filed on approved forms with the Administrative Office of the Courts.

(2) Time spent by counsel on a single case or single proceeding shall be included in a single claim for compensation.

(3) Claims shall be supported by a copy of the court order appointing counsel or

authorizing the expenditure, by a copy of the approval of the director and/or the chief justice, where required, and by the certification of counsel that the services authorized by court order have been rendered.
(4) Counsel will be held to a high degree of care in the keeping of records supporting all claims and in the application for payment. Failure to provide sufficient specificity in the claim or supporting documentation may constitute grounds for denial of the claim for compensation or reimbursement.

(b) (1) The Administrative Office of the Courts shall examine and audit all claims for compensation and reimbursement to insure compliance with this rule and other statutory requirements.
(2) After such examination and audit, and giving due consideration to state revenues, the director shall make a determination as to the compensation and/or reimbursement to be paid and cause payment to be issued in satisfaction thereof.
(3) Payment may be made directly to the person, agency, or entity providing the services.
(4) If the director denies, changes or otherwise modifies the order of the trial court approving the request of counsel for the indigent party, the director shall state the reason(s) for the denial, modification or change in writing. A copy of such denial, modification or change shall be sent to the counsel for the indigent party making the request. Counsel shall then have thirty (30) days to petition the chief justice for review of the action(s) of the director.
(5) Confidentiality. All requests for services, approvals of services, requests for payments of services, and payments for services provided pursuant to this Rule are deemed to be non-public records. All such information shall be kept and remain confidential and privileged unless and until, it becomes pertinent to a disciplinary or malpractice proceeding.

§ 7 Spoken Foreign Language Interpreters and Translators –
(a) The reasonable costs associated with an interpreter's and/or translator's services will be compensated when a trial court finds, upon motion of counsel, or sua sponte when counsel has not been appointed, that an indigent party has limited English proficiency ("LEP"). The term "interpret" refers to the process of transmitting the spoken word from one language to another. The term "translate" refers to the process of transmitting the written word from one language to another.
(b) This section rather than Tennessee Rule of Criminal Procedure 28 applies when an indigent party requires the services of a spoken foreign language interpreter.
(c) Compensation rates for spoken foreign language interpreters shall not exceed the following: Certified Interpreters - $50 per hour; Registered Interpreters - $40 per hour; Non-credentialed Interpreters - $30 per hour. If the court finds that these rates are inadequate to secure the services of a qualified interpreter, the court shall make written findings regarding such inadequacy and determine a reasonable rate for a qualified interpreter.
(d) Time spent traveling shall be compensated at no greater than fifty (50) percent of the approved hourly rate.
(e) Mileage, lodging, meals, and parking expenses may be reimbursed as provided in Section 4(a)(2)(E).
(f) The court shall determine if it is reasonably necessary for documents to be translated as part of assuring adequate representation of an indigent party with LEP. Document translation shall be compensated at no more than twenty (20) cents per word. If the court finds that these rates are inadequate to secure the services of a qualified translator, the court shall make written findings regarding such inadequacy and determine a reasonable per word translation rate.

(g) Claims for compensation of interpreters and translators shall be submitted to the Administrative Office of the Courts on forms provided by the Administrative Office of the Courts.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RECEIVED
JAN 23 2004
Clerk of the Courts
Rec'd By

IN RE:	PROPOSED AMENDMENTS TO SUPREME COURT RULE 13	)))))	NO: M2003-02181-SC-RC2

FILED
JAN 23 2004
Clerk of the Courts

COMMENTS OF THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS TO PROPOSED AMENDMENTS TO SUPREME COURT RULE 13

TENNESSEE ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
810 Broadway, Suite 501
Nashville, TN 37203

ORAL ARGUMENT REQUESTED

A. Overview of TACDL

The Tennessee Association of Criminal Defense Lawyers (TACDL) is a nonprofit statewide organization with more than 800 members, including private criminal defense lawyers and public defenders. Founded in 1973, TACDL is one of the state's leading organizations advancing the mission of criminal defense lawyers to protect and ensure the individual rights guaranteed by the United States and Tennessee Constitutions in criminal cases. TACDL seeks to promote justice and the common good and to provide assistance to its membership in the field of criminal law. TACDL implements these objectives by providing continuing legal education programs, regularly publishing legal articles for its membership, hosting a criminal law eGroup for members, providing recent information about legislation relating to defense issues, and by providing assistance to the members in their representation of clients. TACDL is committed to advocating fair and effective criminal justice in the courts, the legislature, and wherever justice demands.

TACDL also appoints special committees to study and recommend changes to proposed rules, such as the one at bar. An Ad Hoc Rule 13/GIDEON Committee was formed by TACDL with the express purpose of reviewing and commenting on proposed amendments to Supreme Court Rule 13. The comments of TACDL to proposed amendments are the work of many TACDL members, including the co-chairs of the Rule 13/GIDEON Committee, Jerry P. Black, Jr. and Michael J. Passino and additional liaisons, Donald E. Dawson and Mark Stephens, to the joint committee studying Rule 13 spearheaded by the Tennessee Bar Association.

B. Initial Comment

The primary purpose of Rule 13 should be to ensure compliance with the constitutional requirements recognized in Gideon v. Wainwright, 372 U.S. 335 (1963). Providing an attorney to indigent citizens is not enough. Counsel must be properly trained, must be adequately compensated, and must have access to sufficient resources if they are to provide effective assistance.

Rule 13 has a tremendous impact on many people working in the criminal justice system. The first comment by TACDL is that this proposed version of Rule 13 should not be implemented in its present form. TACDL supports the proposal by the Tennessee Bar Association, The Public Defender's Conference, and The Post-Conviction Defender Commission to create an independent agency, the Tennessee Indigent Representation Service (TIRS), within the Judicial Branch with the authority to oversee the delivery of counsel and related services at state expense.

TACDL fully agrees with the Joint Proposal of the Tennessee Bar Association, The Public Defender's Conference, and The Post-Conviction Defender Commission (hereafter referred to as the "Joint Proposal") which advocates increasing compensation, increasing caps, and paying overhead for counsel for indigent persons not represented by the public defender or the post-conviction defender.

TACDL advocates the Joint Proposal recommendation that the Court adopt standards for qualification of counsel which are consistent with the ABA Criminal Justice Standards: Defense Function and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter referred to as the "ABA Death Penalty Guidelines").

TACDL urges the Court to adopt the Joint Proposal recommendation that the courts maintain procedures for defense counsel -- without consultation, notice, or participation of the prosecutor --

to request appointment of and reimbursement for investigative and expert services necessary to provide effective representation of indigent parties.

TACDL agrees with the Joint Proposal recommendation that compensation rates for investigators, experts, and interpreters must be adequate to allow indigents to obtain necessary services.

Finally, TACDL respectfully submits that the Joint Proposal comments to the changes in Rule 13 proposed by the Tennessee Supreme Court do not go far enough to fulfil the promise of Gideon v. Wainwright in the areas set out below.

C. Section 3. Minimum Qualifications and Compensation of Counsel in Capital Cases.

The Proposed Rule 13, Section 3 "Minimum qualifications and compensation of counsel in capital cases" is inconsistent with the ABA Death Penalty Guidelines. The Guidelines have been found by the Sixth Circuit to be "the same type of longstanding norms referred to in *Strickland* [*v. Washington,* 466 U.S. 668] in 1984 as 'prevailing norms' . . ." Hamblin v. Mitchell, ___ F.3d ___ (6th Cir. Dec. 29, 2003), 2003 WL 23024784, sl. op. at p. 4. "The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.*" *Id.*

The qualifications for lead counsel and for co-counsel are insufficient to ensure quality representation in death penalty cases. While the proposed rule increases the numbers and kinds of cases that must be handled by appointed counsel, the rule fails to ensure that the work performed by these attorneys is quality work. The standards are quantitative only. In fact, the effect of the quantitative standards does not filter out from the pool those attorneys who fail to adequately establish a rapport with their respective clients, who fail to adequately investigate the case, who fail

to develop meaningful mitigation on behalf of their clients, and who, as a result, are forced to go to trial. Because those attorneys try cases that could otherwise be resolved, they meet the quantitative standards set forth in section 3 but fail to effectively represent their respective clients. If a case has to be tried, the attorney trying the case needs trial experience. However, mere numbers do not equal quality representation.

The ABA Death Penalty Guidelines call for an independent agency to develop standards for defense counsel in capital cases. The independent agency is responsible for: (1) establishing qualifications for the appointment of counsel; (2) ensuring that the attorneys on the panel have the requisite skill and knowledge in all phases of capital representation so as to provide high quality representation; (3) requiring effective training for panel attorneys' (4) monitoring the performance of attorneys handling capital cases; and (5) removing attorneys from the panel who fail to meet standards set by the agency. TACDL believes that the current Joint Proposal does not give any agency enough authority to do what needs to be done with regard to providing a pool of attorneys who can consistently fulfil the constitutional mandate to provide effective assistance. The proposed rule should establish an independent agency (or give the requisite power to TIRS) to provide the necessary quality control set out in the ABA Death Penalty Guidelines.

Proposed Rule 13 also designates the public defender as lead counsel in a capital case whenever the public defender meets the qualifications set forth in the rule. The ABA Death Penalty Guidelines set out the duties of lead counsel. This attorney is charged with the responsibility of directing the capital case. TACDL is of the opinion that lead counsel designation should turn on the attorney who is best qualified to direct the case and not on mere fiscal concerns.

D. Section 5. Experts, Investigators, and Other Support Services.

1. Response to Commentary by the District Attorneys General

TACDL agrees with the recommendations of the Joint Proposal concerning experts, investigators and other support services but believes it is necessary to respond to the comments of the District Attorneys Conference. TACDL vehemently disagrees with the district attorneys general regarding ex parte proceedings. To restrict in any way counsel's ability to present ex parte requests for expert, investigative, or other support services, creates a system that we respectfully suggest is unethical, unconstitutional, unfair, and unnecessary (see further discussion of this issue in subpart D 2, below).

Before considering some of the specific provisions of the proposed rule, it should be noted that the district attorneys general and the state attorney general do not at any time have to ask a court for permission to fund investigative or expert services. For investigation, the state has at its disposal all of the massive law enforcement agencies of the state, counties, and municipalities, as well as the law enforcement agencies of the federal government and other states. When the State needs experts, it may rely first upon state or local resources, e.g., medical examiners, the Tennessee Bureau of Investigation (TBI), and mental health entities (Memphis Mental Health Institute, Middle Tennessee Mental Health Institute, Moccasin Bend Mental Health Institute). If the district attorneys general and the state attorney general need additional expertise, they look to their own budgets or other statutory

funding[1] and retain experts for consultation and testimony where it will advance their cause without restrictions upon the location of the expert or the hourly rate charged by that expert.[2]

TACDL also does not agree that the district attorneys general have the requisite standing to intervene in matters of indigent funding. Aside from the formidable considerations of Equal Protection, attorney client privilege and work product, there is no harm to the district attorneys general even upon an erroneous grant of support services to an indigent defendant. The defense bar has no right to engage in adversarial proceedings to contest whether and how much money the district attorneys general spend on a given case for investigation or experts and the district attorneys general should have no say in determining what resources are adequate for the effective assistance of counsel. The district attorneys' adversarial participation in what support services an indigent may be constitutionally entitled to also raises serious Separation of Powers[3] issues whereby representatives of the Executive Branch of government seek to interfere with inherently judicial matters.

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[1] *See*, e.g., Tenn. Code Ann. § 40-3-202(2) which provides that the district attorneys general may hire "expert witnesses, including, but not limited to, computer specialists, as the need arises."

[2] For example, in the Ronnie Cauthern death penalty post-conviction case in 2001, the District Attorney's Office paid over $20,000.00 for the testimony of an international law expert from Washington, D.C. and also flew in a psychologist for expert testimony from the non-contiguous state of Florida.

[3] Tennessee Constitution Article II, Section 1, states that "the powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and Article II, Section 2, states that "no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." The doctrine of separation of powers, as set forth in these two sections of the Tennessee Constitution, "is a fundamental principle of American constitutional government." Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975).

2. The Need for Ex Parte Proceedings

Proposed Rule, Section 5 (a)(2) and (3) should be changed so that the rules regarding the ex parte presentation of motions for investigative, expert or other services in the current version of Rule 13 remain the same. The Proposed Rule 13 impinges upon defense counsel's ability to effectively represent his or her client by allowing the trial court to require counsel to serve a copy of the motion for expert services upon the prosecution and allowing the state to oppose the motion in open court.

First, the fair opportunity to present a defense, affirmed by this Court in State v. Barnett, 909 S.W.2d 423 (Tenn. 1995), exists whether it is the defendant's life or liberty that is at stake. Second, Section 5 (a)(3) of the Proposed Rule is contrary to the logic of the Barnett decision which, in affirming the requirement of an ex parte hearing, states:

> Indigent defendants who must seek state-funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the identity of experts who are consulted, but who may not, or do not, testify at trial.

Id., 909 S.W.2d at 428.

Counsel is ethically obligated not to reveal client confidences and attorney work product under Rule 1.6 of the Rules of Professional Conduct without prior client authorization. Under the proposed rule, there is no assurance that these matters will be protected from disclosure to the prosecution. The proposed rule places the indigent defendant on an unequal footing with more affluent defendants by creating the possibility that the indigent defendant's counsel may be required to disclose privileged matters in order to be funded.

Third, counsel is ethically obligated to provide competent representation which requires "thoroughness, and preparation reasonably necessary for the representation." Rule 1.1, RPC.

Fulfilling this rule puts counsel in the untenable position of pursuing the resources necessary to fulfill this ethical obligation while at the same time taking steps that may significantly prejudice the client by disclosing the nature and factual circumstances of the client's defense.

Fourth, Section 5 (a)(3) of the Proposed Rule incorrectly cites State v. Barnett as supporting the proposition that the trial court is vested with the constitutional authority, in a non-capital case in which counsel is not seeking a psychiatric or psychological expert, to require such a disclosure and hearing. Barnett did not decide this question. To the contrary, the Barnett decision specifically made clear that it was expressing *no opinion* on whether an indigent defendant seeking a non-psychiatric expert could constitutionally be required to publicly disclose the expert request. *Id.*, 909 SW2d at 428 n.4 (noting that the North Carolina Supreme Court has not required ex parte hearings when an indigent defendant requests a non-psychiatric expert and expressing no opinion on that issue). Respectfully, the Court should refrain from creating this State's constitutional jurisprudence through a Court rule rather than on a case by case basis after full briefing of the merits.

3. Inclusion of Facts That Suggest the Investigation Will Result in Admissible Evidence

The requirement, pursuant to Section 5(b)(3)(B), that a motion seeking investigative or other similar services itemize "the specific facts that suggest the investigation will result in admissible evidence" appears to require counsel who has just been appointed to predict what the investigator will find before funds are approved to hire the investigator. Counsel cannot be prepared in the fashion contemplated by the Rules of Professional Conduct, the Sixth Amendment or Article I, § 9 of the Tennessee Constitution, without examining all possibilities to uncover evidence relevant to

the defense of the charges or their mitigation. *See* Williams v. Taylor, 529 U.S. 362 (2000)(finding counsel ineffective due to their failure to conduct an investigation which would have revealed extensive juvenile records detailing the defendant's nightmarish childhood which culminated in the imprisonment of the defendant's parents for abuse and neglect; had the attorneys done an appropriate investigation, this information would have been available for use as mitigating evidence).

Using the circumstances at issue in Williams, counsel in that case were unaware of what the juvenile records contained and thus could not have articulated in advance of the investigation that which they sought to uncover by conducting the investigation. Yet, the proposed Rule 13 appears to demand just that level of detail in the showing necessary to justify granting funds for an investigator. The other requirements the proposed rule imposes for motions seeking investigative or other similar services (the type of investigation, itemized list of expenses, etc.) are sufficient for the court to make a judgment as to its merits. Accordingly, subsection 5(b)(3)(B) requiring a showing as to the "specific facts that suggest the investigation will result in admissible evidence" should be omitted.

4. Exclusion of Funding Requests that "relate to factual issues or matters within the province and understanding of the jury"

The Proposed Rule's exclusion of funding requests that "relate to factual issues or matters within the province and understanding of the jury" in Section 5(c)(4)(C) should be omitted. First, this language is vague and subject to very broad interpretations by courts unjustifiably seeking to limit defense expert or investigative expenditures. Second, the admissibility of proffered expert testimony should be determined under applicable legal standards during a hearing. *See* Daubert v.

Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997). This issue cannot be resolved until the expert is retained, conducts an evaluation, and is able to inform counsel and the court of the precise parameters of their anticipated testimony.

The inclusion of this language implies that the question of admissibility should be decided during the process of determining whether the expert will be retained. Even in areas where there is existing jurisprudence concerning the admissibility of certain expert testimony, such as addressing eyewitness identification issues, there are circumstances where such testimony may be admitted. *See* State v. Coley 32 S.W.3d 831 (Tenn. 2000)(general and unparticularized expert testimony concerning the reliability of eyewitness testimony is not admissible but testimony that is specific to the witness whose testimony is in question may be admissible). Without access to the expert in the first instance, there will no opportunity to offer such evidence at trial.

Finally, the proposed rule leaves no room to litigate changes in the law as to what is actually within the province and understanding of the jury. Coley itself is a controversial decision that is contrary to the law of a number of other states.[4] If science has taught us anything, it is that what is perceived as common wisdom one day can be debunked tomorrow due to advances in the application of scientific methodologies. If a litigant can make a sufficient case for an expert to challenge whether the matter at issue is within the province and understanding of the jury, then support services should be approved. Otherwise, the law in Tennessee will stultify and fail to evolve with changing times and circumstances.

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[4] For a collection of cases on this issue, *see* 46 A.L.R.4th 1011, "Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony."

5. Exclusion of Funding for Any Services That "fall within the capability and expertise of appointed counsel, such as interviewing witnesses"

Proposed Rule Section 5(c)(4)(D) excludes funding for any services that fall within the capability and expertise of counsel and specifically identifies the task of interviewing witnesses as such a responsibility. This rule precludes the authorization of any investigative assistance for appointed counsel to interview witnesses. This extreme step does not take into account counsel's constitutional and ethical obligations, or the applicable professional standards. Since a lawyer has no way of knowing which interview(s) of a witness may force the lawyer to be a witness at trial, having the attorney do all interviews of witnesses without an accompanying investigator is like playing craps with the rules of ethical conduct. Due to the devastating implications of this rule's prohibition on the authorization of investigative assistance, it will be addressed in detail.

As the United States Supreme Court articulated in Strickland v. Washington, *supra*, the essence of the right to a fair trial is provided for in the Sixth Amendment, including the right to counsel.

> [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."

Id. 466 U.S. at. 685 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942)). The right to the assistance of counsel envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. It is for this reason that the United States Supreme Court has recognized that "the right to counsel is the right to the

effective assistance of counsel." *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970).

Without the ability to investigate the facts, counsel cannot provide the defendant with an opportunity to meet the case of the prosecution and thus play the constitutionally envisioned role critical to the ability of the system to produce just results. Accordingly, counsel has a constitutional obligation to make a reasonable investigation of the facts of the case or make a reasonable decision that makes particular investigations unnecessary. Strickland v. Washington, 466 U.S. at 680, 691. This duty encompasses the investigation of all plausible lines of defense before a strategic decision is made to rely upon one at trial. *Id.* 466 U.S. at 681. This is because reasonably effective assistance must be based upon "professional decisions and informed legal choices [that] can be made only after investigation of options." *Id.* 466 U.S. at 680. *See also* Wiggins v. Smith, 123 S.Ct. 2527 (June 26, 2003)(counsel's decision not to further investigate defendant's background fell short of prevailing professional standards because their decision was based on inadequate information).

This Court has made it clear that the right to effective assistance of counsel encompasses counsel's obligations to investigate in order to determine what matters of defense can be developed. In 1975, this Court abandoned the previous standard gauging the competency of counsel, which required that in order to be constitutionally ineffective, counsel's representation had to be so deficient that it rendered the trial "a farce, sham, or mockery of justice." Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). In doing so, this Court quoted extensively from the District of Columbia's opinion in United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), in discussing the standards that should measure counsel's obligations. With regard to the obligations to investigate the case,

Baxter quoted DeCoster and its discussion of the American Bar Association Standards for the Defense Function, as follows:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. Baxter v. Rose, 523 S.W.2d at 933 (quoting *DeCoster*, 487 F.2d at 1203-1204).

Counsel's obligations to investigate the case have been reaffirmed by this Court recently. "A key aspect of counsel's performance pertinent to the allegations raised in this case is counsel's duty to investigate. Defense counsel 'must conduct appropriate investigations, both factual and legal,' and 'must assert them in a proper and timely manner.'" Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002)(quoting *Baxter v. Rose*, 523 S.W.2d at 932, 935).

The American Bar Association Standards, which this Court has cited with approval, endorse the same standard when it comes to the obligation to investigate the case:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

American Bar Association Standards for the Defense Function, Standard 4-4.1, Duty to Investigate.

The obligation to undertake a thorough investigation of the facts of a criminal case is a primary component of professional standards imposed by numerous organizations beyond the American Bar Association. *See* Compendium of Standards for Indigent Defense Systems – A Resource Guide for Practitioners and Policy Makers, Vol II Standards for Attorney Performance.

(This document compiles performance standards from indigent defense providers around the country, including the component of a thorough factual investigation as a basic component of providing competent representation to clients. This compendium was prepared by the Institute of Law and Justice and supported by a contract with the Bureau of Justice, United States Department of Justice.[5])

The ABA Death Penalty Guidelines are explicit in calling for an independent investigator to interview witnesses. Guideline 4.1 – the Defense Team and Supporting Services, Commentary, The Team Approach to Capital Defense, provides:

> A. The Investigator
>
> The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, ***the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation***. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. ***Moreover, the defense may need to call the person who conducted the interview as a trial witness***. [*See infra* Guideline 10.7 and accompanying Commentary] As a result, an investigator should be assigned as part of the defense team in every capital trial and post-conviction proceeding.

(emphasis added).

Guideline 10.7 – Investigation, Commentary. 2. Potential Witnesses provides, in pertinent part:

> b. ***Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews***. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

(emphasis added).

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[5] Located online at www.ojp.usdoj.gov/indigentdefense/compendium/standardsv2/welcome.html

Counsel also has ethical obligations which require a thorough investigation of the facts of a case. Rule 1.1 of the Tennessee Rules of Professional Conduct requires counsel to provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1. The comments to this Rule note that competent handling of a matter includes "inquiry into and analysis of the factual and legal elements of the problem, and the use of methods and procedures meeting the standards of competent practitioners." Comment 5, Rule 1.1.

A core component of the right to effective assistance of counsel is counsel's obligation to investigate the case in order to be prepared to meet the prosecution's case and make informed decisions as to tactics and strategy. Furthermore, counsel's ethical obligations and applicable professional standards cannot be satisfied without conducting a thorough investigation which requires the use of a trained investigator to fulfill those obligations effectively.

The prosecution has available to it law enforcement agents to conduct witness interviews without placing attorneys for the prosecution in the position of becoming witnesses themselves to what a witness said. Unless this Court provides mechanisms to fund the services of a private investigator, defense counsel will not have a third party available to conduct witness interviews.

A reasonable parity between the prosecution and defense function with regard to resources is a fundamental tenet of the adversarial system of justice. The American Bar Association has reaffirmed its commitment to such parity in adopting the Ten Principles of a Public Defense Delivery System in February 2002, which include a provision that all public defense contracts should separately fund expert and investigative resources.

The unavailability of a private investigator to conduct the interviews or be present when counsel conducts such interviews puts counsel in the position of fulfilling their responsibilities in a fashion inconsistent with their ethical obligations to avoid becoming a witness and, thus, performing those duties below professional standards. Rule 3.7 of the Tennessee Rules of Professional Conduct generally prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Lawyers who conduct witness interviews unaccompanied by an investigator almost assure they will become witnesses at trial because the cross examination will almost certainly include the need to use prior inconsistent statements made during the interviews. Further, if it becomes obvious that the lawyer or someone in the lawyer's firm needs to be called as a witness on behalf of the client, "the lawyer will be obliged to withdraw from the conduct of the trial and shall not continue representation in the trial." *See* DR 5-102(A). Withdrawal as Counsel When the Lawyer Becomes a Witness.

The American Bar Association Standards governing a lawyer's relationship to third party witnesses highlights this problem and makes clear that such an interview should not take place without the presence of a third party witness.

> (e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

American Bar Association Standards for the Defense Function, Standard 4-4.3 Relations with Prospective Witnesses.

The Court of Criminal Appeals has also noted this dilemma in the context of evaluating the question of a post-conviction petitioner's access to the services of an investigator.

> Since an attorney is limited in the contexts in which she or he can serve as lawyer and witness, Tenn. Sup.Ct. R. 8, Code of Prof. Resp. DR 5-101(B); 5-102, in many frequently raised issues petitioner will be unable to meet the standard of proof absent some support services. Counsel undertaking to investigate and interview the witnesses without the assistance of an investigator or without a third party present is denied effective impeachment if the witness' testimony at the hearing differs from statements made during the investigation. Consequently, those who are indigent post-conviction petitioners are, in effect, cut off from their ability to present a valid post-conviction claim in many contexts. Their inability is only as a result of their financial status. Their non-indigent counterparts who can afford to hire experts and investigators do not face the same barriers to the presentation of a valid post-conviction claim.

Owens v. State, No. 02C01-9111-CR-00259, 02C01-9204-CR-00094.(Tenn. Crim. App. 1994), 1994 WL 112997, rev'd on other grounds in part, 908 S.W.2d 92 (Tenn. 1995).

6. Caps on Fees for Experts and the Provision Allowing Only One-half Fee for Travel Time

The caps of fees for experts and the provision allowing only one-half fee for travel time will prevent counsel from securing necessary expert services. The proposed rule appears designed to ensure that counsel for indigent defendants are only able to retain investigators or experts with lower experience levels or fewer credentials. The caps imposed by this rule will enable counsel to secure services only from those investigators or experts who have a limited market for their services outside the area of indigent defense. This problem is further exacerbated by limiting billing for travel time to 50% of the hourly rate. For example, as corroborated by the Tennessee Medical Association comments, the $250.00 per hour cap for medical and psychiatric experts, is substantially below that which most medical experts charge. The $50.00 per hour cap for investigators is significantly below market as well.

Arbitrary caps on fees for investigators and experts is strongly criticized by the ABA Death Penalty Guidelines. *See* Guideline 9.1 – Funding and Compensation:

> C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
>
> 1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
> 2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
>
> ***Commentary***
>
> In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes, *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932)., "[g]overnment has the responsibility to fund the full cost of quality legal representation." ABA, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 & cmt. (3d ed. 1992). This means that it must "firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter." Pruett v. State, 574 So. 2d 1342, 1354 (Miss. 1990) (quoting Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987))

The caps as well as the mandatory reduction in billing for travel time should be omitted from the final rule in favor of a requirement that the rates charged for the services be reasonable in view of the nature of the expertise and the experience and credentials of the expert.

E. The Disparity Between Prosecution and Defense Services

There is a fundamental misconception in some quarters that Tennessee has a "Cadillac" indigent criminal defense system. The reality is very different. Of the $16,746,104.05 spent by the Administrative Office of the Courts on indigent services, only $11,895,149.32 can possibly be

attributed to defense of criminal cases whether adult or juvenile, at trial, on appeal, or in post-conviction. According to state budget figures, $26,233,000 will be spent on the Public Defenders Conference and $1,061,000.00 on the Post-Conviction Defender's office. The total of these three amounts is $39,189,149.00. When one compares it with the money available for prosecution the approximately $39 million dollars pales in comparison.

It is estimated that the Tennessee District Attorneys General and the District Attorneys General Conference will receive $44,706,600.00[6] in fiscal year 2003-2004 for duties related to criminal law. While the District Attorney Generals would like to characterize the Tennessee Bureau of Investigation as an independent agency,[7] their budget document states "[t]he Tennessee Bureau of Investigation (TBI) is responsible for assisting the *District Attorneys General and local law enforcement agencies* in the investigation and prosecution of criminal offenses." (emphasis added) The TBI budget for 2003-2004 is estimated to be $41,263,600.00.

The combined total for the District Attorneys General and the TBI is $85,970,200.00. This total does not include any of the monies allotted for local law enforcement, the agencies that investigate and prepare the cases for the prosecution. The State Attorney General's office handles all appeals for the prosecution, contributes to the prosecution of a select number of state death

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[6] The 2003-2004 Base Department Total for the all allotments for the District Attorneys is $55, 975, 500. TACDL has subtracted the allotment for Child Support Enforcement ($11,268,900) from that total.

[7] TACDL would note that the recent search committee to find a new Director for the TBI did not have on it any attorneys with a background in and commitment to criminal defense but, rather, it consists of : James W. "Wally" Kirby, Executive Director, Tennessee District Attorneys General Conference; Richard Fisher, a former Assistant District Attorney now in private practice in Cleveland, TN; A.B. Goddard, a civil practitioner in Maryville, TN (Martindale-Hubbell lists his areas of practice as "Probate and Estate Planning; Real Estate Law; Corporation and Commercial Law; Hospital Law"); Judge Robert Jones, a Circuit Court Judge in Maury County; and, Susan Short Jones, former Assistant State Attorney General and currently Corporate Counsel for Access Health Systems in Nashville.

penalty post-conviction cases, and handles in part or in whole all of the federal death penalty habeas corpus proceedings. The State Attorney General's office also has paid what would be considered extraordinary amounts for expert services if requested by the defense in state court, in federal death penalty habeas corpus cases.[8]

The Federal Bureau of Investigation (FBI) does a great deal of testing and analysis in assisting local law enforcement and supplies a myriad of experts to support the prosecution of criminal cases. The FBI has a national budget of 4 ½ *billion* dollars. for fiscal year 2003.[9] The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has as part of its official mission statement that it exists to "support and assist federal, state, local, and international law enforcement." The total budget authority available for use by ATF in fiscal year 2000 was $676 million. An additional $69.1 million was made available from other sources. The Drug Enforcement Administration (DEA) mission statement is, in part, to provide "coordination and cooperation with federal, state and local law enforcement officials on mutual drug enforcement efforts." The DEA was funded in the fiscal year 2002 in the astounding amount of $1.897 *billion* dollars.

In addition, access to the federal National Crime Information Center, the local 911 centers, and state motor vehicle registration records, all assist the prosecution in the investigation of their cases and are resources unavailable to defense counsel. If the indigent defense system is a Cadillac, the prosecution has at its disposal an aircraft carrier with a full fleet of fighter planes.

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[8] In a recent death penalty federal habeas case in middle Tennessee, the State Attorney General used a psychiatrist from Hawaii at $350 per hour, and a neuropsychologist from San Diego, California who was paid $250.00 per hour. Apparently, these two experts billed the state in that one case well in excess of $100,000.00.

[9] The federal law enforcement agencies mentioned above (FBI, DEA, ATF) do not provide any breakout of expenditures pertaining strictly to Tennessee, therefore, there are no Tennessee figures available for this Commentary.

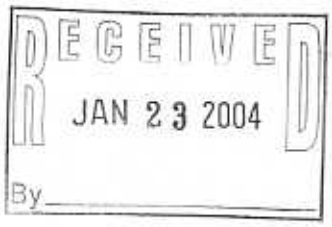
Respectfully submitted,

Paul J. Morrow, Jr.
President, Tennessee Association of
Criminal Defense Lawyers
BPR # 005559

Frank H. Einstein, Ph.D.

Sentencing Alternatives - Mitigation Analysis

January 23, 2004



Mike Catalano
Clerk Of The TN Court Of Appeals & TN Supreme Court
Attn: Janice Rawls
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401 7th Avenue North
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Re: Proposed revisions to Tennessee Supreme Court Rule 13

Dear Mr. Catalano:

I am writing in response to the proposed revisions to Tennessee Supreme Court Rule 13. I have worked as a self-employed mitigation specialist, in Tennessee and nearby states, since 1987 and have been retained on over 50 capital cases and numerous non-capital cases. The following comments focus primarily on how the proposed Rule 13 would affect the work of mitigation specialists working on capital cases. I have divided my comments into two sections, the first containing general comments and the second focusing on particular sections of the proposed rule.

General Comments

1. As a general rule, procedures instituted to provide for the defense of indigent persons charged with capital offenses should conform to the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003). In *Wiggins v. Smith* the U.S. Supreme Court referred to the standards set forth in the ABA *Guidelines* as "guides to determining what is reasonable."

2. Decisions concerning what resources are needed to provide an adequate defense for and assure the protection of the constitutional rights of an individual charged with a capital offense should be made on the basis of the defendant's showing of need for the requested services. The question of whether sufficient funds are available to provide needed services is a separate one and should be addressed separately. As the procedure now stands, these two issues are commingled . As a result, needed services can be denied for financial reasons. Decisions concerning the particular needs of a case and the availability of funds should be kept separate. I propose that these two decisions be kept separate by a structural change which would allow one entity to decide whether defense counsel has made an adequate showing of need for the requested services without considering the availability of funds. If the defense has made an adequate showing of need, then a second entity should make the decision on whether funding is available to provide the constitutionally required service. If funding is not available for the needed service, then the question of whether the state should be allowed to continue to pursue the case as a death penalty case should be considered. Without separating the issue of availability of funds from the question of constitutional requirements, abuses of defendants' constitutional rights are bound to occur.

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3. To the extent that the task of developing a comprehensive and reliable social history with the aim of discovering the mitigating themes in a client's life is open ended, the work of a mitigation specialist is different from that of other experts retained in a capital case. The commentary to Guideline 4.1 of the ABA *Guidelines* sums up the task of compiling the social history as follows:

   > The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation. (footnotes omitted)
   >
   > The task of compiling a social history is unique in that it is open-ended in nature. At the outset of the life-history investigation, the mitigation specialist usually does not know what the mitigating themes in the client's life are. To develop the mitigation in the case, the mitigation specialist must conduct a comprehensive investigation, interviewing as many people who have come into contact with the client and the client's family as can be located and obtaining and reviewing all life-history records, both of the client and of the client's family, that can be located. It is not possible to know, at the outset of the investigation, which of the individuals to be interviewed or which of the records to be reviewed will contain the crucial evidence necessary to developing the mitigation case. As a result, some of the requirements of the proposed Rule 13, which require that the defense articulate in the initial funding request the evidence to be sought cannot be met in the majority of cases.

4. Parts of the proposed Rule 13 revisions (for example the requirement to have prior approval for out-of-state travel and the restrictions on retaining out-of-state experts) have been put into practice in Tennessee since early 2003. In my experience, the delays in securing funding for out-of-state travel have adversely affected my ability to provide mitigation services in at least one case where there was a delay of several months between the time I requested funding for travel in a detailed affidavit, which included both the reasons for the out-of-state travel (primarily to interview family members and others who knew our client and his family) and a detailed budget. This delay impaired my ability to work effectively in two ways: (1) Because many of the family members and friends I wanted to interview are transient, homeless, or incarcerated, much of the contact information I had when I wrote the affidavit was outdated when I was able to travel, and (2) the delay eroded the trust I had been able to build up with our client and his family and friends. I had been telling them that I would be traveling to meet with them, but from their point of view, the months-long delay made me seem an untrustworthy person. This point is discussed further in the comments on proposed section 4(b) on page 4 of this letter.

Comments on Specific Sections of Proposed Rule 13

- Proposed section 3(a) defines a capital case as one where a defendant has been charged with first-degree murder and a notice of intent to seek the death penalty has been filed. This does not conform to Guideline 1.1(B) of the ABA *Guidelines*, which holds that the standards articulated in the ABA *Guidelines* apply from the moment a client who might face the death

penalty is taken into custody. This definition would directly affect a mitigation specialist's ability to work effectively at an early stage of a capital case if an *ex-parte* hearing on requested services of a mitigation specialist is denied according to the provision of proposed section 5(a)(3). Investigating mitigating factors at this early stage of a case can often allow defense counsel to present evidence to the prosecutor not to seek the death penalty.

- The requirement to maintain a log of long distance telephone calls [proposed section 4(a)(3)(A)] would be burdensome if it requires more documentation than is now required by the AOC. Currently the AOC requires copies of long distance phone bills, which include the number called, the date, time, and duration of the call. A requirement to maintain a log listing the purpose of each call in addition to the detailed bill provided by the long distance service would be very time-consuming and would drive up costs.

- If the requirement to maintain a mileage log [proposed section 4(a)(3)(B) calls for more information than is now required by the AOC (miles traveled, origin, destination, and purpose of travel), then this requirement is unnecessarily burdensome. The AOC does not now require maintaining a separate log. (The documentation of travel is included in the statement, submitted.)

- The limitation on reimbursement for lodging costs to $70 [proposed section 4(a)(3)(C)] does not cover all lodging costs, especially when tax is taken into account. If the intention of this clause is to encourage experts to take advantage of government rates offered by many motels, then the AOC should provide experts with an ID or a letter entitling them to those rates. Without such an arrangement, the $70 limit is often insufficient.

- Proposed section 4(a)(3)(D) concerning reimbursement for meals refers to Judicial Department travel regulations, but does not tell us how to find them. The language of this clause does not clearly say whether meals are to be reimbursed on a per diem basis (as they are now) or whether they will be reimbursed at actual cost when supported by receipts.

- Limiting reimbursement for outsourced copying to 10¢ per page [proposed section 4(a)(3)(F)] does not cover the actual costs charged by many institutions for copying records needed for life-history investigations. These include court files, hospital and other medical records, and prison records, among others, which are all essential to the development of a comprehensive and reliable social history. The institutions holding these records frequently charge considerably more than 10¢ per page and often add an additional service charge.

- Proposed section 4(a)(3)(J), requiring receipts for reimbursement of postage, means that the expert is expected to obtain a receipt for each letter mailed. This imposes an unnecessary burden of waiting in line in the post office for each letter mailed. While this may not seem to be a serious hardship, it is when the hourly rates paid to mitigation specialists are set at the low level of this proposed rule. This requirement will, in fact, add to the cost by causing the

mitigation specialist to mail letters inefficiently, spending working time standing in line in the post office.

- While the requirement in proposed section 4(b) to seek prior approval for travel outside Tennessee seems logical, the actual process of seeking approval from the trial court and the AOC has been immensely more complicated than expected, partly because of the degree of detail required, particularly for items such as air fare and motel rates, which fluctuate. As a result, seeking prior approval slows down the progress of preparing the defense and also adds significantly to the cost of preparing the case. Substantial delays in the preparation of the defense have been caused by the time which elapses between he submission of a travel request and the eventual approval of funding, a process which has sometimes taken months. The process adds significantly to the cost of the case when the mitigation specialist is expected to testify at hearings requesting funds. Travel to the trial court plus the time testifying at a hearing consumes time which does not advance the progress of the case.

  The most serious effect of a delay of weeks or months while waiting for authorization for travel outside Tennessee is the erosion of trust which had been built up between the mitigation specialist and the client and client's family. Trust is essential to the establishment of a relationship in which the sensitive issues often central to mitigation — including abuse, alcoholism and other substance abuse, poverty, abandonment, and incest — must be explored. If this trust is compromised, the client and family members will often not discuss the sensitive issues necessary to developing mitigation.

  The requirement to seek prior approval for travel outside Tennessee sometimes becomes illogical. For example, while a mitigation specialist does not need prior approval to travel from Nashville to Johnson City, he or she will not be compensated for travel from Chattanooga to Fort Oglethorpe without prior approval because that city, only a few miles from Chattanooga, is in another state. As mentioned earlier in this letter, this seems to be a case where funding restraints are inappropriately mixed with decisions on what resources are required to protect an individual's constitutional rights.

- Proposed section 5(b)(1)(C) and (D) require that a motion seeking funding for expert services itemize "the means, date, time, and location at which the services are to be provided" and "a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs." For mitigation work the means, date, time and location at which services are to be provided are frequently not known at the outset of work on the case. Part of the task of a mitigation specialist is to determine what the strands of mitigation are and where the potential witnesses and documents are that can support the mitigation. The itemized costs of these services are usually not known at the outset because we don't know who we have to interview, what records we have to request, and where we have to travel. In my experience, the process of interviewing individuals who have come into contact with the client and the process of reviewing of life-history records always leads to other persons who must be interviewed and additional records that must be obtained and reviewed. Mitigation specialists do not know the "itemized costs of the services" or "the amount of any expected additional or incidental costs" at the outset of the investigation when funding is requested.

Developing mitigation is a very different process from scheduling a specific test on the defendant or examining a particular piece of evidence. The proposed requirements of proposed section 5 (b)(1)(C) and (D) do not take these differences into account.

- The requirement to make every effort to obtain an in-state expert or an expert from a contiguous state [proposed section 5(b)(2)] and to explain efforts to obtain an expert from Tennessee or a contiguous state if an expert from elsewhere is requested imposes an unnecessary burden on attorneys and others on the defense team and does not take into account the difficulty in finding experts who are appropriate for the specific needs of the case and who are willing to work on court cases.

  When a mitigation specialist or other member of the defense team recommends a particular expert, that recommendation is made because the expertise and skills of the recommended expert match the particular needs of the case. Experts are not interchangeable. For example, not all psychologists will meet the needs of the defense team in a case where particular issues central to mitigation are identified. A case where mental retardation is a significant issue bearing upon the degree of a client's responsibility for his or her actions and the client's understanding of his or her rights when questioned by law enforcement officials will require a psychologist with specialized expertise and experience with individuals with mental retardation, while a client who grew up in a war-torn environment (for example southeast Asia during the 1970s) will likely require a very different psychologist or other mental health expert, one who is experienced in working with and understanding individuals who have grown up in such a traumatic environment and then emigrated to this country. Experts with such specialized areas of expertise often cannot be found in Tennessee. The problem is made more complicated because many experts are unwilling to work in a court setting.

  The requirement to explain the efforts made to obtain the services of an expert in Tennessee or a contiguous state imposes a significant burden on attorneys and other members of the defense team which drives up costs and does not advance the case.

- Proposed section 5(b)(3)(B) requires that a motion seeking funding must itemize "the specific facts that suggest the investigation will result in admissible evidence." In order to construct a comprehensive and reliable social history, mitigation specialists must obtain and review all basic life-history records, including, but not limited to, school records and medical records, even when there is nothing to suggest that the client has a learning or other cognitive problem or a medical or psychological problem that might have affected behavior or development and thus be potential mitigating evidence. The same reasoning applies to other categories of records.

  As explained in the general comments above, development of mitigation is an open-ended process, difficult to chart at the outset of the endeavor. In the majority of cases, the mitigation specialist does not know, at the outset of the investigation, what the mitigation themes in the client's life will be and therefore cannot predict what the life-history investigation will uncover. For the same reason, "the itemized list of anticipated expenses for the investigation" required by proposed section 5(b)(3)(C) is difficult to determine at the outset, when funding has to be requested.

- According to proposed section 5(c)(4)(D) particularized need cannot be established and funding request should be denied where the motion contains only "information indicating that the requested services fall within he capability and expertise of appointed counsel, such as interviewing witnesses." As written, this clause could be construed to men that mitigation specialists will not be granted funding to interview witnesses because attorneys can perform that task. If interpreted in this way, this restriction raises enormous problems. First, it seems to assume that any member of the defense team can interview a potential witness as easily as anyone else and that the mitigation specialist has no special interviewing skills which may uncover sensitive, embarrassing, and emotionally charged matters. Since mitigation interviews touch on such sensitive matters, a relationship of trust must be built up between the mitigation specialist and the person interviewed. This atmosphere of trust can only be built up by face-to-face encounters between the mitigation specialist and the person interviewed. Second, this clause could lead to a model of preparing mitigation in a case by committee. The ability to understand the significance of what a family member says (or does not say) often depends upon the accumulation of information and details (often non-verbal information) that is in the mind of the interviewer after interviewing and re-interviewing the client and others. This information, which is seldom articulated or reduced to writing in a memo, is crucial to understanding the nuances of what is said or not said in an interview. If a mitigation specialist is barred from conducting interviews, much important information will simply not be recognized, and the entire process of developing mitigation will be vitiated.

- The maximum $65 hourly rate for mitigation specialists authorized in proposed section 5(d)(1)(F) is lower than the prevailing rate charged by many mitigation specialists, especially experienced ones. The term "mitigation specialist" can cover different kinds of work performed by people with varying backgrounds and levels of experience. For example, some individuals confine their work to collecting records and interviewing people while others provide more comprehensive services including analysis of the social history and development of penalty phase strategy. The hourly rate charged varies according to several factors including: educational background; experience; the complexity of reports produced; the ability to develop the information into a comprehensive psycho-social assessment; the ability to work with and provide social history information to other experts; the ability to assist in developing penalty phase strategy; the ability to assist in witness preparation; and the ability of the mitigation specialist to testify when needed.

  The proposed hourly rate of $65, which is lower than that charged by many experienced mitigation specialists, conflicts with Guideline 9.1(C) of the ABA *Guidelines*, which state: "Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases." And further: "Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector."

  Setting the rate at $65 per hour will discourage experienced mitigation specialists from working in Tennessee and will further reduce the pool of mitigation specialists available for Tennessee cases.

- Proposed section 5(d)(2), which sets the rate for time spent traveling at 50% of the approved hourly rate will reduce the effective hourly rate earned by mitigation specialists even further, thus exacerbating the problem discussed above.

  One ambiguity in the language of this section concerns the question of what constitutes travel time. It is not clear whether travel time includes only intercity travel or whether it also includes the time driving to the home of a person to be interviewed or to a facility where records are located.

- Proposed sections 5(d)(4) and (5) place a cap on investigative and expert services in a post-conviction capital case to $20,000 and $25,000, respectively. This cap is not consistent with Guideline 4.1(B) of the ABA *Guidelines*, which states: "The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings." The commentary further elaborates on the necessity of providing the "'basic tools of an adequate defense'" in the following paragraph:

  It is crucially important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.

  Establishing caps for investigative and expert services in post-conviction cases does not meet the standard set by the ABA *Guidelines*. Since post-conviction cases require that the defense team investigate the mitigation preparation and courtroom presentation carried out in the original trial in addition to re-investigating the client's life history, it is likely that adequate preparation at post-conviction will be more costly than preparation for the original trial level case. It is also likely that mitigation specialists and other experts will be reluctant to work under the limitations of these proposed caps.

- Proposed section 6(b)(2) gives the director of the AOC the power to decide, after "due consideration to state revenues," whether or not to pay a claim for work that has been completed and was pre-authorized. It will be extremely difficult for a mitigation specialist or other expert who depends on earned income to accept work in Tennessee under these conditions.

Thank you for the opportunity to submit these comments. If you have any questions concerning these comments, I will be happy to answer them.

Sincerely,

Frank H. Einstein

Frank H. Einstein, Ph.D.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	PROPOSED AMENDMENTS TO SUPREME COURT RULE 13	)))))	NO.: M2003-02181-SC-RC2

COMMENTS OF THE TENNESSEE OFFICE OF THE POST-CONVICTION DEFENDER TO PROPOSED AMENDMENTS TO SUPREME COURT RULE 13

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ORAL ARGUMENT REQUESTED

A. Introduction

The Post-Conviction Defender Commission and the Office of the Post-Conviction Defender were established by the Tennessee legislature in 1995

> to provide for the representation of any person convicted and sentenced to death in this state who is unable to secure counsel due to indigence, and that legal proceedings to challenge such conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice.

Tenn. Code Ann. § 40-30-202 [2003 Repl.]. To carry out this legislative intent, the Office of the Post-Conviction Defender was assigned, as its principal duty, the representation of death sentenced inmates in state post-conviction proceedings. Tenn. Code Ann. § 40-30-206(a).

The experience of this Office provides us with a unique perspective of the issues raised by the Court's proposed Rule 13 as it pertains to the provision of counsel and services in death penalty cases and post-conviction proceedings. Since the Office was opened on April 1, 1996, we have directly represented 29 death sentenced inmates in state post-conviction, and in several other cases assisted in a manner that permitted us to gain significant knowledge concerning the performance of counsel at trial and on direct appeal.

Members of the staff of this Office have been directly involved in the preparation of the comments and recommendations that have been filed in this matter by the Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers. We fully endorse those comments and suggestions and will attempt not to repeat the commentary accompanying the recommendations of those organizations. Additionally, we are familiar with the memorandum filed by noted capital defense attorney William P. Redick, Jr. and the letter filed by former Public Defender's Conference

Capital Division attorney Kelly Gleason and endorse and adopt the arguments and suggestions made therein.

The Office of the Post-Conviction Defender will focus its remarks on the areas over which it is statutorily responsible and can provide unique insight - counsel and services in death penalty cases and post-conviction.

B. Appointing Qualified Counsel in Death Penalty Cases

1. The deficiencies inherent in Rule 13 as currently written and as proposed

Since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the goal of any system involving the imposition of the death penalty has been to avoid arbitrary sentences of death and to ensure reliable determinations by the decision maker. The knowledge, ability and commitment of defense counsel is fundamental to protecting the defendant from an arbitrary decision imposing the death penalty. If counsel does not possess all three of these qualities, an unreliable verdict is probable. There is nothing in the present Rule 13 or the changes proposed that address any of these necessary qualities.

The present and proposed rules speak only to quantitative experience, not qualitative ability. The proposed rule varies little from the present rule and requires counsel merely to meet requirements which have little with which to gauge an attorney's ability to represent a defendant facing a penalty of death. In the current and proposed Rule, the requirements for lead counsel[1] are:

(1) be licensed in Tennessee;

(2) have regularly represented defendants in criminal jury trials for at least three years;

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[1] The example used here involves the Rule 13 requirements for lead counsel. The requirements for co-counsel are also quantitative standards that are likewise insufficient to ensure the appointment of qualified co-counsel.

(3) have completed twelve hours in specialized training in the defense of defendants charged with a capital offense anytime during the attorneys lifetime; and

(4) have experience as lead counsel in the jury trial of one capital case, co-counsel in the trial of two capital cases, one capital case and as lead or sole counsel in the jury trial of one murder case, or lead or sole counsel in three jury trials in murder cases or one murder case and three felony cases.

It is necessary to examine the practical effect of who does and does not qualify under these standards. Consider the following hypothetical attorneys. The following two attorneys would not be qualified for appointment under Rule 13 as either lead or co counsel: (a) a nationally known and recognized death penalty trial attorney with experience representing defendants in capital cases throughout the United States, who lives in Bristol, Virginia, is licensed in Virginia, is a member of the bars of the federal district courts of Virginia, the Fourth Circuit, and the United States Supreme Court and lectures regularly in national and Tennessee death penalty seminars; (b) a civil attorney licensed in Tennessee and has prepared for the trial – including the sentencing phase – of ten capital cases but who, due to diligent motions practice, the creation of a good relationship with the client, a reputation for winning in complex civil trials, and strong negotiation skills, has settled all ten cases for sentences less than death.

However, an attorney who has never obtained a sentence other than death in a capital case, never worked with an expert witness, never made an opening statement in the penalty phase or presented penalty phase evidence other than putting the client and his family on to plead for the

client's life,[2] and last attended a death penalty related seminar in 1980 would be eligible for appointment as long as he or she is licensed in Tennessee. In short, the proposed rule requires only "experience" rather than skill, knowledge or commitment.

2. The Tennessee experience from the perspective of post-conviction counsel[3]

The above description of the attorney who would qualify as appointed counsel is based upon the actual experience of the undersigned in handling post-conviction cases for death sentenced inmates. We repeatedly find cases in which plea offers were made but counsel never took or had the time to establish a working relationship with the client, or the client's family. Consequently, the client never developed the trust necessary to accept the attorney's advice to accept the plea offer. In many cases, it is only the client's mother or father who has met anyone involved in the client's case before trial. Often, no one working for the client has visited the neighborhood in which the client lived or was raised. It is only in a very few cases that even a rudimentary social history has been prepared. In some cases, no expert services were requested. In many other cases, experts were approved but the attorneys provided no guidance or essential information for the experts' evaluation. Yet, each of the attorneys involved was fully qualified as lead counsel under the present and proposed Rule 13. From the vantage point of post-conviction counsel, it is evident that many attorneys qualified under Rule 13 and appointed in capital cases in Tennessee lack the skill, knowledge and/or commitment to handle death penalty cases.

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[2] The practice of calling only relatives or close friends to provide shallow testimony that the defendant is a "good person" and "please don't kill him" is as widespread in Tennessee as it is ineffectual.

[3] Because the examples presented throughout this commentary involve cases that are still pending in the post-conviction or appellate courts, the descriptions, while accurate, are intentionally presented in non-specific fashion.

3. Appointment by the courts is unworkable

Allowing the judiciary to appoint defense counsel in death penalty cases is inherently flawed. The history of court appointments in capital cases in Tennessee demonstrates that judicial appointments cannot ensure the appointment of counsel qualified as defined by the *ABA Guidelines*. Under any system of judicial appointment, arbitrary decisions and unreliable death sentences will persist.

A court has no real basis for determining who is truly qualified and who is not. Most judges in Tennessee have never served as defense counsel in a capital case. Many have never served as defense counsel in a criminal case. In addition, too many appointing courts are influenced by such things as whether the lawyer will move the docket along, file complicated motions for expert services, or interrupt the smooth flow of the judicial machinery.

The vantage point of the trial judge does not permit an evaluation of the thoroughness or the effectiveness of the preparation. If the court is unaware what evidence was available and not presented, what questions could have been asked but were not, or what expert testimony would have been helpful but was neither requested nor presented, the court may mistakenly believe the attorney is both qualified and committed, when neither is true. The court is further misled by the existence of quantitative standards which the attorney meets. The appointing court needs a monitoring agency to create a panel of attorneys who have the actual knowledge, skill and commitment to defend a capital case, and who can provide a consistency of representation across the state that is currently lacking.

4. The solution requires an independent appointing authority

The *ABA Standards for the Appointment and Performance of Defense Lawyers in Death*

Penalty Cases, February 2003 (hereinafter *ABA Guidelines*) provide the solution to what appears to be an intractable problem. This Office submits that the joint TIRS proposal of the Tennessee Bar Association, District Public Defender's Conference, the Tennessee Association of Criminal Defense Lawyers and the Office of the Post-Conviction Defender (hereinafter "the Joint Proposal" or "TIRS") would provide an appropriate independent appointing authority.

The *ABA Guidelines* speak directly to this issue, warning that quantitative requirements are insufficient and noting the need for measuring skill and commitment. The commentary to Guideline 5.1 states:

> As described in the Commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ form those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.

The *ABA Guidelines* also stress the need to consider both skill and commitment. *Id.* The Guidelines further emphasize the need for an appointment authority that is independent of the courts. Guideline 3.1 states:

> A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines, for:
>
> > 1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and
> >
> > 2. performing all the duties listed in Subsection E (the "Responsible Agency").

> B. **The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.**

(Emphasis added.)

It is important to note the Joint Proposal contains a significant limitation on providing adequate counsel to all death eligible defendants. It applies only to appointed counsel other than attorneys from public defender offices. The exemption of public defender offices was the result of the attempt to achieve consensus for the Joint Proposal. The Public Defender's Conference has steadfastly insisted on absolute independence and has refused to accept any oversight from the proposed Commission under TIRS.

The position of the Public Defender's Conference is antithetical to the *ABA Guidelines.* Subsection C to Guideline 3.1 directs that:

> **C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:**
>
> Defender Organization
>
> 1. A "defender organization," that is either:
>
> a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
>
> b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
>
> Independent Authority
>
> 2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in

capital representation.

The Joint Proposal falls short of this requirement by failing either to create a jurisdiction-wide capital trial office or to place the public defenders handling capital cases under the supervision of the TIRS director.[4] This shortcoming will continue the problems in the provision of counsel to defendants facing the death penalty in Tennessee that currently render our death penalty system arbitrary and unreliable.

In summary, TIRS is the appropriate model to provide adequate counsel; however, without supervision over the qualifications and performance of public defender attorneys in capital cases it cannot achieve the necessary goal of ensuring the appointment of qualified counsel for all indigent capital defendants.

C. Appointing qualified counsel in death penalty appeals and post-conviction

Under both the present and proposed Rule 13, the requirements for appellate and post-conviction counsel are also quantitative only, with no regard for skill, knowledge or commitment. For example, one requirement is that counsel appointed on appeal must have "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." Proposed Rule 13, Section 3(g). Consider again the hypothetical attorney in Section B who qualified by attending a capital case seminar in 1980, and

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[4] The observation of this Office is that in many instances public defender attorneys, even those in local public defender capital trial units, lack the necessary commitment, skills and/or knowledge to provide quality representation in capital cases and often have caseloads that prevent adequate preparation. In one case, the public defender testified that, at the time of the capital trial, his office had three attorneys responsible for five counties and it was simply impossible to set aside the time necessary for adequate preparation.

has handled numerous trials and appeals in capital cases. Consider that he has never filed a brief in a capital case exceeding a total of 20 pages or raising more than five issues at least two of which claim the insufficiency of the evidence. In addition, he has consistently failed to argue that the errors constitute a violation of the federal constitution and has never argued that any part of the death penalty statute was unconstitutional. In short, counsel has never met the performance standards of the *ABA Guidelines* (either the 1989 or 2003 versions); yet, counsel continues to be qualified for appointment under Rule 13.

Alternatively, consider an attorney who is in the litigation section of a major civil firm. She was editor of the law review while in law school, clerked for a justice on the United States Supreme Court and, during law school, had a summer internship with a capital case resource center. She is licensed and practices in the District of Columbia and has never been counsel of record on the appeal of a criminal case although she assisted counsel in the preparation of several briefs in both state and federal court during her internship. She is well aware of the obligation to constitutionalize and federalize appellate issues and to raise all issues that may obtain relief in some court during the later post-conviction or federal review of the death sentenced inmate's case. Regrettably, she is not eligible for appointment.

Again, from the experience of the attorneys in this Office, the first performance description is not without precedent. We have repeatedly seen appellate briefs that fail to constitutionalize issues and, thus, result in their waiver. We have repeatedly seen briefs that are 7, 11, or 15 pages, including the statement of the case and the statement of the facts. We have repeatedly seen briefs that fail to raise any challenge to the constitutionality of the death penalty, the jury instructions, or other issues which may at some point gain relief.

The *ABA Guidelines* provide, "Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and international law governing death penalty cases, including issues that are 'percolating' in the lower courts but have not yet been authoritatively resolved by the Supreme Court." Commentary to Guideline 1.1.

Significantly, the *ABA Guidelines* do not differentiate between trial, appeal and post-conviction counsel with regard to the requirement that counsel possess the necessary skill, knowledge and commitment to handle a capital case. Because Rule 13 does not require any evaluation of counsel's performance or counsel's commitment, the requirements of the Rule fail to promote the reliability of the convictions and death sentences in Tennessee capital cases. By permitting the continued appointment of counsel who regularly fail "to raise every legal claim that may ultimately prove meritorious" and continually fail to preserve constitutional issues, Rule 13 actually subverts the effort to create a reliable capital case system in this state. Such a result is in direct opposition to the requirements of *Furman* and its progeny.

As an example of the inherent problem of appointment by the judiciary under Rule 13, consider the following recent case in which the post-conviction court refused to appoint the Office of the Post-Conviction Defender and instead appointed a local attorney who is on the list of qualified attorneys to handle post-conviction cases that is maintained by the Administrative Office of the Courts. That attorney had filed an amended petition that was two pages in length (the second page containing only the signature of the attorney and the certificate of service) that raised only three issues - to wit:

I.

"That the Petitioner's Federal and State Constitutional Rights were

> violated during the voir dire process when a number of jurors were excused on their mere statements that they could not impose the death penalty without any further detail (sic) questioning by defense counsel. [Citation to Record omitted.]
>
> II.
>
> That the Petitioner's Federal and State Constitutional Rights were further violated when a written question was submitted to the Court by one of the jurors. The question was 'I would like to know has he changed his life to Christ or how is his behavior in prison.' The Court erred in instructing the jury without admonishing the jury that such instruction should not be given any more weight than the instructions heretofore given. [Citation to Record omitted.]
>
> III.
>
> Were violated when defense counsel inadvertently, during the sentencing phase of the trial 'opened the door' allowing the State to introduce evidence that would have otherwise been inadmissable.

Clearly, the first two, if not raised on direct appeal, were waived, and the third, although potentially couched in language alleging ineffective assistance of counsel, can hardly be considered meritorious as it states that counsel's actions were "inadvertent" as opposed to the failure of counsel to perform some duty to engage in some conduct that would be below the standards required by trial counsel.[5]

Regarding this appointment, the court and counsel with the Office of the Post-Conviction Defender engaged in the following colloquy:

> You know, not to minimize the fine seminars at law schools that are offered these days, and I'm sure they provide great experience for law students, but I'm just a little uncomfortable in having – because **one of the primary issues that's raised in a post-conviction matter – certainly in a serious matter such as a capital case would be the**

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[5] Perhaps if the allegation were that trial counsel had "opened the door" to harmful testimony because counsel failed to investigate and had he investigated he would have known that his questions would permit the introduction of harmful evidence, it would constitute a claim of ineffective assistance of counsel.

effectiveness of the trial attorney at trial.[6] And when a trial judge has the opportunity to appoint, on the one hand, a staff of attorneys, half of whom – or eighty percent of whom have never tried a capital case; or on the other hand, **a local trial attorney who is qualified to handle capital cases and has, indeed, tried several, if not many, capital cases in their entirety; handled appellate work in capital matters**; handled many, many other serious felonies, murders included that weren't capital; it would just seem to me a defendant – **a petitioner – would be better represented by the individual who has been through the system over and over and knows the types of issues to look for and to identify from first-hand personal experience**. It would just – I understand in, perhaps, rural areas where there may not be just a whole lot of attorneys available for appointment or a whole lot of capital cases that are tried, and therefore may be a real shortage of attorneys who are qualified from a personal standpoint to handle these types of cases; but in an urban area such as this, where we do have a long list of very qualified attorneys, and **Mr. _____ is right at the top of that list, in my opinion**, it just seems to me that a petitioner would be better represented by an individual who has that type of experience. What's your position on that?

Reply by staff member:

Your Honor, in all due respect to the court, I think the last – either the last time or two times ago when I was before the court on this issue, I think some issues came out about Mr. ____ in terms of that he had not yet contacted [trial counsel] and gone through his file. That was the first time I was here in October. When we came back in November, he again said he had still not reviewed the file. We have [trial counsel] available – we have [trial counsel] he's available in the courthouse and could be here again. I understand [the court's appointed post-conviction counsel]'s never interviewed [trial counsel] and has never gotten his file. Among the more important things, in terms of a post conviction, is raising all issues that may, at some point, be available to the defendant, either in state court or in federal

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[6] Despite this remark by the trial judge noting the importance of ineffective assistance of counsel claims the attorney, whom the trial court had appointed to handle the post-conviction had not reviewed trial counsel's files or interviewed trial counsel before stating he was ready to proceed with the final post-conviction hearing. Interviewing trial counsel and reviewing trial counsel's files is the minimal requirement for post-conviction counsel. Incredibly, the attorney in question never raised a claim of ineffective assistance of counsel.

court.

The Office of the Post-conviction Defender was subsequently appointed in this case and has since filed a 63 page amended post-conviction petition in which it notes that the petition raises all known non-frivolous claims, but since the investigation is not yet complete counsel cannot yet state that other non-frivolous claims do not exist.[7]

Given that the counsel originally appointed in the above-referenced post-conviction case was "qualified" under Rule 13, the value of the Rule's qualifications must be scrutinized under the *ABA Guidelines*. Guideline 1.1 sets out the requirements for post-conviction counsel as:

> Counsel's obligations in state collateral review proceedings are demanding. Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. **Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.**

(Emphasis added.)

In the instance cited above, the Rule 13 qualified counsel failed to meet the requirements of post-conviction counsel in every aspect. He failed to interview and consult with the client. He failed to obtain prior counsel's files or to interview prior counsel. He failed to conduct any investigation. He announced he was ready for the final hearing after raising only three issues at least 2 of which

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[7] The attorneys submitting this response recognize that not all claims raised will be proven valid. However, this information is noted to demonstrate the failure of the first attorney, who failed to even interview trial counsel or review trial counsel's files, to competently represent the client even though he was "qualified" under Rule 13.

were waived. Again, the *ABA Guidelines* are clear. The commentary to Guideline 10.14 provides

> Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

During one hearing regarding whether the first appointed counsel should be replaced by the Office of the Post-Conviction Defender, the appointing court praised the attorney it had appointed. The court stated that the attorney may not raise all the issues that the Office of the Post-Conviction Defender would raise but he was good at narrowing the issues to issues that would be successful. Given that only the three issues set out above were raised, this statement speaks loudly as to the appointing authority's lack of any understanding of the requirements of capital post-conviction counsel's duties.

The *ABA Guidelines* make clear that post-conviction counsel must raise all arguably meritorious issues not just those counsel believes will be immediately successful. The commentary to Guideline 10.14 continues from the paragraph quoted above:

> As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues. These include not only challenges to the conviction and sentence, but also issues which may arise subsequently. Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications. Counsel should also be aware that any change in the availability of post-conviction relief

> may itself provide an issue for further litigation. This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

In summary, the qualifications of counsel in direct appeal and post-conviction set out in the proposed Rule 13 and the continued appointment of counsel by the courts as set out in proposed Rule 13, fail to create an appointment system in capital cases that guards against arbitrary infliction of the death penalty.[8] The Office of the Post-Conviction Defender submits that the TIRS system will go a long way toward improving the provision of defense counsel in capital cases at all stages - trial, direct appeal and collateral review. However, we again caution that not including the public defenders under the TIRS umbrella is a substantial deficiency that will greatly weaken the effectiveness of the TIRS commission and director in ensuring a less arbitrary and more reliable death penalty in Tennessee.

D. Provision of expert services in death penalty cases[9]

1. Overview

Any evaluation of the manner in which expert and investigative services are provided in capital cases must begin with whether the state procedures increase or decrease the reliability of

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[8] The undersigned note that the Joint Proposal changes continue to utilize quantitative qualifications for the appointment of counsel on direct appeal and in post-conviction. The use of quantitative measurements is largely the result of the difficulty in structuring a system in which independent judges in 31 judicial districts make appointments that will ensure qualified counsel in all stages of capital defense. This problem can only be solved by utilizing an independent agency to review, certify and monitor the qualifications of counsel appointed in death penalty cases.

[9] While the authors of this commentary agree with the Joint Proposal and TACDL that Rule 13's provision of services in non-capital cases is fraught with problems, our comments, with the exception of the comments *ante* regarding non-capital post-conviction, will be limited to our area of institutional concern - capital cases.

capital sentences and whether they tend to make the death penalty more or less arbitrary. The goal of Rule 13 is to provide defense expert, investigative and support services in criminal cases, including capital trial and post-conviction cases. Additionally, the Rule attempts to confront the reality that the funding for indigent defense is limited and, therefore, an effort must be made to control the manner in which those limited funds are allocated. The question is whether Rule 13 accomplishes either of these goals in a manner that meets constitutional requirements and ensures reliability in the outcome of capital cases. Sadly, the answer is that Rule 13 fails to meet either goal.

With regard to the provision of services, the proposed rule fails because it was written without consulting criminal defense professionals or the various standards developed by the American Bar Association, the National Legal Aid and Defender Association and others committed to the delivery of quality defense services. The Rule places too great an emphasis on cosmetic savings in the cost of defense services. This myopic approach on cost containment contradicts the explicit requirements of the *ABA Guidelines.* The commentary to Guideline 9.1 - Funding and Compensation observes that:

> In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes, "[g]overnment has the responsibility to fund the full cost of quality legal representation." [citing *ABA Standards for Criminal Justice: Providing Defense Services* Standard 5-1.6 & cmt. (3d ed. 1992)] This means that it must "firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter." [citing *Pruett v. State*, 574 So.2d 1342, 1354 (Miss. 1990)(quoting *Makemson v Martin County*, 491 So.2d 1109, 1113 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987)).]

Because of a lack of a defense perspective, many of the proposed changes will increase rather than decrease costs while substantially denying effective defense services.

For more than twenty years, the American Bar Association has wrestled with the task of improving standards for the provision of quality defense services. This Court and the federal courts have long recognized the contribution of the ABA in setting the standards by which the effectiveness of defense services should be judged.[10] The *ABA Standards for Criminal Justice (Second Edition 1980)*, Chapt. 5, Providing Defense Services, §5-1.4 instructs that:

> The [legal representation] plan should provide for investigatory, expert and other services necessary to an adequate defense. **These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.**

(Emphasis added.) Unlike the proposed Rule 13, the commentary to § 5-1.4 makes no distinction between the need for mental health and other necessary defense experts. The commentary also denounces the requirement in subsection 5(c)(4)(D) that denies services for matters "within the capability and expertise of appointed counsel, such as interviewing witnesses." It states:

> Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available for their use adequate supporting services. These include *inter alia* expert witnesses capable of testifying at trial and other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings, and trained investigators to interview witnesses and to assemble demonstrative evidence. The quality of representation at trial, for example, may be excellent and yet valueless to the defendant **if the defense requires the assistance of a psychiatrist or handwriting expert** and no such services are available. **If the defense attorney must personally**

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[10] *See*, *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)(in judging ineffective assistance of counsel "trial courts and defense counsel are to look to and be guided by the American Bar Association standards for the administration of criminal justice ...."); *Wiggins v. Smith*, ___ U.S. ___,123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003)(Recognizing the ABA Standards as "standards to which we long have referred as 'guides to determining what is reasonable.'"); *Hamblin v. Mitchell*, ___ F.3d.___, 2003 WL 23024784 (6th Cir. 2003).

> **conduct factual investigation, the financial cost to the justice system is likely to be greater. Moreover, when an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge their credibility if their testimony conflicts with statements previously given or withdrawing from the case.**

(Emphasis added.)

It is evident that the Rule was written without attention to the *ABA Guidelines*, which likewise provide the appropriate scales upon which to measure the manner in which a state provides defense services. Guideline 4.1, The Defense Team and Supporting Services provides:

> A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
>
> 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
>
> 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
>
> B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.
>
> 1. Counsel should have the right to have such services provided by persons independent of the government.
>
> 2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

The appointment of an investigator and a mitigation specialist is mandatory, not optional, under the *ABA Guidelines* and mandated by the United States Supreme Court in *Wiggins* and the Sixth Circuit

in *Hamblin*. *See* footnote 10, *supra*. Moreover, an investigator and a mitigation specialist are required at "every stage of the proceedings," not simply at trial. *Id.*

When private counsel is appointed or if the defender agency appointed does not have on staff the necessary investigators or mitigation specialists, the appointing authority must provide these services without any showing of need. The need has been automatically established because the death penalty is involved. Rule 13 does not provide for such automatic provision of these necessary defense team members. In the experience of the Office of the Post-Conviction Defender, mitigation specialists and investigators are not always included on the defense team at trial. Many attorneys currently handling death penalty cases lack the necessary knowledge to utilize the services of a mitigation specialist or to effectively direct the actions of an investigator. Any rule for the provision of defense services in a death penalty case must provide for the required minimum four member defense team and must ensure that appointed counsel are sufficiently trained and have sufficient understanding of the development and presentation of mitigation to utilize fully a mitigation specialist. The proposed Rule 13 does neither.

In approximately 60 % of the cases this Office has handled since it opened April 1, 1996, a mitigation specialist was not used at the trial level. In another 30 % of the cases, a mitigation specialist was involved with the defense at trial, but the services were underutilized or ignored. Often the most basic of mitigation documents – the client's social history – was not even prepared. It is apparent that many attorneys who are considered qualified as lead counsel under Rule 13 neither understand mitigation nor have the necessary knowledge or skill to work effectively with a mitigation expert.

2. Specific Issues

a. The cap on services in post-conviction

Subsection 5(d)(4) sets an arbitrary cap on investigative services in post-conviction in capital cases at $20,000. Subsection 5(d)(5) sets a similarly arbitrary cap on expert services at $25,000. The investigative services cap establishes two classes of indigent death sentenced inmates in post-conviction: those represented by the state-funded Office of the Post-Conviction Defender which has investigators on staff and those represented by appointed private counsel who are bound by the caps. This arbitrary cap on appointed private counsel may prevent adequate investigation necessary to prove the petitioner's claims. Similarly, caps on other expert services will prevent adequate development of the facts necessary to prove claims alleged in the post-conviction petition, e.g. ineffectiveness of counsel. This limitation on services contained in the proposed Rule is not only contrary to the commands of the *ABA Guidelines*, it establishes an arbitrary administrative hurdle between a death sentenced inmate and a serious review of the constitutionality of his or her conviction and sentence.

Facts in post-conviction must be proven by clear and convincing evidence. Tenn. Code Ann. 40-30-110(f); *but see* Tenn. Sup. Ct. R. 28 § (D)(1)("Petitioner shall be required ... to establish the grounds alleged and the entitlement to relief by clear and convincing evidence.")[11] Further, the

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[11] Contrary to its asserted requirement in Rule 28, this Court has correctly held that only the facts underlying the claim must be proven by clear and convincing evidence. *See, Fields v. State*, 40 S.W.3d 450 (Tenn. 2001). Moreover, to rule otherwise would violate the United States Constitution and United States Supreme Court precedent. As stated by Justice O'Connor, writing for the Court in *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000):

> Take for example, our decision in Strickland v. Washington [citation omitted]. If a state court were to reject a prisoner's claim of ineffective assistance on the grounds that the prisoner had not established by a preponderance of the evidence

limitation on expert resources in post-conviction is contrary to the stated intent of the Rule itself. Section 1(a)(1) states in part: "This rule is intended to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996." The requirements of Section 107 (28 U.S.C. § 2261) include: "payment of reasonable litigation expenses." Frequently, there will be cases which will require more than $25,000 for expert services and/or more than $20,000 for investigative services. Therefore, the proposed Rule 13 cannot "meet the standards set forth in Section 107." The hourly fee caps for specific expert services, the geographical restrictions for experts and restrictions on travel, etc., prevent competent counsel from providing quality representation and prevent the petitioner from satisfying the burden of proof in post-conviction. The Rule as written frustrates the petitioner's ability to develop a colorable claim. Simply put, the Rule fails to meet the requirements of Section 107 and further denies the people of the State a reliable structure to ensure the integrity of sentences of death.

Moreover, the *ABA Guidelines* make no distinction between the requirements for high quality representation in capital trials and capital post-conviction. Guideline 1.1 - Objective and Scope of Guidelines states:

> B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may by entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

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that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

The commentary to Guideline 1.1 stresses the need for counsel in state post-conviction to "undertake a thorough investigation into the facts surrounding all phases of the case," and to examine and evaluate "all of the available evidence - both that which the jury heard and that which it did not...." Thus, counsel must reevaluate forensic evidence related to guilt and must thoroughly explore the client's background, social history and the possible presence of psychiatric or psychological disorders. This investigation is time consuming and requires consultation with experts. Further, it is difficult, if not impossible, to predict the amount of time needed for expert testimony. The court's schedule, the extent of cross-examination, whether the court will ask questions, whether the expert will be needed to assist counsel in cross-examination of the state's expert and for rebuttal are all unpredictable factors.[12]

In the experience of this Office, effective preparation of a petitioner's post-conviction claims regularly requires the services of multiple experts at costs considerably more than $25,000. Consider the typical case that this Office handles. Trial counsel has either not used a mitigation specialist or did not understand how to use the services he or she had. As a result, there has been no social history prepared or the one that was prepared is inadequate to the task. At trial, the client's wife testified he was a good husband, when he was not drinking or on drugs, and he cared about his children. His mother and/or father testified that they do not want to see their son die. There may

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[12] Consider the following three examples of recent cases. In the first case, one expert's fees easily exceeded the $25,000 cap when he was required to spend three extra days in court because the judge continued to hold his regular docket each day. Counsel and the expert arrived at court at the judge's request at 8:30 a.m. and on each day remained until at least 11:00 p.m. In another case, the defense expert was forced to remain over for a day at the request of the district attorney who asked for, and was granted, a recess in the middle of cross-examination. Finally, in the third case, a defense expert drove for several hours to court on two separate occasions only to be told upon arrival that the court had scheduled other proceedings or that the district attorney had failed to appear.

have been some reference to an unspecified mental problem or troubled childhood. Such evidence is frequently presented in the most aggravating manner possible, e.g. "He was in trouble constantly while in high school"; "He was drinking and using drugs during the commission of the crime." No effort was made to explain why he was in trouble while in high school or why he was using drugs or alcohol during the commission of the crime.

Through extensive investigation and the use of various experts, this Office is typically able to develop a social history that reveals serious childhood abuse, long-standing mental illness and/or brain damage. Almost always we uncover evidence that demonstrates that the client was drinking and using drugs to self-medicate or some other ground that mitigates the client's actions. This kind of mitigation provides an explanation as to why the client, while responsible for the crime, should be considered less culpable for his or her actions. Often, the client's background will contain many of the known risk factors reported by the United States Department of Justice as causes for future violent behavior.[13]

Many of our clients' mothers abused alcohol during pregnancy triggering the need for specialized expertise in the effects of alcohol on the developing fetus. Claims involving mental retardation require specialized knowledge to investigate, discover and present evidence of deficits in adaptive behavior. We commonly experience cases in which the client and his family present an image of the perfect family that does not explain the events in the client's life. Often the family suffers from the same impairments as the client and is unable to articulate the true circumstances of

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[13] U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, June 1995, Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders, pp. 3-7.

the client's life.[14] These cases demand the very specialized services of a mitigation specialist or other expert with extensive training and experience in working with and interviewing traumatized individuals. Once such experts have become involved, we regularly find overwhelming evidence of family abuse that affected our client. Our staff investigators have interviewed numerous family members over the course of scores of hours before locating the one sibling or cousin who will talk about the abuse in the family. When that one person is found, others then feel free to tell their stories and the horrors of our client's developmental years are reported. This then leads to overwhelming mitigation proof. Under the proposed Rule and the manner in which the present Rule is now being administered, it is impossible to spend the time and conduct the investigation necessary to uncover massive mitigation evidence.

Capital case post-conviction defense is complex. Those making the decisions about what support services to grant or deny must have an extensive and current working knowledge of the burdens on counsel in capital cases. The above comments only scratch the surface of the shortcomings of the proposed Rule 13. Many participants in the process have provided insight to the Court and several have addressed the failure of the Rule to address any of the concerns outlined in the *ABA Guidelines.* The Office objects to the current implementation of Rule 13 to the extent that it impermissibly curtails the ability of defense counsel to provide effective quality representation to their indigent clients. The present arbitrary procedures affecting *inter alia* expert fees, expert location and the manner in which experts may conduct their work gives the lie to any claim of providing the type of representation required by constitutional mandate and ethical guidelines. The question is whether Tennessee will make a commitment to providing quality representation of

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[14] *See ABA Guidelines*, Guideline 10.7 – Investigation, Commentary.

indigent defendants in death penalty cases. Current practice and the proposed Rule certainly fail to advance the provision of quality representation in capital cases.

E. Clemency

Rule 13 provides no mechanism for appointing counsel in death penalty clemency proceedings or for providing expert and investigative services in clemency. Although the Post-Conviction Defender is authorized to represent death sentenced inmates in clemency proceedings (Tenn. Code Ann. § 40-30-206(e)), it lacks budgetary allowances for services in clemency. In some cases, the Office may not be the appropriate counsel to handle clemency and those inmates may be left without counsel or services. The *ABA Guidelines* clearly indicate that the "appointing authority" should be responsible for ensuring qualified counsel and services in clemency proceedings. *See*, Guideline 1.1B and Guideline 10.15.2.

F. The TIRS proposal will move the provision of counsel and services in a positive direction

Adopting the Joint Proposal for TIRS would make Substantial strides toward reaching the goal of providing quality counsel in criminal cases. As defined in the proposal, the TIRS Commission and Director, would be in an independent position to provide and monitor defense services, including those for post-conviction. Continuing of the present system will compound the problems in Tennessee's death penalty. Despite the improvements offered by TIRS, that proposal contains the serious limitation of not governing the standards, performance and appointment of public defenders in capital cases. This Office recommends to the Court that the TIRS proposal be expanded to include a statewide death penalty trials office as is recommended by the *ABA*

Guidelines. Guideline 3.1 - Designation of a Responsible Agency.[15] Only through the creation of a centralized capital trial unit can Tennessee begin to move toward a reliable capital case system and avoid arbitrary death sentences.

Such a system may appear to be more costly than then present system. However, national experience has shown that the improved performance by those providing defense services in death penalty cases under a statewide model actually results in the prosecution requesting death in fewer cases as well as the return of fewer death verdicts. Fewer death notices reduce trial costs. Fewer death sentences reduce the cost of collateral proceedings. The result is a system that tends toward seeking death in only those murders that truly classify as the "worst of the worst" and in death sentences that can withstand appellate scrutiny.[16]

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[15] The authors understand that the federal Innocence Protection Act, which was passed during the 2003 session of Congress, contains provisions for funding to assist states in creating state-wide capital defense trial offices. Funding for the Innocence Protection Act is pending.

[16] *See*, comments of Indiana Chief Justice Randall Shepard to the Judges of the United States Court of Appeals for the Seventh Circuit in 1996:

> The impact of placing capable counsel at the side of a defendant is dramatic. In the first three years of Criminal Rule 24's operation, 1992, 1993, and 1994, not a single Indiana jury recommended the death penalty. **Moreover, appointment of capable counsel has altered the decisions prosecutors make about selecting the cases most warranting the ultimate penalty. Since our rule was adopted, the rate at which prosecutors seek the death penalty each year has fallen by more than 50 percent.** (Emphasis added.)

The undersigned attorneys thank the Court for the opportunity to comment on this extremely important matter of providing qualified counsel and services to indigent defendants in Tennessee.

Respectfully submitted,

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NASHVILLE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	**PROPOSED AMENDMENTS TO SUPREME COURT RULE 13**	)))))	**NO. M2003-02181-SC-RC2**

MOTION REQUESTING OPPORTUNITY TO BE HEARD REGARDING THE PROPOSED CHANGES TO TENN.SUP.CT.R. 13 AND DEATH PENALTY CASES

Comes now William P. Redick, Jr., and requests an opportunity to be heard briefly by this Court when Oral Argument is held on February 11, 2004 regarding the proposed changes to Rule 13 and their affect on the representation of indigent defendants in death penalty cases. See, Comments On The Proposed Changes To Tenn.Sup.Ct.R. 13 Regarding Their Affect On the Representation Of Indigent Defendants In Death Penalty Cases, attached hereto as Appendix A.[1]

Undersigned counsel makes this request, because:

1. Unique constitutional protections apply to capital defendants that require the enforcement of unique rights to funds and services that do not apply in non-capital cases. These constitutional protections must be considered in the determination of the appointment of counsel in death penalty cases and in the determination of the funds and services to be authorized to the defense, upon proper request, in death penalty cases.

2. The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, promulgated 1989 and 2004, provide a blueprint for the best systemic approach to insure the appointment of the most qualified available counsel in death penalty cases, and provide the

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[1]As well as attaching hereto a copy of the Comments, undersigned counsel mailed a separate copy to Janice Rawls, Chief Deputy Clerk, as directed by this Court's Order entered in this cause on November 13, 2003.

systemic structure best able to insure that defense counsel will receive the resources and services that they will need to represent a capital defendant. The American Bar Association is a national, mainstream bar association that represents the interests of all attorneys in this country, including defense attorneys, prosecutors, and judges. The authority of the American Bar Association has previously been recognized by the United States Supreme Court and by this Court regarding topics addressed in Rule 13 and this Commentary, attached hereto as Appendix A.

For the foregoing reasons, Undersigned counsel prays:

1. That this Court accept Comments On The Proposed Changes To Tenn.Sup.Ct.R. 13 Regarding Their Affect On the Representation Of Indigent Defendants In Death Penalty Cases, attached hereto as Appendix A, as undersigned counsel's comments regarding the application of Rule 13 in death penalty cases;

2. That this Court allow undersigned counsel 15 (fifteen) minutes to address this Court with regard to the application of Rule 13 in death penalty cases at the Oral Argument scheduled to be held on February 11, 2004.

Respectfully submitted,

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AFFIDAVIT

I swear and affirm that the foregoing is true to the best of my knowledge.

William P. Redick, Jr.

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	PROPOSED AMENDMENTS TO SUPREME COURT RULE 13	)))))	NO. M2003-02181-SC-RC2

COMMENTS ON THE PROPOSED CHANGES TO TENN.SUP.CT.R. 13 REGARDING THEIR AFFECT ON THE REPRESENTATION OF INDIGENT DEFENDANTS IN DEATH PENALTY CASES

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ORAL ARGUMENT REQUESTED

COMMENTS ON THE PROPOSED CHANGES TO TENN.SUP.CT.R. 13 REGARDING THEIR AFFECT ON THE REPRESENTATION OF INDIGENT DEFENDANTS IN DEATH PENALTY CASES

COMMENTS ON THE PROPOSED CHANGES TO TENN.SUP.CT.R. 13 REGARDING THEIR AFFECT ON THE REPRESENTATION OF INDIGENT DEFENDANTS IN DEATH PENALTY CASES

I. Introduction

Death penalty cases pose unique problems in the provision of counsel and the provision of supporting services for indigent defendants charged with capital crimes. Rule 13 affects rights protected by the state and federal constitutions, as well as by state statutes and rules, some of which apply only to defendants in death penalty cases. This commentary attempts to address the ways in which Rule 13 and its proposed changes affect the rights of indigent capital defendants, and create problems unique to death penalty cases.

The American Bar Association has provided a blueprint: *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("*ABA Guidelines*"),[1] that is recognized by the Tennessee Supreme Court and the United States Supreme Court as an "authority," "guide," and "precedent" for the administration of an indigent defense system in death penalty cases,[2] and is unlike anything available in non-capital cases. The *ABA Guidelines* apply to virtually every aspect of Rule 13 and its administration. This commentary attempts to analyze the proposed changes to Rule 13 in light of the requirements of the *ABA Guidelines*.

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[1]In February 1989, the American Bar Association promulgated the *ABA Guidelines*. In February 2003, after the benefit of 14 years of experience with the *ABA Guidelines*, the American Bar Association issued a revised version. (All references to the *ABA Guidelines* in this discussion are to the 2003 version.).

[2]The authority of standards and guidelines promulgated by the American Bar Association has been recognized by the highest courts of this state and country:

United States Supreme Court: See, e.g., Strickland v Washington, 104 S.Ct. 2052, 2065 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."); Wiggins v Smith, 123 S.Ct. 2527, 2535-2537 ("[I]n referring to the ABA Standards for Criminal Justice as guides, we applied [in Williams v Taylor, 529 U.S. 362, 390 (2000)] the same 'clearly established' precedent of *Strickland* we apply today." Id. at 2536.).

Tennessee Supreme Court: See, e.g., Baxter v Rose, 523 S.W.2d 930, 936 (Tenn. 1975) (In the seminal Tennessee case regarding the standard for judging ineffective assistance of counsel, the Tennessee Supreme Court said: "[T]rial courts and defense counsel are to look to and be guided by the American Bar Association standards for the administration of criminal justice in general, and specifically to those portions of the standards which relate to the defense function.")

Currently, very few requirements of the *ABA Guidelines* are being met in Tennessee with regard to either the appointment or the performance of counsel in death penalty cases. The existing procedure for judicial appointment of counsel and judicial scrutiny of the provision of defense services, as contemplated in Rule 13 -- and particularly the proposed changes to Rule 13 -- cannot be squared with the *ABA Guidelines*. Neither can Rule 13 and the proposed changes to the rule be squared with the state and federal constitutions; because, they sanction the denial and limitation of funds and services to indigent defendants for reasons, other than a reliable fact-based determination of the defendant's lack of need.

This commentary begins with a description of the unique problems involved in death penalty cases and then offers specific criticisms of Rule 13 and its proposed changes.

II. Defense representation in Tennessee capital cases.[3]

"Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding." *ABA Guideline* 1.1, Commentary at 3-4. The representation is "more difficult and time-consuming," and involves "psychological and emotional pressures unknown elsewhere in the law." Id. at 4.

> The unique bifurcated nature of capital trials and the special investigation into defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases.

McFarland v Scott, 114 S.Ct. 2785-86 (1994) (Blackmun, J., dissenting from certiorari denial). Furthermore, "[c]ourt-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts." Id. at 2786. See, Toward A More Just And Effective System Of Review In State Death Penalty Cases, American Bar Association, at

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[3]Virtually all death penalty defendants are indigent. No single inmate on Tennessee's death row is financially able to retain counsel (which, in itself, is persuasive evidence of the discriminatory and capricious nature of the administration of the death penalty in Tennessee). Rule 13, which applies only to indigent defendants, therefore, sets the criteria by which defenses are financed in virtually every death penalty case in Tennessee.

7 (August 1990) ("The American Bar Association is persuaded that the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings."), and id. at 49-61 (a discussion of the special demands of the representation of capital clients and the inadequacy of existing state plans for the representation of defendants and petitioners in death penalty cases.).[4]

Repeatedly, since the passage in 1977 of Tennessee's post-Furman death penalty sentencing statute, death sentences imposed on Tennessee defendants have been reversed during collateral review by state and federal courts on the basis of ineffective assistance of counsel.[5] While this precedent confirms the inadequacy of the representation in many death penalty cases, it reflects only the "tip of the iceberg;" in that "practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'" McFarland, supra, 114 S.Ct. at 2787 (Blackman, J., dissenting from denial of cert.). It is generally recognized that effective representation in capital cases is, at best, sporadic

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[4]On October 23, 2003, ABA President Dennis Archer announced that the American Bar Association is launching a nationwide campaign to strengthen defense tactics in states that allow the death penalty and released the following statement: "Time and time again we learn of cases where due to inadequacies in defense, people are wrongfully convicted and sentenced to death." Associated Press Release.

[5]See, e.g., Cooper v State, 847 S.W.2d 521 (Tenn. Crim. App. 1992); Johnson v State, 1992 WL 210576 (Tenn. Crim. App. 1992); Campbell v State, 1993 WL 122057 (Tenn. Crim. App. 1993); Adkins v State, 911 S.W.2d 334 (Tenn. Crim. App. 1994); Bell v State, 1995 WL 113420 (Tenn. Crim. App. 1995); Goad v State, 938 S.W.2d 363 (Tenn. 1996); Austin v Bell, 126 F.3d 843 (6th Cir. 1997); Rickman v Bell, 131 F.3d 1150 (6th Cir. 1997); Groseclose v Bell, 131 F.3d 1161 (6th Cir. 1997); Brimmer v State, 29 S.W.3d 497 (Tenn. Crim. App. 1998); Teague v State, 772 S.W.2d 915 (Tenn. Crim. App. 1988); Smith v State, 1998 WL 899362 (Tenn. Crim. App. 1998); Taylor v State, 1999 Tenn. Crim. App. LEXIS 732 (Tenn. Crim. App. 1999); Wilcoxson v State, 22 S.W.3d 289 (Tenn. Crim. App. 1999); Caughron v State, 1999 WL 49906 (Tenn. Crim. App. 1999); Carter v Bell, 218 F.3d 581 (6th Cir. 2000); State v Bush, Cumberland County Circuit Court No. 84-411 (March 7, 2002).

Death sentences have been reversed on the basis of ineffective assistance of counsel in other Tennessee death penalty cases in the collateral litigation pipeline, though review of these cases has not been completed and a final disposition has not been entered. See, e.g., Harries v Bell, M.D.Tenn. 3:84-0579, Order and Memorandum, August 23, 2002; Caruthers v Bell, E.D.Tenn. 3:91-cv-031, Order and Memorandum Opinion, June 6, 2001.

and occasional.[6]

"Attorney error is often the result of systemic problems, not individual deficiency." *ABA Guideline* 1.1, Commentary at 16. See, also, *ABA Guideline* 2.1 and 3.1. For that reason, the American Bar Association has promulgated standards requiring that a death penalty sentencing state "should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases." *ABA Guideline* 3.1, Commentary at 27; see, also, *ABA Guideline* 3.1(E) at 23.

Tennessee, however, does not provide these services.[7] The state of Tennessee has neither a "jurisdiction-wide capital trial office," *ABA Guideline* 3.1(C)(1)(a), nor a "jurisdiction-wide capital appellate . . . office." *ABA Guideline* 3.1(C)(1)(b). Tennessee's existing defense service delivery (though there was in times past) does not provide resource assistance or direct representation on a state-wide basis in death penalty cases until after trial and direct appeal, in other words, until after the death sentence has been imposed and the appeal therefrom completed. There is no existing entity

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[6]For example, Justice Ginsberg has stated that she has "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, Associated Press, Apr. 9. 2001. Justice O'Connor expressed concern that the system "may well be allowing innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N. Y. Times, July 5, 2001, at A1. Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings of the death penalty system as a whole." Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 147-48 (2001).

[7]While they are not being provided now, some of the services, cited above, had been provided in this state in the past by the Capital Case Resource Center of Tennessee (CCRC) while it was in existence from 1988 to 1995 and the Capital Division of the District Public Defenders Conference (CD/DPDC) from 1996 to 2003; but, they are not longer available. Previously, CCRC and particularly CD/DPDC were operating on limited budgets, and, consequently, were able to provide only limited services on a triage basis. CCRC had more resources and staff than did CD/DPDC; CCRC also enjoyed an autonomy and flexibility in the provision of service that were unavailable to CD/DPDC. Nevertheless, both of these discontinued programs did provide some degree of service with a state-wide coverage and perspective – service that is not now available at all. The diminishing systemic services in Tennessee death penalty cases have diminished the quality of representation.

(unlike services available in times past) that has the flexibility of moving resources from trial to appeal to collateral litigation on an as-needed basis. Also, (unlike times in the recent past) there is no current state-wide, continuing effort to increase the pool of qualified capital counsel, who are willing and available to accept appointments.[8] See, *ABA Guideline* 3.1(E)(1). Further, contrary to the *ABA Guidelines*, the state currently provides: no state-wide entity available to coordinate resources and litigation strategy throughout the state; no entity available to set a standard of effective care in this state for the representation of capital defendants at trial, appellants on appeal; and, no entity available to set a standard of effective care for the performance of investigators, mitigation specialists, and other forensic experts at any of these procedural stages; and, no state-wide coordination of services

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[8]The importance of a continuing, pro-active effort to expand the pool of qualified counsel available for appointment in death penalty cases cannot be overestimated. A joint state and federal Task Force, consisting of state and federal judges, prosecutors, and defense counsel, created the Capital Case Resource Center of Tennessee (CCRC), circa 1988-1995. The first priority of this Task Force was a directive to the staff at CCRC to address the absence and need for qualified counsel in death penalty cases by identifying and recruiting qualified attorneys who were available to accept appointments to represent capital defendants. To that end, the staff at CCRC spent thousands of hours with considerable help from members of the state and federal bench in a pro-active effort to increase the size of the pool of qualified attorneys who were willing to accept appointments in capital cases. This effort continued during the life of CCRC.

Effectively matching qualified attorneys with death penalty defendants, and obtaining their appointment in capital cases, is challenging, to say the least. Experience has taught, however, that the continuing pro-active effort to seek out, recruit, and secure the appointment of attorneys with the talent, experience, commitment, and availability sufficient to effectively represent capital defendants is the only way to even begin to fill the need for qualified counsel.

The systematic efforts to increase the size of the pool of qualified counsel were completely terminated in 1995, however, when CCRC was shut down. The results of the discontinuation of those efforts has been obvious to many who are familiar with the scope and scale of the demands on defense counsel in capital cases.

A cursory look at the approved district-by-district lists of counsel who currently are "qualified" to accept appointments in capital cases, as required in Rule 13 §3(c) through (j), include the names of few attorneys who have the commitment or skill or the sufficient staff and supporting services to assure effective representation in death penalty cases. The importance of the preservation of a continuing, pro-active effort to increase the pool of counsel qualified to accept appointments in capital cases, including the participation of attorneys from major law firms in this state and from any other sources where qualified counsel can be found, cannot be overstated. The state and federal Task Force that created CCRC understood the importance of the continuing recruitment of quality counsel for capital cases and experience of the placement of recruited counsel on death penalty cases during the life of CCRC bore this out; but, it has since been forgotten.

to be provided in the transition between trial, appeal, and state and federal collateral litigation.

The state-funded Post-Conviction Defender's Office (PCDO) is the only current state-wide service offered in death penalty cases; but, in addition to being limited only to the representation of capital defendants on state post-conviction, the PCDO is presently strapped with debilitating statutory, budgetary, and other limitations. Among the statutory limitations, the PCDO is statutorily required to represent every conflict-free state capital post-conviction litigant. See, T.C.A. § 40-30-206(a), 207. This requirement ignores the need for a continuing effort to recruit and appoint new qualified counsel with sufficient staff and resources to accept appointments in capital cases, invites overwhelming caseloads to be placed on the PCDO, and ultimately results in the decay of staff morale and the quality of their service delivery. Also, as a general proposition experience has taught us that representation by staff attorneys in government institutional offices tend not to have the same influence and effective results in the courts on behalf of the capital defendants as do qualified, committed counsel from recognized, resource-rich law firms, who are experienced in representing fee-paying clients in complex litigation. Furthermore, the PCDO is barred from providing case specific consultation to defense attorneys in capital cases at the trial and appellate level. See, T.C.A. § 40-30-206(d)(3). Such a limitation denies the PCDO the opportunity to provide a service where it is needed the most and where there is no comparable services available. As previously noted, although its necessity is emphasized by the *ABA Guidelines* 3.1(C)(1)(a), (b), there are no state-wide services available in death penalty cases in this state at all at the trial and appellate level. The ability to provide resource assistance to counsel at the trial and appellate level would add a badly needed service.

Tennessee trial courts are encouraged to appoint the local public defender, rather than private counsel, to provide representation in capital cases. The public defender shall be appointed in indigent cases, including capital cases, "if [the public defender is] qualified pursuant to this rule and no conflict of interest exists." Proposed Rule 13 § 1(e)(3). Specifically, in capital cases: "Whenever possible, a public defender shall serve and be designated 'lead counsel.'" Proposed Rule 13 § 3(b)(1). This strategy may save the state money on the front end -- at trial. This strategy will not provide the best, or even adequate, representation in most trial-level death penalty cases, however, and will likely cost the state more on the back end – during collateral litigation -- due to reversals due to this ineffective

representation by unqualified counsel.

Be they public defenders or private attorneys, the existing system typically fails to identify qualified attorneys for appointment and fails to provide appointed counsel with the resources sufficient to adequately defend clients in death penalty cases. In fact, "qualification" standards, particularly those based primarily on past experience, will never insure the appointment of qualified counsel. See, discussion, infra, re: proposed Rule 13 §3(c), (d), (e), (g), (h), as it pertains to the proposed qualification standards for counsel in death penalty cases.

The quality of the appointed counsel will always be determined by the characteristics of the appointing authority, not qualification standards. The appointing authority should consist of attorneys who are qualified in the defense of capital cases. See, *ABA Guideline* 3.1 (C)(2) (The "Responsible Agency" should be "defense attorneys with demonstrated knowledge and expertise in capital representation."). "In assigning counsel to capital cases, the overriding consideration must always be to provide high quality legal representation to the person facing a possible death sentence," *ABA Guideline* 3.1, Commentary at 26. Counsel appointed in death penalty cases should be attorneys, who have "demonstrated a commitment to providing zealous advocacy and high quality legal representation in capital cases." ABA Guideline 5.1(B)(1)(b).

If the state has the structure and a commitment to an aggressive policy and practice of the continuous recruitment of new counsel by a qualified appointing authority from whatever source they may be found, the quality of the appointments will increase. There should be no *per se* prohibition against the appointment of any category of counsel, including out-of-state counsel.[9] Although they will never replace the need for a qualified appointing authority, qualification standards could be an aid, if they contain meaningful criteria, which also includes an "out clause" that allows the appointment of counsel who may not literally satisfy some of the criteria but are nevertheless qualified, as judged by the qualified appointing authority.

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[9]Without any assessment of need, Proposed Rule 13, categorically and thus arbitrarily, prohibits the appointment of out-of-state counsel for capital trials, see, proposed Rule 13 § 3(b)(1) ("Both attorneys must be licensed in Tennessee and have significant experience in Tennessee trial practice."), and for capital appeals, see, Proposed Rule 13 § 3(f) ("If new counsel are appointed to represent the defendant on direct appeal, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee.").

Given the failure of existing qualification standards as administered, see, discussion, infra, re: proposed Rule 13 §3(c), (d), (e), (g), (h), Tennessee attorneys often find themselves appointed to represent a capital client, who they are not qualified to effectively represent, and for whom they do not have the resources to effectively represent. Whether the representation is attempted by retained or court-appointed counsel, public defender or private attorney, defense services in individual death penalty cases are almost always underfinanced, and in many instances only a fraction of the necessary funds are provided. A benefit of appointing more qualified counsel will be a better application and use of state funds for defense services. Under the present scheme, there can be little doubt that monies are authorized to unqualified attorneys, who know how to ask for the money, but do not know how to use it.

In some cases, the system has created the appearance of effective representation, though not the reality. In other cases, it does not even create the appearance of effective representation. Consequently, death sentences have been and continue to be imposed in an arbitrary and capricious manner, notwithstanding constitutional mandates to the contrary. Thus, Tennessee can ill-afford to do anything that would further limit the quality of representation in capital cases, which would be an inevitable result of an implementation of the proposed changes to Rule 13.

Historically, the availability of quality representation in death penalty cases in Tennessee has not been sufficient to meet the need; and, it has not improved. In fact, in many ways it has gotten worse. As will be more fully addressed in the comments that follow, the implementation of patchwork efforts to address this need (such as the minimal increase in the compensation rate of court-appointed private attorneys and the imposition of criteria for appointment eligibility) have not resulted in any significant improvement in, and in some instances have simply discouraged and hampered, the appointment of qualified counsel. Other efforts to address the problem have been implemented only to later be discontinued.[10]

The proposed changes to Rule 13, if implemented, will inevitably further reduce and limit the quality of representation. A decrease in the allocation of funds and an imposition of limitations on

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[10]See, footnote 7, supra, regarding the creation and termination of The Capital Case Resource Center of Tennessee (CCRC) (1988-1995) and The Capital Division of The District Public Defenders' Conference (DPDC) (1996-2003).

the investment of resources for the defense in death penalty cases, worthwhile though it may be budgetarily, will discourage, not encourage, an already inadequate effort to provide effective representation in death penalty cases. The resources that attorneys require for the preparation and presentation of their proof, such as qualified investigators and other forensic experts, are already scarce, perhaps more scarce than qualified death penalty attorneys. If the measures proposed in Rule 13 are implemented, the resources will become partially, and in some instances completely, unavailable. Limitations on the ability of defense counsel to gather and present lay and expert evidence will limit the ability of the defendant to present his defenses, will violate the constitution, and will inevitably spread the shameless epidemic in Tennessee of arbitrarily imposed death sentences.

III. The constitutional mandate that sufficient funds be authorized to protect the constitutional rights of an indigent defendant is based on need, not the availability of funds.

We hold these truths to be self-evident: that all men are created equal.
Declaration of Independence, 1776

The rights of a indigent capital defendant to the resources necessary for him or her to prepare and present his or her defense are based on the most fundamental premise of our American democracy: the egalitarian principle. Chiseled into the edifice above the entryway into the United States Supreme Court Building are the words: "Equal Justice Under the Law." It is this sentiment that was captured by the Tennessee Supreme Court when it stated: "There is no question but that an indigent defendant in a criminal prosecution must be provided with the tools of an adequate defense or appeal when those are available for a price to other defendants." State v Elliott, 524 S.W.2d 473, 475 (Tenn. 1975).

A. All indigent defendants

The indigent defendant's rights at issue are the defendant's right to counsel and, upon a demonstration of need, the defendant's right to the provision of resources sufficient to adequately and

effectively prepare and present his defenses and otherwise protect his constitutional rights.[11] The right to necessary resources is mandatorily protected by the state and federal constitutions (rights to counsel and due process), state statute (TCA § 40-14-207(b)), and state Supreme Court Rule (Tenn. Sup. Ct. R. 13).

Limitations on any defense request for the authorization of funds made pursuant to the authority, cited above, for any reason other than a reliable determination that they are not needed by the defense to prepare and present his or her defense, violates fundamental, mandatory, constitutional law. The ultimate conflict manifest in Rule 13 can be described as one created by a right to funds based on need even though the need exceeds the availability of funds. No matter the reason for the limitations, if they are motivated by the unavailability of funds or any other reason not based on the defendant's lack of need, the indigent defendant's rights and the bedrock principle of our democracy,

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[11] A defendant in a capital case has a right to counsel pursuant to the Sixth Amendment of the United States Constitution and Art. I § 9 of the Tennessee Constitution. See, e.g., Powell v Alabama, 287 U.S. 45 (1932); Tenn.Sup.Ct.R. 13 §3. This constitutional right to counsel includes the right to "adequate" and "effective" counsel. See, e.g., Strickland v Washington, 466 U.S. 668 (1984); McMann v Richardson, 397 U.S. 759 (1970); Baxter v Rose, 523 S.W.2d 930 (1975); Beasley v United States, 491 F.2d 687 (6th Cir. 1974).

In order for the representation by counsel to be adequate and effective, the indigent defendant has the right to the resources necessary to protect his right to present any defenses that he might have, including any defenses available to be presented in the sentencing stage of the trial during which the defendants life is at stake. Legally, the provision of funds to indigent defendants for these resources is determined by the defendant's need. As the United States Supreme Court said in Ake v Oklahoma, 105 S.Ct. 1087, 1092 (1985):

> This Court has long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Indigent defendants are due from the state "an adequate opportunity to present their claims fairly within the adversary system." Ross v Moffitt, 94 S.Ct. 2437, 2444 (1974). In order to make this presentation, indigent defendants must have the "basic tools of an adequate defense or appeal," Britt v North Carolina, 92 S.Ct. 431, 433 (1971), and the "raw materials integral to the building of an effective defense." Ake v Oklahoma, 105 S.Ct. at 1093 (1985). According to Tennessee statute, the indigent capital defendant is due funds "necessary to ensure that the constitutional rights of the defendant are properly protected." T.C.A. § 40-14-207(b).

the egalitarian principle, have been violated. In a conflict between an indigent defendant's right to be treated equally with a defendant who is able to pay, and the state's interest in being able to execute the defendant, on the scale of democratic values, the former must prevail.

Rule 13, particularly with the proposed changes, establishes a process and criteria by which the availability of funds will be limited for arbitrary reasons, rather than because the funds are not needed. Recent history reflects that the rights of Tennessee capital defendants, who are virtually all indigent, have been violated in this regard on a consistent basis. See, Part I, supra. The proposed changes to Rule 13 create an even greater risk that the mandatory, constitutional rights of indigent capital defendants will continue to be violated.

B. Death penalty cases are different: The obligation of the state to provide effective counsel and sufficient supporting services is unique, greater, and more specific, capital cases than in non-capital cases.

In a capital case, substantial additional rights apply. In a capital case, as opposed to a non-capital case, any denial of funds that will prejudice a defendant's ability to present his case in the sentencing stage of a capital case will violate the defendant's state and federal constitutional protection against cruel and unusual punishment, as defined by the post-Furman v Georgia cases of the United States Supreme Court.

When funds are denied, notwithstanding the need, the result can be, and repeatedly in this state has been, the arbitrary imposition of a sentence of death. No one on Tennessee's death row can afford counsel; all -- 100% -- death row inmates are indigent and represented by court-appointed counsel. People, who can afford counsel, are not sentenced to death in Tennessee. This fact may suggest that death sentences are imposed in Tennessee more due to the quality of representation and the availability of resources for defense services than due to the seriousness of the crime or the culpability of the offender.[12]

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[12] Any cursory comparison of the population of Tennessee inmates convicted of homicide who did not receive the death sentence with those who did receive the death sentence reveals that there is no discernable, definable difference between the two populations of inmates. The determination of the population against whom the sentence of death is to be imposed is apparently based on "the luck of the draw," which includes arbitrary, capricious, and, thus, unconstitutional reasons, and not the seriousness of the offense or the culpability of the offender.

Available demographic evidence demonstrates that death sentences are imposed in Tennessee for any number of several arbitrary reasons, in addition to the defendant's economic status, including, for example, race of defendant[13], gender of defendant[14], race of victim[15], location of the offense[16], and the subjective preferences of the prosecutor[17]. An improved quality of representation will reduce the number of death sentences that are imposed for irrelevant, arbitrary, and unconstitutional reasons.

The failure to provide effective counsel and sufficient resources in a capital cases has ramifications well beyond those manifest in a non-capital case. The quality of counsel in a death penalty case is literally a matter of life or death. If someone is arbitrarily or otherwise wrongfully sentenced to a term of imprisonment, mistakes in the conviction or imposition of the sentence can be corrected during the term of his sentence and the inmate can be released or retried. If someone is

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[13]As of October, 2003, 39% (41 of 104) of those on death row in Tennessee were African-American, while the percentage in the general population is less than half that number. Nationwide, since 1976 (when Gregg v Georgia marked the reinstatement of the death penalty in some of the states), 34% (299 of 876) of those actually executed were African-American. See, *Death Row, U.S.A.*, Legal Defense Fund of the NAACP, October 2003.

In February, 1990, the Federal General Accounting Office, the investigative arm of the United States Congress, reviewed more than 28 studies and found "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death sentence." Death Penalty Sentencing: Research Indicates Pattern of Racial Disparity, United States General Accounting Office, Report to the Senate and House Committees on the Judiciary, February, 1990, p. 5.

[14]Since 1976, only two women, between 1% and 2% from among those sentenced to death, have been sentenced to death in Tennessee. See, *Death Row, U.S.A.*, Legal Defense Fund of the NAACP, October 2003.

[15]Although meaningful statistics are not available for Tennessee, nationwide the evidence of a discriminatory disparity according to the race of the victim is impressive. For example, of the 876 defendants executed in this country since 1976, the victims were white in 80%, African-American in 14%, of the cases. See, *Death Row, U.S.A.*, Legal Defense Fund of the NAACP, October 2003.

[16]A majority of the counties in Tennessee have sent no one to death row since 1976. During this same span of time, more inmates have been sentenced to death out of Shelby County, than the total of inmates sentenced to death from all other counties in the state *combined.*

[17]See, footnote 16, infra. The extreme variance in the likelihood that a defendant will be sentenced to death, depending on the county in which he was sentenced, is a function of the differences among the prosecutors in the 31 judicial districts in their exercise of individual, subjective discretion to seek the sentence of death.

arbitrarily or otherwise wrongfully executed, nothing can correct the mistake. Freedom, but not life, can be restored.

When a person's life is at stake, the constitutional obligation for the state to provide the tools and materials necessary for an effective defense takes on an altogether different meaning. In non-capital cases only a single criminal event is on trial. In a death penalty trial, however, the investigation and preparation span the defendant's entire lifetime and beyond. Even evidence pre-dating the defendant's birth, potentially going back generations, or evidence of the cultural milieu in which the defendant has lived his life, are typically relevant and potentially dispositive on the life and death question. The state must provide defense counsel with the resources that will allow them to approach the preparation and presentation of the case on behalf of their client as managers of a defense team, who are sufficiently qualified in psychology and the social sciences, prepared to gather any evidence relevant to the defendant, the life that he has led, and the complex of influences on his mental state and behavior.

In Williams v Taylor, 120 S.Ct. 1495 (2000), the United States Supreme Court set aside a sentence of death finding that "it is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Id. at 1513. The Court noted that trial counsel "failed to conduct an investigation that would have uncovered extensive [social service] records" that would have revealed abuse and deprivations that Williams suffered in his life, and "failed to seek prison records" that would have revealed other mitigating evidence, even though "not all of the additional evidence was favorable to Williams." Id. at 1514. The Court concluded that the finding of insufficient prejudice by the Virginia Supreme Court was "unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence." Id. at 1515.

Most recently, in Wiggins v Smith, 125 S.Ct. 2527 (2003), the United States Supreme Court set aside the sentence of death, found that counsel were ineffective because "[d]espite the fact that the Public Defender's Office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report," and concluded:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred as "guides to determining what is reasonable." [citing Strickland and

> Williams]. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) [emphasis omitted]. 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

Ibid. at 2536-37 (citations omitted).

The uniqueness of the representational problems in capital cases is the reason that the American Bar Association has devoted so much attention to the development of specific guidelines. In order to better understand the scope and scale of effective representation in capital cases, see the commentary to the following Guidelines: *ABA Guideline* 1.1 Objective and Scope of the Guidelines; *ABA Guideline* 4.1 The Defense Team and Supporting Services; *ABA Guideline* 5.1 Qualifications of Defense Counsel; *ABA Guideline* 9.1 Funding and Compensation.

Problems with the proposed changes in Rule 13 that result in limitations on the authorization of funds are particularly acute with regard to any limitations that apply to the investigative and expert services a defendant and his or her counsel will need for preparation and presentation of the capital sentencing stage defenses. The scope and scale of the potential presentation of evidence in a capital sentencing hearing is much broader than that in the guilt phase. Consequently, the constitutional obligation of defense counsel -- and thus the concomitant obligation of the funding source for indigent defendants -- in the preparation and presentation of evidence is much broader for the capital sentencing stage than that required in non-capital cases.

Mitigating evidence includes "any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v Ohio, 98 S.Ct. 2954, 2965 (1978). This is a broad and subjective category of evidence. While evidence may not be mitigating to some jurors, if a single juror is persuaded that evidence is

sufficiently mitigating for a sentence of less than death to be imposed, the sentence will be life – there will be no retrial on this issue of sentencing. See, T.C.A. § 39-13-204(h).

The United States Supreme Court has been emphatic about the seriousness of the error created by interference with, or limitation on, the ability of the sentencer to consider evidence in mitigation that is available to be presented on behalf of a capital defendant. See, e.g., Lockett v Ohio, supra (sentencing authority's refusal to consider family history as mitigation violated 8th Amendment); Eddings v Oklahoma, 102 S.Ct. 869 (1982) (same); Hitchcock v Dugger, 107 S.Ct. 1821 (1987) (limitations on the jury's consideration of non-statutory mitigating factors violated the 8th Amendment); Mills v Maryland, 108 S.Ct. 1860 (1988) (limitations on the ability of individual jurors to consider facts in mitigation violated the 8th Amendment); Penry v Lynaugh, 109 S.Ct. 2934 (1989) (limitations on the jury's ability to consider evidence of mental retardation as mitigation violated the 8th Amendment).

Furthermore, the admissibility of evidence in a capital case is not limited by the rules of evidence; for example, reliable hearsay is admissible. See, § T.C.A. 39-13-204(c). Without the rules of evidence applying, the scope and scale of the potential proof in a capital sentencing hearing expands considerably.

There is a lower threshold for evaluating prejudice to the capital defendant resulting from the withholding of mitigating evidence. If the mitigating evidence withheld from the jury would likely have been sufficient, had it been presented, to cause only "one juror," Wiggins v Smith, supra, 123 S.Ct. at 2543[18], to hold out for a sentence of life, the defendant is prejudiced by the exclusion. See, T.C.A. § 39-13-204(h).

Thus, the mitigating evidence available to be presented on behalf of a capital defendant has a broad definition and scope, the rules of admissibility are relaxed, and the threshold of prejudice for failure to present it are low. Any denial or limitation on the indigent defendant's ability to investigate, prepare, or present available evidence in mitigation is potentially a constitutional violation and any criteria for such a denial or limitation is subject to abuse of discretion, if it is based on any

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[18]See, also, e.g., Frazier v Huffman, 343 F.3d 780, 799 (6th Cir. Sept. 8, 2003); Johnson v Bell, 344 F.3d 567, 574 (6th Cir. Sept. 10, 2003).

consideration other than the defendant's need or lack thereof.[19] This vulnerability to abuse is particularly significant when, as here, the judicial or administrative reviewing authority has limited experience defending capital cases, is not privy to the detail, nuances, perspective, and evolution of defense counsel's mitigation strategy, and, instead, is particularly sensitive to the need to conserve funds.

IV. The prosecution and judiciary have not accorded the defense bar the relative independence, autonomy, and quality services required to effectively address the needs of indigent capital defendants.

A. The prosecution

1. The prosecution is not required to obtain judicial approval of expenditures.

The prosecution, unlike the indigent defendant, is not required to undergo judicial scrutiny or suffer limitations imposed by the judiciary, unrelated to need, with regard to the authorization of funds for services in the prosecution of cases. Consequently, the prosecution has the benefit of services unavailable to indigent defendants.[20] This independence and autonomy the prosecution enjoys also gives it an unfair advantage in the adversarial system, because it allows them access to services and witnesses unavailable to indigent defendants and their counsel. This prosecutorial

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[19]Compare, these legal standards with the criteria set out in proposed Rule 13 § 5(c)(2), (3), and (4); and, see discussion of that specific section, infra.

[20]It is not uncommon, particularly in collateral state and federal capital litigation, for the prosecution to rely on expert witnesses who would be unavailable to the defense according to Rule 13.

For example, during recent litigation in a Tennessee capital case, the state Attorney General had the services of a psychiatrist from Hawaii who was compensated at the rate of $350 per hour, and a neuropsychologist from San Diego, California who was compensated at the rate of $250 per hour. Both of these two experts had together apparently billed the state in that one case well in excess of $100,000.00. The prosecution did not have to obtain permission from the judiciary before they expended these funds. Furthermore, pursuant to the proposed changes to Rule 13, defense counsel would have presumptively been prohibited from obtaining the services of either of these experts due their geographic location, see, proposed Rule 13 § 5(b)(2), and their compensation rates, see, proposed Rule 13 § 5(d)(1)(C) and (D).

advantage tips the playing field to the prosecution's advantage and raises serious questions about the fundamental fairness of the system.

Apart from the disparate limitations imposed by the judiciary on defense services, the prosecution already has the advantage of city, county, state, and federal investigative agencies, and crime laboratories -- further benefits unavailable to criminal defendants.

2. The prosecution's input regarding Rule 13 assumes and advocates an unfair advantage in the adversarial system.

While the prosecution receives no scrutiny from either the judiciary or the defense as to how they spend their money, the prosecution contends that it, along with the judiciary, should supervise expenditures by the indigent defense. In a draft commentary[21] on the proposed changes to Rule 13, the District Attorney General's Conference objected strenuously to any *ex parte* hearings by the judiciary in response to defense requests for the authorization of funds. Indeed, the proposed changes to Rule 13 even include a provision providing that "the trial court may determine after reviewing the *ex parte* motion that maintaining confidentiality of the request is not constitutionally required. (citations omitted). In such circumstances, the trial court has the authority to require defense counsel to serve a copy of the motion on the district attorney general and to hold a contested hearing on the request." Proposed Rule 13 § 5(a)(4).[22]

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[21]The District Attorney Generals' Conference has offered commentary on the proposed changes to Rule 13. Rule 13 concerns only the provision of defense counsel and services to indigent defendants; it does not involve any aspect of the prosecution's function. In fact, the prosecution need not endure any scrutiny or micro-management by the judiciary in the administration of expenditures in the prosecution of cases. The prosecution and the defense are opposing parties in an adversarial system. The appointment of counsel and the provision of defense services is an administrative matter insufficiently related to the issues of any case or controversy prosecuted before the court to allow the participation of the prosecution, an adversary party. To allow the prosecution to influence the provision of services to its adversarial opponent against whom the prosecution has brought criminal charges creates an unfair advantage for the prosecution. It is difficult to imagine that any commentary by the Tennessee Association of Defense Lawyers, for example, as to how the prosecution should use funds in the preparation and presentation of its cases, would be offered, invited, welcomed, or considered.

[22]This proposed subsection is designated to apply in "non-capital" cases, see, proposed Rule 13 § 5(a)(4), but, according to the definition of a capital case found at proposed Rule 13 § 3(a), the

The prosecutors suggest that they should have notice and the opportunity to oppose in open court any request by indigent defendants for the provision of services. If the prosecutors were allowed to contest requests for funds by indigent defendants, this would create problem due to the equal protection clause of the state and federal constitutions; because, it would allow fee-paying defendants with retained counsel, who are not required to disclose to the prosecution such expenditures, advantages unavailable to indigent defendants, who would have to disclose during an open court hearing on a request for funds. Also, this involvement by the prosecutors would give them another unfair advantage in the prosecution of criminal cases, in addition to the fact that the prosecutors have no judicial limitation on their expenditures, because the defendant would have no opportunity to contest expenditures by the prosecution.

On the other hand, the *ABA Guidelines* protect the indigent capital defendant's right to an *ex parte*, confidential hearing on his request for funds. See, e.g., *ABA Guideline* 4.1 ("Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, counsel should insist on making such requests *ex parte* and *in camera*." *ABA Guideline* 4.1, Commentary at 66). In addition to giving an unequal preference to defendants with retained counsel as well as an unfair advantage to the prosecution, any contrary rule would put defense counsel for an indigent capital defendant in a position in which he would have to reveal client confidences in violation of his ethical obligations pursuant to Rule 1.6 of the Rules of Professional Conduct. For all of these reasons, there should be no circumstances in a capital case in which the indigent defendant should have to defend his request for funds to prepare his defense against open court opposition by the prosecution, his adversary in an accusatorial system.

B. The judiciary

1. The statement that Rule 13 is intended to meet the opt-in provisions of the AEDPA manifests interests in conflict between those who drafted and administer the rule and those for whose benefit the rule exists.

Proposed Rule 13 § 1(a)(1)(vi) includes a statement that "[t]his rule is intended to meet the

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proposed changes in Rule 13 could be used to deny the capital defendant an *ex parte* hearing, if the request for funds is made prior to the issuance by the prosecution of a notice of intent to seek death.

standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA).[23] Pursuant to the AEDPA, if the federal courts are persuaded that a state has met certain minimum criteria regarding the quality of representation in state post-conviction capital cases, "opt-in" benefits accrue to the state prosecutor in the form of procedural barriers that limit the capital petitioner's opportunity to litigate in federal court the merits of substantive claims. Proposed Rule 13's stated intent, therefore, is to limit a capital defendant's federal litigation opportunities. This is one example of the conflict between the interests of the judiciary and those of the indigent defendant that render problematic the judiciary's micro-management of service delivery to indigent defendants as manifest by Rule 13, and particularly as manifest by the proposed changes to Rule 13. The stated intent to satisfy the "opt-in" provisions of the AEDPA is not only inconsistent with the interest of defendants, it is also simply not a good idea. Experience has taught that Tennessee does not need to place further limits on a capital defendant's ability to litigate in federal court.[24] The overwhelming

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[23]Because the proposed changes in Rule 13 will greater limit the access of defense counsel to funds and services, the proposed changes in Rule 13 will bring Tennessee further from, not closer to, the provision of adequate representation in death penalty cases, and, consequently, further from, not closer to, substantive compliance with the requirements of AEDPA.

[24]According to former Sixth Circuit Court of Appeals Chief Judge Gilbert Merritt, 8 of the 12 (75%) Tennessee capital cases brought to federal court for habeas review have required reversal. See, *Death penalty system needs fix, judge says*, The Tennessean, Sept. 27, 2002, at 1A. (citing Judge Merritt's report to the Tennessee Bar Association's Federal/State Judicial Conference in Nashville on Sept. 26, 2002)

In that same report, Judge Merritt stated that "of the 156 death sentences imposed over the last 25 years under Tennessee's current death penalty law . . . [a]lmost half have now been reversed on appeal. 56 have been have been reversed because of error in the sentencing phase of the case, and 14 have been reversed because of errors in the guilt phase of the case." He also stated: "The capital punishment system had broken down in 1972 when the Supreme Court reversed the whole direction of capital punishment law under the Eighth Amendment in Furman v Georgia. At that time the capital punishment system was being administered in an arbitrary way. The system is still broken."

The fact that relief has been granted in federal court in three quarters of the cases (8 out of 12, see, supra), alone, demonstrates the need for federal review and that limitations to any federal review should be reduced, not increased. United Supreme Court Justice Blackmun has stated:

> The mere presence of "[s]uch a high incidence of uncorrected error" found in capital habeas corpus proceedings, (citation omitted) testifies to the inadequacy of the legal representation afforded at the trial and state post-conviction stages. Yet the barriers to relief in federal habeas corpus proceedings are high. Even the best lawyers cannot

majority of the litigation in federal court, as it is, consumes valuable state resources that are wasted on litigation over whether or not the federal court should even reach the merits of substantive claims. More limits on a capital defendant's ability to litigate in federal court will increase, not decrease, litigation concerning non-substantive, collateral matters, and, thus, discourage, not encourage, finality. It will also increase the likelihood of creating a grave injustice through the execution of a defendant not legally appropriate for the death penalty.

2. The review of the trial court's authorization by the AOC and the Chief Justice is fatally flawed.

a. Micro-management of requests for the authorization of funds by the Administrative offices and the Chief Justice of the Tennessee Supreme Court is inconsistent with the spirit and language of T.C.A. § 40-14-207(b).

The proposed changes to Rule 13 also contemplate that "[o]nce the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director [of the Administrative Office of the Courts] for prior approval." Rule 13 § 5(e)(4). In some instances, "the claim shall be transmitted to the chief justice for disposition and prior approval." Rule 13 § 5(e)(5). These requirements are inconsistent with the language and spirit of the statute. T.C.A. § 40-14-207(b) provides:

> (b) In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an ex parte hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary.

This statute directs "the court of record having jurisdiction" to "in its discretion, determine" whether

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> rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel. The accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review (citations omitted) make it even less likely that future capital defendants who receive qualified legal counsel in federal habeas actually will obtain relief.

McFarland v Scott, supra, 114 S.Ct. at 2790 (citations omitted). Given this history, it is apparent that more procedural barriers will create more problems than it will solve.

the funds should be authorized. Neither, a state government administrative officer nor the Chief Justice are "the court of record having jurisdiction of the case" under T.C.A. 40-14-207(b) and thus have not been authorized to exercise this discretion.

The language of the statute is clear and with good reason. In most instances, "the court of record having jurisdiction of the case" is in a better position to "determine" the authorization, than is the Chief Justice. Particularly unable to make this determination is a state government administrative officer, who has no judicial authority, has had no experience defending capital defendants, and has only limited knowledge about the case, the defendant, and the lawyer making the request. Apart from a qualified defense counsel making the request, or some other hypothetical reviewing authority which has quality experience defending capital cases, see, e.g., *ABA Guideline* 3.1 (B) and (C); and *ABA Guideline* 4.1, the trial court with jurisdiction over the specific case at issue is better able to determine the needs of the defendant than is the Administrative Office of the Courts or Chief Justice.

b. Micro-management of requests for the authorization of funds by the Chief Justice of the Tennessee Supreme creates a conflict of interest for the Chief Justice, if not the entire Tennessee Supreme Court.

It is highly problematic for the Chief Justice, who is a member of the Court that will have the final state appellate review of the merits of the issues raised in that same case, to have unreviewable authority to cut funds previously authorized by the presiding trial judge. A Chief Justice who limits the services available to an indigent defendant has a conflict of interest when later asked to review a record that may well have been limited by the very Justice's prior funding decisions. The *ABA Guidelines* provide that "Counsel should have the right to have such services provided by persons independent of government" *ABA Guideline* 4.1(B)(1), and "the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds." *ABA Guideline* 4.1(B)(2).

c. Micro-management of requests for the authorization of funds by entities unfamiliar with the case, unqualified in the defense of capital cases, and who have an inconsistent interest to serve will

increase the incidence of arbitrary, thus unconstitutional, denials of requests for funds.

The micro-management of the provision of counsel and services for indigent defendants manifest in the proposed changes to Rule 13 discourages a proper allocation of available funds for defense services on an as-needed basis, as the constitution requires, and encourages an arbitrary and unconstitutional limitation on the allocation of funds to the defense. This is particularly true when the requested funds are reviewed and determined by administrative and judicial entities that do not have the experience or information necessary to make a reliable decision about what is needed to protect the rights of the defendant in the preparation and presentation of his defenses. As the request goes up the line from defense counsel, to the trial court, to the Administrative Office of the Courts, to the Chief Justice of the Tennessee Supreme Court, the likelihood will increase that the reviewing entity will be more unfamiliar with the nuances and detail of the case, more insensitive to the needs of defense counsel and the indigent defendant, more inexperienced in the defense of capital cases, and more sensitive to the budgetary demands. Consequently, the likelihood will increase that any limitations on the request will be imposed for arbitrary, and thus unconstitutional, reasons.

The judiciary micro-manages and limits the expenditures by defense counsel, particularly as evidenced by the current proposed changes to Rule 13. As previously pointed out, the prosecution is not required to undergo this micro-management and scrutiny by the judiciary. It is difficult to rationalize this unequal treatment, particularly in those instances in which the prosecution would have access to services and witnesses unavailable to the defense.

d. Defense counsel has no opportunity for the review of decisions by the Administrative offices and the Chief Justice of the Tennessee Supreme Court regarding limitations on the authorization of funds.

"The determination by the director shall be final, except where review by the chief justice also is required. In those instances, the determination of the chief justice shall be final." Proposed Rule 13 § 6(b)(4). When cuts are made by an administrative officer or a member of the Supreme Court, defendant's counsel is provided no hearing or opportunity to demonstrate that the reduction eviscerates the trial court's attempt to "ensure that the constitutional rights of the defendant are

properly protected." T.C.A. § 40-14-207(b). Neither the Chief Justice, nor the Administrative Office of the Courts actually hears from defense counsel in a face-to-face discussion in which the defense attorney can respond to questions and defend or negotiate a request for funds. Thus, Rule 13 directs the Administrative Office of the Courts and the Chief Justice to limit expenditures without giving defense counsel any opportunity to be heard on whether the cuts deny needed constitutional services to the defendant.

The denial of notice and an opportunity to be heard is a violation of the due process clause of the state and federal constitutions, because it denies the indigent defendant an opportunity to present his claims at a meaningful time and in a meaningful manner. See, for example, Seals v State, 23 S.W.3d 272, 277-78 (Tenn. 2000) (quoting Burford v State, 845 S.W.2d 204, 207 (Tenn. 1992)). When a request for the authorization of funds is properly presented, pursuant to T.C.A. § 40-14-207(b), the authority designated by the statute to make the decision, i.e. the trial court, the indigent defendant's right to a hearing is recognized. Proposed Rule 13 provides, however, that the due process rights to a notice and a hearing will be denied when the funds request is denied by a party not even authorized by T.C.A. § 40-14-207(b) to act on the request.

Rule 13 does not allow for notice and or an opportunity to be heard upon post-trial court review by the AOC and/or the Chief Justice. Existing Rule 13 does allow "any aggrieved party," Rule 13 § 6(b), Supreme Court review subsequent to any "final action" by the AOC and/or the Chief Justice. This has been omitted from the proposed revised version. The procedure should provide due process and an opportunity for defense counsel to be heard at any point in the process in which the authorization of funds or services might be limited.

e. Summary

The infirmities in the existing and proposed process for the review of the trial court's authorizations for defense services cumulate and render the process fatally flawed, as follows:

1. The trial court is in a position superior to any subsequent reviewer to make a constitutional determination of the services needed by the defendant, and, additionally, as the "court of record having jurisdiction of the case" is the only entity authorized by T.C.A. § 40-14-207(b) to make the determination.

2. The AOC, which is *not* authorized by T.C.A. § 40-14-207(b) to make the determination regarding defense services, but which is directed by Rule 13 to make this determination, is relatively unfamiliar with the case, unqualified in the defense of capital cases, unfamiliar with the needs of defense counsel, and has an interest in the preservation of limited funds that is inconsistent with the defendant's needs and that will encourage the arbitrary, thus unconstitutional, reversal of the trial court's authorization.

3. The indigent defendant and his counsel have no notice or opportunity to be heard by the AOC regarding any denial or reduction in the authorization by the AOC.

4. The indigent defendant and his counsel have no right to be heard in any review of the decision reached by the AOC.

5. Subsequent review by the Chief Justice, as designated by Rule 13, creates a conflict of interest for the Chief Justice and the Tennessee Supreme Court upon later review of the case on the merits.

3. The judiciary may not recognize the importance of communicating with and being responsive to informed representatives of the indigent defense bar.

Under current conditions, there does not appear to be an opportunity for meaningful systematic interchange between the judiciary and informed representatives of the indigent defense bar sufficient to provide an opportunity for the judiciary to understand and effectively address the needs of indigent defendants and their counsel. Proposed measures that could improve defense services, even those that would not require the expenditure of additional funds, have not been implemented for the sole apparent reason of the absence of any consideration of effective, meaningful input from the defense bar by those who determine policy.

For example, in response to another crisis in indigent defense funding that occurred in 1992, various state-wide bar associations filed petitions with the Tennessee Supreme Court seeking relief. The Petitioners in that action were The Tennessee Bar Association (TBA); the Tennessee Association of Criminal Defense Lawyers (TACDL); The Tennessee Trial Lawyers Association (TTLA); the Criminal Justice Funding Crisis Group (CJFCG); The Tennessee District Public Defenders Conference (DPDC), and The Capital Case Resource Center of Tennessee (CCRC). In response to those petitions, the Tennessee Supreme Court created The Indigent Defense Commission

(IDC). See, In re The Indigent Defense System, 883 S.W.2d 133 (Tenn. 1994). The IDC was directed by the Tennessee Supreme Court, *inter alia*, as follows: "The Commission will be responsible for developing and recommending to the Court a comprehensive plan for the delivery of legal services to indigent defendants in the state court system." Id. at 134. After considerable study and time-consuming investigation, the IDC submitted a comprehensive report with recommendations for reform to the Tennessee Supreme Court pursuant to that Court's direction. The IDC was subsequently disbanded by the Tennessee Court and none of its recommendations received any response from the Court or were implemented by the Court.

As far as death penalty cases go, it is respectfully submitted, the establishment of procedures and process by the judiciary that are appropriate to the situation and in satisfaction of constitutional mandate would require the judiciary to have a greater appreciation for the perspective of informed members of the indigent defense bar. It is also respectfully submitted that the situation requires a more realistic appreciation by the judiciary of the historical evidence which demonstrates the arbitrary imposition of death sentences in the past and the prospect for the continued imposition of arbitrary death sentences in the future due to the failure of the state to provide adequate and effective representation with access to necessary services.

Unilateral revisions to Rule 13 and micro-management of the allocation of funds to indigent defendants without meaningful consideration of the perspective of informed representatives of the indigent defense bar will create a system that is unresponsive to the indigent defendant's need and, consequently, unconstitutional. The problem, as insurmountable as it seems, is simplified in one way: The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, February 2003, provide the blueprint for the most effective system and should be followed.

4. The administration of indigent defense services should be performed by an entity "independent of the judiciary." ABA Guideline 3.1(B).

a. The appointment of counsel in capital cases should be the responsibility of an entity "independent of the judiciary . . . or elected officials," which consists of "defense attorneys with demonstrated knowledge and expertise in capital representation." *ABA Guideline* 3.1(B), (C), (E).

Rule 13 contemplates that trial judges will supervise the appointment of counsel in death penalty cases. The courts have not proven to be either sufficiently motivated or knowledgeable, however, to appoint the best available, or even competent, counsel. Judges serve interests, other than those of the indigent capital defendant, however, that are often in conflict with those of the defendant. For example, judges could, and should, be concerned with moving the docket, or serving the interest of the prosecution, or the interests of the surviving victim's family, or the interests of the media, or the interests of her or his public constituency, etc. This involves the juggling of conflicting interests and is a lot to ask of any single person, judges included. As a result, the court might unconsciously appoint an attorney who will not tie up the court, impose on the prosecution, or offend the surviving victims, the media representatives, or the public with "unnecessary" adversarial litigation. In fact, it blinks reality to ignore the problem inherent in the appointment by a judge of an advocate for the defense who might later be attempting to get that same judge reversed on appeal. All of these matters could detrimentally effect the quality of the appointment of counsel in death penalty cases.

Furthermore, a unique and rare perspective and commitment is required to be able to effectively defend capital cases, which few attorneys have. It is very difficult to vicariously acquire this perspective without substantial experience actually defending capital cases. It is respectfully submitted that this is a reality difficult for many members of the judiciary to appreciate. State court judges are typically confident that they know what is required of defense counsel and which attorneys can best meet these requirements; but, few judges have ever defended a capital case or attended any quality training programs about the effective defense of capital cases. Consequently, few judges have a basis for realistically judging the demands on and needs of defense counsel in a capital case. Many judges have had experience prosecuting criminal defendants, and, perhaps, capital defendants; but, that experience provides little insight for judges concerning the requirements of effective capital defense and even may cause the judge to be biased in such a way as to present an impediment to appreciating the demands on capital defense counsel. Consequently, many state court judges – trial and appellate – have had a very limited opportunity to appreciate the scope and scale of the obligations of a defense attorney in a death penalty case.

For that reason, the *ABA Guidelines* provide that a "Responsible Agency should be

independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases." *ABA Guideline* 3.1(B). The appointment of counsel in death penalty cases should only be done by "defense attorneys with demonstrated knowledge and expertise in capital representation."[25] *ABA Guideline* 3.1(C)(2); see, also, *ABA Guideline* 3.1 (E)(4) (In a list of tasks regarding the appointment of counsel and supervising the performance of counsel to be performed by an agency "independent of the judiciary," specific mention is made of the duty to "assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys.").

b. The supervision of the disbursement of funds for defense services in capital cases should be the responsibility of an entity "independent of the government," *ABA Guideline* 4.1(B)(1) which consists of "defense attorneys with demonstrated knowledge and expertise in capital representation." *ABA Guideline* 3.1(B), (C), (E).

The conflicting interests that beset the trial court and the relative lack of experience and knowledge that trial judges typically have regarding the defense of capital cases render problematic the trial court's review of defense counsel's requests for funds for supporting services.

The *ABA Guidelines* provide that defense services should be provided by persons "independent of the government." *ABA Guideline* 4.1(B)(1); see, generally, *ABA Guidelines* 4.1 and 9.1. "The Responsible Agency" designated in *ABA Guideline* 3.1, consisting of "defense attorneys with demonstrated knowledge and expertise in capital representation," *ABA Guideline* 3.1(C)(2), should assume the responsibility for the disbursement of funds for defense services along with its

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[25]No such appointing authority exists in Tennessee. The *ABA Guidelines* provide that "The Responsible Agency" should be "an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation." See, 13 § 3.1(C).

No existing state agency, including the District Public Defenders' Conference (DPDC), is equipped to perform this function. The structural limitations of the DPDC (i.e. 31 independent and locally-elected public defenders with no central quality control) and the nature of the political pressures imposed on the DPDC (i.e. adequate funding of effective counsel in death penalty cases is not a priority with the legislature, in whose good graces the administrators of the offices of the public defender must remain) render it an inappropriate vehicle for the appointment of attorneys and the provision of defense services in capital cases.

duties regarding the appointment and performance of counsel in death penalty cases. See, *ABA Guideline* 3.1(E)(1) through (8).

V. The "assembly line" appointment of "cut-rate, cookie-cutter" attorneys, investigators, and forensic experts in death penalty cases.

Although the surpassing difficulty of the litigation and the inadequacy of the defense services typically provided in death penalty cases is generally recognized, see, discussion, supra, the approach taken in Tennessee is built on an apparent assumption that any attorney or any investigator, or any psychologist, or any other forensic expert will be satisfactory in a death penalty case. This approach assumes that one professional is just as good as another and is a manifestation of the sentiment expressed by Justice Blackman in McFarland v Scott, supra, 114 S.Ct. 2787, in that Tennessee "has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer,'" an investigator, a psychologist, etc. The "assembly-line, cookie cutter" approach does not provide the indigent capital defendant with the *best* available professional services, but forces upon the indigent capital defendant *any* available professional services as long as they are relatively less costly. The history of the administration of the death penalty in this state and the persistent arbitrary application of death sentences against defendants due to their lack of economic power, not due to their culpability, reflect the result of this type of approach. With this approach, the state can expect and will receive, as it has in the past, ineffective, inadequate representation, and unreliably imposed death sentences.

This is clearly *not* the approach that is required by the *ABA Guidelines*. *The ABA Guidelines* contemplate that the available professional best able to provide the service needed by the indigent defendant is required and will be appointed. See, for example, *ABA Guideline* 5.1(B)(1)(b) ("In formulating qualification standards [for death penalty defense counsel], the Responsible Agency should insure: . . . [t]hat every attorney representing a capital defendant has: . . . demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases."); *ABA Guideline* 3.1(C), commentary at 26 ("[T]he overriding consideration must always be to provide high quality legal representation to the person facing a possible death sentence.").

See, also, e.g., *ABA Guideline* 3.1(A)((1) (The "Legal Representation Plan" is to "ensur[e] that each capital defendant in the jurisdiction receives high quality legal representation."); *ABA Guideline* 3.1(E)(1) through (8) (Sets out the duties to be performed by the "Responsible Agency" designed to ensure the appointment and performance of best available counsel.); *ABA Guideline* 4.1(A) (1) ("The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation."); *ABA Guideline* 9.1(A) ('The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel."); *ABA Guideline* 9.1(B) ("Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation."); *ABA Guideline* 9.1(C) ("Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.").

Even assuming that resources are limited, the *ABA Guidelines* contemplate:

1. That the best available attorneys will be recruited and appointed to fit the characteristics of specific death penalty cases and that this recruitment and appointment will be conducted and performed by attorneys qualified to know how to find and identify attorneys qualified to represent death penalty defendants, make the match to the appropriate case, and make conflict-free appointments in capital cases. The local public defender will not automatically be appointed; nor will any attorney be appointed, simply because he meets existing minimum standards and is available. No attorney will be categorically eliminated from consideration for appointment categorically because he or she is from out-of-county, from out-of-state, does not have an in-state office, is not licensed to practice in the state, or does not strictly satisfy arbitrary "qualification standards" based on experience, without regard for the quality of the experience.

2. That state-wide trial and appellate offices staffed by qualified attorneys will provide resources to appointed counsel in order to: assist them in their representation; help them identify investigators and forensic experts appropriate to the case; provide high quality training for attorneys, investigators, and forensic experts on effective performance in the defense of capital cases; provide resource

materials, sample pleadings, brief banks to appointed defense counsel; provide direct representation as counsel of record when needed; and set a standard of care for representation, investigation, and expert assistance in capital cases. The court-appointed lawyer will not be left to fend for himself regardless of qualifications, workload, support staff, assistance from other sources, unique characteristics of the case, etc.

3. That the best possible investigators or forensic experts will be selected to assist counsel depending on the characteristics of the case and the assistance that the case requires, and not depending necessarily on whether they are from in-state, or charge the minimum (or less) hourly compensation rate, or are willing to work without full compensation for travel, or are willing to perform whatever work the case requires with their fee set at an arbitrary ceiling.

4. That these decisions will be made without categorical limitations unrelated to the total circumstances of the case. The decisions regarding the availability of funds will be made dynamically, not in an information vacuum or independent of other needs in the case, and be based on a prioritization of need and with the input of court-appointed counsel. These decisions will not be made by someone who is neither a defense counsel, nor someone who has not had substantial, quality experience defending capital cases, and will not be made without strategic planning with regard for the total needs in the case, as understood by the counsel of record.

Budgetary limitations are not a legitimate reason to set arbitrary limits that are not based on need or lack thereof -- to allow otherwise is facially unconstitutional. The *ABA Guidelines* make it clear that budgetary limitations are not a valid basis to fail to provide the best possible defense services. The state and federal constitution require another solution to the budgetary problem.

VI. Specific proposed changes to Rule 13 as they relate to death penalty cases.

A. §3 – Minimum qualifications and compensation of counsel in capital cases:

1. § 3(b)(1), (f) -- There should be no limitation on the appointment of counsel based on geographic location.

Pursuant to the proposed Rule 13, the appointment of counsel is limited to counsel who are

licensed to practice and who maintain offices in Tennessee. There is no apparent legitimate reason for this provision. The *ABA Guidelines* do not contemplate any such restriction. The appointment of attorneys should not be limited to attorneys "licensed in Tennessee." Such a restriction may be prohibited or limited by the Privileges and Immunities Clause of the United States Constitution.[26]

As it is, Tennessee capital defendants often do not have the benefit of representation by qualified attorneys. To limit the appointment in capital cases to Tennessee attorneys, or to any other arbitrary category of attorney, will make it even more difficult and unlikely that qualified counsel will be appointed. Rule 13 should authorize the appointment of qualified counsel in capital cases without limitation to the geographical location of the attorney. If it is necessary to go out-of-state to locate qualified counsel, out-of-state counsel should be allowed to be admitted *pro hac vice*.[27] It might be appropriate for Rule 13 to encourage (but not require) the appointment of at least one Tennessee attorney. In some cases, it would be optimal to have one out-of-state attorney and one in-state attorney. It is typically advantageous to the defendant to have at least one local counsel on the case, depending on the qualifications of available local counsel. There should not be any prohibition, however, against the appointment of out-of-state counsel.

Assuming that the additional costs for travel of out-of-state counsel is the contemplated reason that Rule 13 excludes out-of-state counsel, the cost problem can be addressed without

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[26]"[A] nonresident's interest in practicing law is a "privilege" protected by the [Privileges and Immunities] Clause [of the United States Constitution]." Supreme Court of New Hampshire v Piper, 105 S.Ct. 1272, 1273 (1985). See, also, Supreme Court of Virginia v Friedman, 108 S.Ct. 2260 (1988); Sargus v West Va. Bd. of Law Examiners, 294 S.E.2d 440 (W. Va. 1982); Noll v Alaska Bar Assoc., 649 P.2d 241 (Alaska 1982); Gordon v Comm. on Character & Fitness, 397 N.E.2d 1309 (N.Y. 1979); Matter of Judd, 461 N.E.2d 760 (Mass. 1984).

[27]In Supreme Court of New Hampshire v Piper, the United States Supreme Court stated:

> Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights.

105 S.Ct. at 1273.

> The lawyer who champions unpopular causes surely is as important to the 'maintenance or well-being of the Union' [as are other endeavors that are protected by the privileges and immunities clause].

105 S.Ct. at 1277 (citations omitted).

commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster."

2. The eligibility criteria and the appointment lists exclude attorneys who are qualified. Tennessee has a number of talented attorneys with a commitment to excellence and the ability to represent capital litigants, who do not satisfy the criteria for inclusion on the lists because they do not have sufficient experience in capital or non-capital criminal cases. (For example, several specific instances have occurred in which exceptionally qualified attorneys, who have, in part, proven their qualifications by successfully obtaining relief for capital petitioners in state or federal post-conviction review, are not eligible pursuant to Rule 13 to represent their clients in the retrial.) The Commentary to *ABA Guideline* 5.1, at 37, provides: "There are also those attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases. . . . These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole."

3. The appointment lists are administered and controlled by judiciary and the Administrative Office. In many past instances not even minimumly qualified counsel have been appointed. See *ABA Guideline* 3.1 and discussion, supra. The "Responsible agency" delegated to appoint counsel in death penalty cases should be populated by "defense attorneys with demonstrated knowledge and expertise in capital representation." *ABA Guideline* 3.1(C)

4. Many of the attorneys who meet the existing criteria for appointment in capital cases, are solo practitioners or practitioners in small firms that are without the support staff and resources sufficient to provide the necessary services. For this reason, the most qualified representation can be found among carefully selected attorneys, often from larger firms, even including attorneys whose practice is predominantly civil[28], if their firm has the resources necessary to carry the burden in capital cases.

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[28]Gideon v Wainwright notwithstanding, the level of practice and the quality of representation in indigent criminal cases by court-appointed counsel, as a general rule, is clearly inferior to that provided to non-indigent clients, including representation in civil cases involving property and not liberty or life. Even counsel with predominantly civil litigation experience will often provide more effective representation in capital cases, if their experience consists of representation in cases that are well-financed and involved protracted and complicated litigation. Most attorneys in Tennessee, who work predominantly in indigent criminal representation, concentrate on cases involving high volume, quick turnover, and little time in preparation -- this is not good experience for capital case

"[T]he Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such size and aggregate level of experience as to be able to function effectively." ABA Guideline 5.1, Commentary at 37.

5. There is no continuing pro-active effort, with the assistance of the state and federal judiciary, to expand the pool of qualified counsel. See, *ABA Guideline* 3.1(E)(1), and discussion at footnote 8, supra.

6. The compensation of counsel in death penalty cases is too low at all procedural stages to attract qualified counsel, be they private attorneys or public defenders. See, *ABA Guideline* 9.1(B) and discussion, infra.

Due to the difficulty of the litigation in death penalty cases, the emotional investment required of counsel, the investment of time required, and the difficulty in amassing adequate support services necessary to effectively defend a capital case, the defense of capital cases is unattractive to the overwhelming majority of qualified counsel in this state. For all of the reasons addressed, herein, the proposed changes to Rule 13 will make representation in death penalty cases more unattractive than ever.

Even under otherwise optimal circumstances, the problem ultimately comes down to the fact that there are simply not enough qualified counsel available to accept appointments. The solution to the problem does not include the exclusion of *any* category of attorneys that may include attorneys qualified to represent capital defendants or petitioners, such as out-of-state counsel as in proposed Rule 13 § 3(b)(1), (f). Also, the solution to this problem is not to appoint attorneys, who are not qualified, but to find attorneys who are qualified. See, *ABA Guideline* 5.1(B)(1)(b) provides: "In formulating qualification standards, the Responsible Agency should insure: . . . [t]hat every attorney representing a capital defendant has: . . . demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases."

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representation. Often the best combination of counsel on a capital defense team includes one attorney with predominantly criminal experience and a second attorney with quality experience providing representation to non-indigent clients in complex and lengthy civil litigation.

3. § 3(k) – the rate of compensation for counsel in capital cases is inadequate.

It has recently been reported by the print media in Tennessee that attorneys providing services to the Tennessee Lottery Board are to be paid by the state at the rate of $250 per hour. Attorneys contracting with the state are on occasion paid comparable rates for other legal services. At the same time, attorneys who represent citizens of Tennessee whose lives are at stake are limited to rates that are more or less one quarter or a third of that paid to attorneys representing the Lottery Board. This disparity between the amount of money paid to attorneys representing the Lottery Board and that paid to attorneys for defending capital clients is a sad indication of the state's priorities. With human life at stake in death penalty cases and a game of chance with money at stake in lottery cases, the symbolic significance can hardly go unnoticed and the disparity in the compensation of counsel for each type of representation may, indeed, shock the conscience.

Proposed Rule 13 § 3(k) sets out the hourly rate of compensation for court-appointed private counsel in death penalty cases. Private court-appointed capital counsel receive relatively little compensation, particularly when their costs of operating a law practice are considered. Typically, the overhead costs of maintaining a practice of law can run in excess of $50 per hour.[29] According to the graduated scale for compensation provided for in Rule 13, the state rate of compensation for court-appointed death penalty counsel is $100 per hour for in-court time in trial; but, this rate is only for lead counsel *during trial*, which should only be a relative fraction of the time spent on the case, and does not apply at any time to second counsel who is compensated at a lower rate. The rate goes down from $100 for lead counsel in-court at trial to $60 per hour for out-of-court time invested by second counsel at trial and on appeal and by either first or second counsel for out-of-court time spent in post-conviction proceedings. See, proposed Rule 13 §3(k).

Pursuant to the proposed Rule 13 §(k), the rate of compensation goes down as the case moves from direct to collateral review. The *ABA Guidelines* do not contemplate such a reduction in the compensation rate. In point of fact, the litigation during collateral review involves more

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[29]Surveys conducted in 1992, over 10 years ago, among the membership of the Tennessee Bar Association (TBA) and the Tennessee Association of Criminal Defense Lawyers (TACDL) indicated that the overhead rate per hour for TACDL private attorneys was $47.26 per hour and for TBA attorneys $46.81 per hour.

complicated procedural issues than does the litigation confronted by counsel at trial, even though the trial is the "main event." State post-conviction litigation has some of the characteristics of civil litigation along with its essential criminal nature. State post-conviction counsel start out with an entire trial and appellate record that they must assimilate and absorb; they also must anticipate complex, unique, and peculiar considerations in anticipation of the potential for subsequent litigation in federal court on habeas corpus review. There is no basis for the decreasing rate of compensation.

According to the *ABA Guidelines*, death penalty defense representation is "more difficult and time-consuming,' and involves "psychological and emotional pressures *unknown elsewhere in the law.*" *ABA Guideline* 1.1, Commentary at 4. Clearly, no case has more at stake than does a death penalty case. See, *ABA Guideline* 1.1, Commentary. It should come as no surprise that most qualified counsel avoid death penalty case appointments. In order to be competitive sufficient to attract qualified counsel, the compensation rate must be substantially higher.

Most private attorneys cannot afford to accept appointments in death penalty cases. In order to effectively practice death penalty defense law, it is necessary for many attorneys that they devote their full-time practice to it; yet, the compensation rates of death penalty defense counsel in state court are so low that an attorney cannot afford to work full-time representing death penalty defendants. At best, the hourly compensation rate in death penalty cases is considerably less than that paid to private attorneys by non-indigent clients, which can go up to $250, $350, or higher. This disparity discourages attorneys from accepting capital cases and in practice encourages them to favor fee-paying clients when they have capital cases on their caseload. The *ABA Guidelines* provide that "Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation."

The compensation rate in federal court for representation in original federal capital prosecutions and federal review of state court capital cases is typically $125 per hour (for work both in-court and out-of-court). The disparity in the compensation rate between federal court and state court creates a potential conflict of interest for attorneys who represent capital defendants in both state and federal court. The attorney is invited to give his or her clients in federal court first priority

over clients in state court due to the higher rate of compensation in federal court.[30]

Furthermore, the disparity between the higher rate for time spent in-court and the lower rate for time spent out-of-court invites attorneys to accept appointments in capital cases in order to take advantage of the higher in-court rate, without a appreciation for the fact that the predominant service to be provided a capital defendant will be work done out-of-court. In point of fact, if counsel provides effective representation, the emphasis will be on out-of-court time. A strategy of high priority for defense counsel should be to avoid a death-qualified jury. It is generally accepted that death-qualified juries are more prosecution-prone at the guilt stage and death-prone at the sentencing stage. In the overwhelming majority of the cases, the quality of representation and preparation should be directed toward disposing of the case without going to trial; but, the compensation schedule encourages counsel to take their clients to trial. The in-court rate should be the same as the out-of-court rate. See, *ABA Guideline* 9.1(B)(3) ("Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court.").

B. § 4 – Payment of expenses incident to representation.

1. § 4(b) – There is no basis for requiring prior authorization for travel depending on whether the travel is in-state or out-of-state, as required by proposed Rule 13 § 4(b).

Considering only the life history investigation required in preparation for a capital sentencing hearing, this investigation must take counsel and his investigator to wherever the client has had significant contacts and experiences. Many, if not most, capital defendants have lived or spent significant time and have developed significant contacts out-of-state.

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[30]According to Kevin McNally of the Federal Death Penalty Resource Counsel Project, funded by the Administrative Office of the United States Courts, the average total cost for defense services (including attorney's fees and non-attorney costs, such as for investigative and forensic expert assistance) at the trial level in original federal capital prosecutions in fiscal 2001 averaged $1,216,322.00 per case.

Requiring prior approval for out-of-state travel necessarily indicates that the approval may be refused. To refuse funds based on whether or not the state line has been crossed is not based on need, is arbitrary, and, thus, is unconstitutional. The legal standard to be applied in the determination of whether the funds requested for travel should be authorized is whether the travel is "necessary to ensure that the constitutional rights of the defendant are properly protected," T.C.A. 40-14-207(b), not whether it crosses state lines. Nothing about crossing state lines creates any type of a presumption or inference that the funds are not "necessary."

A distinction between travel expenses that require prior authorization and those that do not based on a radius of miles from the location of the indictment or from the primary locus of the investigation (which can be anywhere, given the requirements of the investigation of the client's life history) makes more sense than a distinction regarding whether the travel expense was incurred in-state or out-of-state. For example, under the proposed standard, the attorney for a defendant in Memphis may incur expenses for a trip from Memphis to Johnson City without obtaining prior authorization, while proposed Rule 13 would require prior authorization for travel expenses to be incurred for travel from Memphis, Tennessee to West Memphis, Arkansas.

C. § 5 – Experts, investigators, and other support services.

In numerous ways, Proposed Rule 13 §5 violates the *ABA Guidelines* and prevents a capital defendant from effectively presenting his case. See, *ABA Guideline* 4.1, Commentary at 29-33 (describing generally the basic non-attorney needs of a capital defense team). Without regard to need, Rule 13 § 5 arbitrarily limits, for example, the defendant's use of out-of-state services, limits the types of facts that can be investigated, puts caps on hourly rates, cuts in half the amount of compensation that non-attorney personnel can receive as reimbursement for travel, and puts caps on the total compensation for defense experts.

"[Q]uality representation cannot be rendered unless assigned counsel have access to adequate supporting services, including, 'expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing, and trained investigators to interview witnesses and to assemble demonstrative evidence'." *ABA Guideline* 4.1, Commentary at 30 (quoting from *ABA Criminal*

Justice Standards: Providing Defense Services, Standard 5-1.4, comment (3rd ed. 1992)). "This need is particularly acute in death penalty cases." *ABA Guideline 4.1*, Commentary at 30.

The availability of forensic investigators and experts in capital cases is problematic under the best of circumstances. Measures that will limit the availability of these services should be discouraged, not encouraged. Furthermore, both counsel and experts from other jurisdictions pollinate Tennessee with fresh ideas and experiences which can only enhance the quality of our justice in death penalty cases. It is not uncommon for counsel in a death penalty case to require a unique expert, a comparable substitute for which is simply not available in Tennessee. It is fair to say that the need for, and unavailability of, qualified extra-legal forensic assistance in death penalty cases is even greater than that for qualified counsel. Furthermore, to the extent that these limitations discriminate against out-of-state services, the Privileges and Immunities Clause of the Art. IV § 2 of the United States Constitution may be violated. See, discussion, re: proposed Rule 13 § 3(b)(1), (f) and footnotes 23 and 24, supra.

Truth be known, it is impossible for the court, and particularly the Administrative Office of the Courts, to make an advance determination of how defense counsel can adequately and effectively satisfy the defendant's needs for investigative and expert assistance in any given capital case. Unfortunately, on the front end of the representation it is literally, impossible for the best qualified attorney to do more than estimate the needs for extra-legal forensic assistance. See, *ABA Guideline* 4.1, Commentary at 29-33 (a general discussion of death penalty defense counsel's need for supporting services). This logistic problem points up the need for approval based only on need. The difficulty of the determination of need requires vigilance in the elimination of any criteria based on considerations other than need that can result in the arbitrary violation of constitutional rights.

1. §5(b)(2) – The limitations on out-of-state experts, as provided, should not be implemented.

Proposed Rule 13 § 5(b)(2) requires that "every effort shall be made to obtain the services of an in-state expert, or if an in-state expert is not available, an expert from a contiguous state" and, if the services of an out-of-state expert or one not from a contiguous state are sought, "the motion shall explain the efforts made to obtain the services of an expert in Tennessee or a contiguous state."

The practical application of these requirements is constitutionally problematic, because the location of the expert is unrelated to the defendant's need. Geographic limitations for non-attorney services are not placed on defendants who retain counsel; and, they are not placed on prosecutors against whom the indigent defendants must defend. To the extent that services are denied because of their geographic location, defendants are limited in their ability to present their defense and the likelihood of the arbitrary imposition of a death sentence increases. Furthermore, to the extent that the limitations proposed for Rule 13 discriminate against out-of-state investigators, and experts, it would appear that the restrictions violate their rights protected by Art. IV, § 2 (the "Privileges and Immunities Clause") of the United States Constitution.

Often a case presents unique factors that render one or two experts as the only ones who can effectively provide the services needed. These experts may be in-state or out-of-state, and that factor is unrelated to whether the defendant needs their services or not. The Administrative office and the Chief Justice often are not able to pass effective judgment on the defendant's need for an expert with a particular set of skills, training, or experience. This restriction is a manifestation of the "cookie-cutter, assembly line" approach taken by Rule 13, discussed earlier, which is inconsistent with the whole idea of the *ABA Guidelines*.

The prosecutors and retained counsel do not have to satisfy any of the requirements and limitations of Rule 13. While the prosecution and the defense attorney are in the best position to determine what their respective cases need, the prosecutor does not have to contend with the review and limitations imposed by the Administrative Office or the Chief Justice, as does court-appointed counsel. The only reason that defense counsel has to tell anyone what he or she needs is because the client is indigent. These features put the indigent defendant at a disadvantage to the prosecution and to criminal defendants who can afford counsel. It is the type of disadvantage that effects the outcome of trials and results in the arbitrary imposition of death sentences.

2. §5(c)(2), (3), (4) -- The criteria by which to judge a sufficient showing of need for requested funds, as provided, should not be implemented.

Proposed Rule 13 requires the defense to, "show[] by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence,

is likely to be a significant issue in the defense at trial." Rule 13 § 5(c)(2). This showing, requiring such specificity, is subject to abuse by the reviewing authority. It is the rule, and not the exception, that abundant, legitimate proof, admissible for presentation in mitigation on behalf of the defendant, will be available for investigation, development, and presentation with no relationship or only a most remote relationship to the "inculpatory evidence" presented in the case. See, discussion, supra.

> Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine . . . the prosecution's death-eligibility case.

Williams v Taylor, 120 S.Ct. 1495, 1516 (2000). Since mitigating evidence need "not undermine . . . the prosecution's death eligibility case," id., attempts to limit the authorization of funds solely on this basis are unconstitutional. This standard does not measure the defendant's need for services.

Rule 13 §5(c) could be interpreted in such a way as to provide a means for a judicial or administrative reviewing authority to deny virtually any request for funds that might be made on a defendant's behalf. The criteria invite abuse, particularly given that the reviewing authority has conflicting interests between the defendant's needs for funds and the authority's need to conserve funds. The reviewing authority is encouraged by these proposed changes to Rule 13 to limit the amount of funds authorized. Proposed Rule 13 §5(c)(4) provides that a request for funds should be denied where the motion contains only:

1. "[C]onclusory assertions" (Proposed Rule 13 § 5(c)(4)(A)): It is clear that a requesting defense attorney must make his request with some specificity. This requirement, therefore, appears to be reasonable.

2. "[A]ssertions establishing only the mere hope or suspicion that favorable evidence may be obtained" (Proposed Rule 13 § 5(c)(4)(B)): This criteria is easily subject to abuse by the reviewing authority and would lead to a denial of requests in violation of constitutional rights. This standard is simply unworkable and unsatisfactory -- by definition. An investigation is conducted because you don't know what "evidence will be obtained;" if you know what you will find, there is no need for an investigation. Defense counsel can speculate and predict where they will look and for what they will look, but cannot tell what they will find.

A "mere hope or suspicion" that something favorable will be found is inevitable on the front end. This is true regarding the investigation at either stage of the trial, guilt or sentencing. The

sentencing mitigation investigation, however, is necessarily open-ended at the beginning. In every capital case, the first task that the mitigation investigator undertakes, with the supervision and direction of a mitigation specialist and defense counsel, is the development of the client's life history. See, e.g, Wiggins v Smith, supra, 125 S.Ct. 2527 (2003). Because the defense would be unable to articulate what they will find in their life history investigation with any specificity, any reviewing authority would be able deny a request for funds pursuant to this standard.

3. "[I]nformation indicating that the requested services relate to factual issues or matters within the province and understanding of the jury" (Proposed Rule 13 § 5(c)(4)(C)): This criteria is so vague and overbroad that it is virtually meaningless. It is difficult, or even impossible, to imagine what factual issues defense counsel wish to investigate that are *not* "factual issues or matters within the province and understanding of the jury." This standard is not given to any type of objective application. If the factual issues to be investigated are relevant to the trial, by definition, they are "within the province and understanding of the jury;" because, the jury is directed by the court to resolve the factual issues relevant to the case. The application of this criteria would inevitably be arbitrary, unrelated to a fair determination of defendant's need, and subject to abuse by a reviewing authority, particularly if the reviewing authority is primarily motivated by a need to protect state funds.

4. "[I]nformation indicating that the requested services fall within the capability and expertise of appointed counsel, such as interviewing witnesses" (Proposed Rule 13 § 5(c)(4)(D)): This criteria is particularly disturbing. Is this proposed provision intended to require the attorneys to personally interview all the witnesses, or that no request for funds to be used to interview witnesses will be granted, if the monies are requested for the services of an investigator?

In some instances, the presence of an investigator at the interview is essential. Rule 3.7 of the Rules of Professional Conduct prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. If the lawyer conducts the witness interviews unaccompanied by an investigator, she or he will inevitably be encouraged to violate this prohibition. *ABA Standard* 4-4.3 provides that "defense counsel should avoid interviewing a prospective witness except in the presence of a third person." Further, the Court of Criminal Appeals has recognized: "Since an attorney is limited in the contexts in which she or he can serve as a lawyer and a witness

(citations omitted), in many frequently raised issues petitioner will be unable to meet the standard of proof absent some support services. Counsel undertaking to investigate and interview the witnesses without the assistance of an investigator or without a third party present is denied effective impeachment if the witness' testimony at the hearing differs from statements made during the investigation." Owens v State, 1994 WL 112997 (Tenn. Crim. App. Mar. 25, 1994, rev'd in part on other grounds, 908 S.W.2d 92 (Tenn. 1995).

Attorneys are compensated at an hourly rate higher than that paid to investigators; therefore, witness interviews by investigators represents a greater economy of resources than would interviews by attorneys.

Interviewing witnesses is primarily what investigators do. Investigators are trained to interview witness and are typically better at it than are attorneys. Attorneys, particularly, are not very good mitigation investigators. Individual investigators are selected based on a perception that they possess characteristics which make them better able to interview the witnesses that will be peculiar to the case at hand.

The review of requests for the authorization of funds during state post-conviction proceedings have their own peculiar limitations. Depending on the specificity of their application, some of these limitations will be applied arbitrarily and on a basis unrelated to the petitioner's needs. Proposed Rule 13 requires the defense to show "that the services are necessary to establish a ground for post-conviction relief," Rule 13 §5(c)(3). This might particularly be difficult with relation to the investigation and presentation of evidence in support of ineffective assistance of counsel claims, which are inevitably raised in the post-conviction review of capital cases. In order to prepare proof in support of ineffective assistance of counsel claims, it is necessary to conduct the investigation and to prepare the presentation that trial counsel did not perform. This investigation, particularly with regard to the development of mitigating evidence, by definition, must be very far afield; and, specific limitations, such as those set out in proposed Rule 13, necessarily invite abuse of discretion by the reviewing authority.

3. § 5 (d) – Caps on the hourly rates of non-attorney defense services should not be imposed.

Proposed Rule 13 places caps on hourly rates of non-attorney defense services below that compensable in the private sector, see, Rule 13 § 5(d)(1)[31]; cuts the compensation rate for travel time in half, see, 13 § 5(d)(2); and places caps on the total authorization of funds for non-attorney defense services, see, Rule 13 § 5(d)(4) and (5).

According to the *ABA Guidelines*, however, the defendant should be allowed to obtain services at "prevailing rates" as need dictates. The hourly rate of compensation allowed for "non-attorney members of the defense team" should be "a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases," *ABA Guideline* 9.1(C). Further, "[m]itigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector," *ABA Guideline* 9.1(C)(2); and, "[m]embers of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available." Pursuant to *ABA Guideline* 9.1(C)(3), therefore, the defendant's right to non-attorney assistance would be balanced, at least to an extent, with the ability of the prosecution to obtain experts without judicial scrutiny. In proposed Rule 13, however, while the prosecution suffers no limitation, the defense must endure, notwithstanding a demonstrated need, restrictions regarding the hourly rate, total compensation, and the location of the non-attorney assistance whose services are sought. The problems that this creates in an adversarial system, in which the playing field must be level in order to be fair, are obvious.

Rule 13 §5(d)(1) establishes caps on the hourly rate for specific forensic assistance. These limitations are arbitrary, not based on need, and in some instances will simply make it impossible to obtain services. The limitations in §5(d)(1) will prevent defense counsel from obtaining needed

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[31]While the proposed caps on the hourly compensation rate for investigators and experts are exceedingly low, in most instances they are still well below the hourly compensation rate authorized for court-appointed defense counsel, who are managing the services of these investigators and experts. Compare §5(d)(1) with §3(k). Attorneys, who manage the members of the defense team, should not be compensated at a rate less than that at which team members are compensated.

services for reasons that are inconsistent with the *ABA Guidelines* 9.1(C)(2) and (3) and not based on any constitutionally recognized criteria.

4. §5(d)(2) -- The reimbursement rate for time spent traveling should not be cut.

The limitation on compensation for time spent traveling to fifty percent of the approved hourly rate, as provided in proposed Rule 13 §5(d)(2), is not based on existing scales or prevailing rates as the *ABA Guidelines* 9.1(C)(2) and (3) direct. It is an arbitrary limitation that, in some instances, will prevent defense counsel from obtaining needed services.

5. §5(d)(3) -- Investigators should not be required to be licensed in order to eligible for appointment pursuant to Rule 13.

Investigators are required to be licensed by state statutory law. Although requiring an investigator to be licensed may be appropriate for some purpose beyond the scope of this rule, it has not improved the quality of investigative services in capital cases. More than anything, the requirement of a license has created a political fraternity from which potential competitors are excluded, without any consideration for their performance qualifications and excludes qualified, but unlicensed, investigators. Qualified investigators are very difficult to find and an arbitrary, categorical exclusion like this reduces the pool of available qualified investigators. Also, for example, it may be impossible to find a licensed investigator with fluency in a foreign language or an understanding of an immigrant culture, though to use otherwise would not satisfy the need required. If an investigator is needed in another state or country, and that jurisdiction does not require licensing, it may be impossible to obtain the investigator needed for the case. The requirement of a license is unrelated to the defendant's needs for services and, consequently, will result in the arbitrary, thus unconstitutional, limitation of defense services. For this reason, Rule 13 §5(d)(3) is counterproductive and unconstitutional. With good reason, this restriction in proposed Rule 13 is not found in the *ABA Guidelines*.

6. §5(d)(5) -- The proposed cap for total funds authorized for investigative and expert services during post-conviction proceedings should not be

included.

The proposed caps on investigative services found at Rule 13 §5(d)(4) (i.e. $20,000), and expert services found at proposed Rule 13 §5(d)(5) (i.e. $25,000) during post-conviction proceedings are arbitrary and in many, perhaps most, instances will directly impede the petitioner's ability to present his defenses. Inevitably, claims of ineffective assistance of counsel will be brought during the post-conviction proceedings. Due to the typical deficient nature of the defense in capital trials, as demonstrated by past history, claims of ineffective assistance of counsel are almost always colorable and usually substantial. It is the burden of the petitioner's counsel to conduct the investigation, prepare and present the case that defense counsel did not present, but should have, at trial. In many, if not most, of the cases these caps will not be enough to meet the need. These limitations are not found in the *ABA Guidelines*, are not based on a lack of need, and are arbitrary. This provision should be excluded.

7. **§5(d)(6) -- The limitation on the authorization of funds for expert tests only in those instances in which the results are "admissible as evidence" should not be included.**

Regarding proposed Rule 13 §5(d)(6), the fact that expert test results "are not admissible" does not necessarily mean that they are not needed by a forensic expert to reach valid conclusions that could be the subject of admissible testimony. A defense expert may wish to conduct an inadmissible test in order to aid his analysis of a problem unique to his expertise and relevant to the inquiry he was contracted to make. One can speculate about how the exercise of discretion regarding this restriction might be abused. This restriction is unrelated to a showing of what funds are "necessary to ensure that the constitutional rights of the defendant are properly protected." T.C.A. § 40-14-207(b). This restriction is also arbitrary and not found in the *ABA Guidelines*.

Typically, the only way to reliably determine whether the expert test is admissible as evidence is through adversarial testing. If the request is submitted *ex parte*, how can the admissibility of the results of the expert's test be determined in an adversarial forum. . . or, does this proposed rule mean that the defense will be required to put the prosecution on notice, if he seeks funds for the performance of a test by an expert, in order that the prosecution can test its admissibility in open court in advance of trial? If it is required that the prosecution receive notice of an anticipated test by

an expert, this would violate the defendant's right to investigate and prepare his defense free from violation of the equal protection clause, given the unequal and unfair treatment thereby inflicted on the indigent defendant. This proposed provision is another example of a restriction being placed on the defense that is not imposed on the prosecution. This provision should be excluded.

VII. Conclusion

For these reasons, the proposed changes to Rule 13 should not be implemented and Rule 13 should be replaced with a rule that is consistent with the requirements of the *ABA Guidelines* and implemented in a manner that is consistent with the requirements of the state and federal constitutions which require that the review of requests for the authorization of funds for defense services must be based only on the needs of the defendant, and not, for example, based on arbitrary reasons that are dictated by a perceived limited availability of funds.

Respectfully submitted,

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RECEIVED
JAN 26 2004
By

January 23, 2004

Janice Rawls, Chief Deputy Clerk
Re: Rule 13 Comments
100 Supreme Court Building
401 Seventh Ave. N.
Nashville, TN 37219-1407

Re: Rule 13 Comments

Dear Ms. Rawls,

I am writing to make general comments on Rule 13 from the viewpoint of counsel that is often appointed and otherwise fully employed. When an attorney takes an appointed case he or she works at a greatly reduced rate subject to unrealistic maximum fee caps. The initial cap is generally so low that no attorney could reasonably represent a client properly for less. Therefore it is generally the rule rather than the exception that additional fees over the initial cap are sought.

Assuming an attorney has private work to do at his or her normal hourly rate, the more he or she works on the appointed case, the more income he or she loses. Rather than acknowledge this sacrifice and readily compensate an attorney who works long hours on an appointed case, our system is set up to make it difficult to obtain fees above the initial cap. Special approvals must be obtained to get additional fees. These approvals require appointed counsel to spend additional time on the case without it providing one iota of benefit to his or her client.

Many knowledgeable people believe issues should be addressed at the level where the issues arise. However, it appears that we are to go "all the way to the top" to get approvals for expert services. Such a system requires additional "red tape" in order to obtain decisions that should be made by trial court judges based on their superior knowledge of the needs of the individual litigant in that unique case.

These decisions should not be made in a distant place based on the ability of trial counsel to put "magic words" on bureaucratic forms. By requiring additional orders, reviews, comments, revisions, re-submission, etc., the workload of the appointed attorney is greatly increased making it more difficult to complete a proper representation within the caps allowed. Operating within that bureaucratic bungle then becomes as much of a challenge as the representation itself. This unnecessary additional burden causes appointed counsel stress and financial sacrifice but does not contribute positively to the achievement of justice.

Thank you for taking the time to review these comments which I have hastily documented.

Sincerely,

J. Al Johnson

Shelby County Government

A C Wharton, Jr.
Mayor

RECEIVED
JAN 26 2004
By

January 21, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Ms. Rawls:

In response to the Supreme Court's request for comments on the proposed amendment to Rule 13, I formulated a committee in my office to study the matter, and on behalf of the 68 attorneys in the Shelby County Public Defender's Office, I would like to submit the following comments for consideration by the Court:

Let me first say that we have studied the proposed draft submitted by the joint efforts of TBA, TACDL, and the District Public Defenders Conference, and generally speaking support their proposed new rule and the creation of the "Tennessee Indigent Representation Services" as an independent body. However, we make the following comments concerning both the Supreme Court's proposed Rule and the joint draft:

1. In § 1, 4(A) does the reference to "district public defender" include the two public defenders offices not in the District Public Defender Conference?

1. In § 1, 5(A) we believe it is important to specifically advise when a case has been "concluded." Is a writ of certiorari to the U.S. Supreme Court required?

2. In § 2, (e) we believe that "trial by jury" should be added as a factor indicating that the matter is worthy of additional compensation.

3. In § 3, (a) while we agree that it is necessary to begin preparing for a capital case at the earliest possible opportunity, as a compromise, we would suggest considering an amendment to Tenn. R. Crim. P. 12.3(b) to require notice to seek the death penalty within 30 days of arraignment in Criminal/Circuit Court.

4. In § 3, (c) we prefer to have separate qualifying conditions for "lead" and co-counsel" as suggested by the Supreme Court's proposal. However, we believe that "lead counsel" should have at least five years experience and that the

required training be conducted within a specified period of time. As for (c)(4), we believe that these skills are difficult to measure and that (c)(4)(C) is impossible to achieve without prior death penalty experience.

5. In § 5, (b) the rule should clarify "where" the motion is to be filed.

6. In § 5, (b)(3) the language requiring specific facts suggesting the investigation will result in admissible evidence is too strict.

7. In § 5, (c) "significant issue in the defense at trial" should be clarified to include the mitigation phase of a capital case.

8. In § 5, (d) we believe that there should be some mechanism for exceeding the rates specified when it is not possible to obtain an expert at the stated rate. As far as the rates, they are too low. Psychologists should be raised to $175, etc. In addition, counsel should not be required to seek the lowest bidder.

9. In § 5, (e) there should be some requirement that the Director take prompt action on the request; perhaps within a specified period of time.

Thank you for your consideration.

Sincerely,

Robert Wilson Jones

Robert Wilson Jones
Chief Shelby County Public Defender

RECEIVED
JAN 26 2004
By

Susan McBride
Mitigation Specialist
1619 Shelby Ave
Nashville, TN 37206

January 21, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee:

The part of the Rule 13 proposed changes that disturbs me most is the way it will impact how defense attorneys and mitigation specialists in death penalty cases approach the process of gathering sensitive information from emotionally damaged people. As difficult as this process is, my job, as is the job of any mitigation specialist, is to retrieve as much information as possible about a client's life history since the judge or jury must hear and make sense of the course of his life. This requires me to build a relationship of trust with the client as well as witnesses who can report critical events of his life. I am charged with the task of persuading the client's family and other witnesses to his life to speak with me honestly about him.

It takes many visits to gain trust and open the door to painful, shaming family secrets within a cloak of safety. One highly significant example of the sensitivity of my task involves the area of sex abuse -- which is almost a given in the lives of most of our clients and/or their family members. There is no way a stranger should approach a sexually abused person over the phone and ask them about one of the darkest times of their life no matter how much training they have. It is inappropriate and cruel. Given that we open wounds that are likely festered from years of trauma, approaching a person about this awful time in their life has to be accompanied with great care and follow up. Our gathering of information has to be done responsibly. I expect this of myself and my fellow mitigation specialists, capital defense attorneys, police officers, child welfare workers, and any others whose duties involve investigating this issue.

When appropriately trained police officers and child protection workers

investigate allegations of sexual abuse and especially when they interview victims of sexual abuse, I expect them to approach the issue with sensitivity. Otherwise, the process can trigger a traumatic reaction in a situation absent of therapeutic remedies

In my experience, appropriate investigative techniques involve several visits to those who have been abused or who bear the hallmarks of abuse[1] so that they can become comfortable with talking about an event which may be extremely traumatic and potentially humiliating[2]. Victims of sexual abuse often blame themselves for the abuse and this is one of the difficulties presenting a barrier to discovery of truthful, critical, specific information whether it is regarding the factual details of a criminal investigation of sexual abuse of the mitigation investigation of a capital defendant.

If, as is common, sexual abuse is a part of the social history of a client or his family, my next job is to document that through evidence which is admissible in court and is persuasive. This often means that I need to get corroboration of the events in question by seeking out individuals who suffered similarly at the hands of the abuser, by eliciting precise details which will accurately and completely depict the nature of the abuse, and by attempting to confirm the information with the client, who if abused himself, will create barriers as described above compounded with the stress of incarceration and a potential or pending execution.

What I fear in the proposed Rule 13 changes and what is currently happening with the denial of funding requests in capital cases is a lack of understanding of the practicalities and sensitive nature of mitigation investigation. To be as concrete as possible about the effects of this: imagine you were a mitigation investigator in a capital case and you were asked to do phone interviews of your client's sister and some initial witnesses had suggested that her father had molested her and her mother knew that this occurred. How would you

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[1]Appropriately trained mitigation specialists, as are trained child sexual abuse investigators, are aware of indications from social history, interview clues, and behavior patterns that a person may be a victim, perpetrator, or both.

[2]In using the term " humiliating", I describe the emotional perception of the person in question and not my (or a judge or jury's) perception. There is a unique aspect to sexual crimes in that victims may feel stigmatized, violated, or even guilty. Overcoming the barriers placed by these feelings is a difficult but essential task for the mitigation specialist.

speak with her on the telephone and expect her to react? What if you were allowed to travel to see her in person only one time? Would you expect her to open up and tell you everything the first time you met her? Eliciting these tough, frightening, horrible details and images – which no one wants to talk about it, would rather have buried, which in their mind are painful, embarrassing, or for some even damning – are the routine responsibility of mitigation specialists.

There are a lot of other things mitigation specialists do but since the task of documenting human tragedy is the part that is most crucial, I would like the Court to consider how the proposed rule changes and current AOC practice can harm not only the work of mitigation specialists in Tennessee, but also the real people involved in these cases.

Please reconsider the notion of shortchanging the already victimized people I meet by requiring me to treat them with any less regard than a trained investigator working for the prosecution arm of the state would.

Sincerely,

Susan McBride

Susan McBride