CIRCUIT COURT

STATE OF TENNESSEE

TENTH JUDICIAL DISTRICT

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March 30, 2004

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Clerk of the Courts

The Honorable Frank F. Drowota, III
Chief Justice Tennessee Supreme Court
401 Seventh Ave, N., Ste. # 318
Supreme Court Building
Nashville, Tennessee 37219-1407

RE: Recommendations of the Judicial Rule 13 Committee

Dear Chief Drowota:

Enclosed herewith you will find the recommendations of the Judicial Rule 13 Committee.

It is my understanding, based on our earlier conversation, that you will pass this information to all appropriate parties who are concerned with this issue.

Our committee also considered the issue of how to handle conflicts within the public defender's office, but for now we have deferred this question to enable us to obtain further information that will assist us in addressing this problem.

Should you need further information concerning these recommendations, please feel free to contact me.

Very truly yours,

Carroll L. Ross

CARROLL L. ROSS
Chairman,
Judicial Rule 13 Committee

/clr

cc: Connie Clark, AOC
All Members of Judicial Rule 13 Committee

RECOMMENDATIONS OF THE JUDICIAL RULE 13 COMMITTEE

1. The Judicial Rule 13 Committee opposes the creation of a Commission to determine indigent fees.

2. The Judicial Rule 13 Committee opposes all ex parte hearings unless such hearings are constitutionally mandated.

3. The Judicial Rule 13 Committee recommends that the Public Defender's Office shall be appointed in all cases unless, in the sound discretion of the trial judge, appointment of other counsel is necessary.

4. The Judicial Rule 13 Committee is in favor of reasonable caps on over-all amounts being paid for expert and investigative services.

5. The Judicial Rule 13 Committee takes a position that all elected Public Defenders and their assistants who are otherwise qualified should be required to complete all appropriate certification procedures that would enable them to handle capital cases.

6. The Judicial Rule 13 Committee is in favor of reconsidering the certification requirements to allow attorneys who have participated in the trial of a capital cases either as a prosecutor or as a judge to be certified as qualified to defend capital cases.

7. The Judicial Rule 13 Committee recommends that there be a 150-mile-radius exception to the instate or contiguous state rule included in §5(b)(2) of proposed Rule 13.

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April 23, 2004

The Honorable Frank F. Drowota, III
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RE: IN RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13
M2003-02181-SC-RL1-RL

Dear Chief Justice Drowota:

Thank you for providing the Office of the Post-Conviction Defender with a copy of the Recommendations of the Judicial Rule 13 Committee. Although I have participated in the response being sent to you on behalf of the Joint Commentors, I will take this opportunity to reply separately to Recommendations 5 and 6 which apply only to death penalty cases and Recommendation 3 to the extent that it would impact death penalty representation.

Recommendation 5 has particular application only to public defender offices and I understand that the Public Defenders' Conference will specifically reply to the impact that such a rule will have on the Public Defender system. However, Recommendation 5, along with 6, if implemented, would adversely effect the quality of the representation of indigent defendants in capital cases. It is this potential impact of Recommendations 5 and 6 to which I will address my reply.

As I set out below, requiring that all public defenders and their assistants must complete the certification for qualification to represent indigent defendants in death penalty cases, and requiring that the local public defender be appointed in all death penalty cases would be a step backward from the goals of providing quality representation of indigent defendants in death penalty cases. It appears that the motivation for these recommendations of the Judicial Rule 13 Committee is to reduce cost. As pointed out by the Joint Commentors, this may be a false savings. As has been noted by Prof. Eric Freedman, reporter for the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, February 2003, (Guidelines), "an ineluctable fact" is that "[t]he death penalty is expensive ... [A] state's decision to have a criminal justice system in which death is available as a sanction necessarily entails substantially higher costs than the contrary decision

does."[1] The Court in rewriting Rule 13 must not weaken an already broken and unreliable system for providing representation of indigent defendants in death penalty cases. It is imperative that this Court, through its rule making power, establish the high standards for representation that are required by the American Bar Association and which have been found to be the threshold constitutional requirement by the United States Supreme Court (*Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)) and the United States Court of Appeals for the Sixth Circuit (*Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)). The Commentary to Guideline 1.1 specifically notes that the *ABA Guidelines* are considered the "practice norms and constitutional requirement" and "are not aspirational," but "embody the current consensus about what is required to provide effective defense representation in capital cases." I would encourage the Court to establish the necessary foundation for provision of counsel to meet this evolving constitutional standard. It is the role of the legislature to weigh the cost versus benefits of the death penalty, while it is the duty of the Court to set out the requirements for constitutional representation.

Appointing the public defender in all cases would be counter to providing high quality defense in death penalty cases both due to the work load imposed upon public defenders and because not all public defenders necessarily have the requisite zeal to provide representation in death penalty cases. Guideline 5.1 admonishes that a key qualification for defense counsel in capital cases is that he or she has "demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases." The Commentary to Guideline 1.1, notes: "Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master." While the vast majority of public defenders and assistant public defenders maintain the commitment and ability to fully and ethically handle their duties in non-capital cases, not all have the necessary time or the desire to meet the uniquely demanding requirements of representation in capital cases. In fact, many might find it necessary to decline capital case representation in order to meet ethical demands of their representation in non-capital cases.

I would note staff members of this office have repeatedly been informed by public defender attorneys that their workloads have prevented them from committing the time they view as necessary in capital cases. If my own experience as a state court public defender in Kentucky is typical, then I know first hand that with a caseload requiring felony trials in excess of one per month, it is impossible to provide adequate representation in the attorney's regular caseload let alone the death penalty case that is added on top.

I am very concerned with Recommendation 6, which suggests that the requirement for experience in the defense of capital cases be met by participating in capital cases as a judge or prosecutor. While some former judges and former prosecutors may be prepared to provide high quality representation to indigent defendants in capital cases, in all due respect to the courts and to prosecutors neither observing a capital case from the bench nor trying one as a prosecutor provides much insight into death penalty defense. As one small example, neither function is concerned with obtaining mitigation evidence from a defendant and the likely dysfunctional family of a defendant. Depending on the quality of defense counsel, participating as a prosecutor or judge in a capital case

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[1] Freedman, *Introduction*, 31 Hofstra L. Rev. 903 (2003)

does not ensure that the lawyer would even have witnessed a properly prepared capital case. Essentially, this recommended change does nothing other than add yet another quantitative requirement that has no relationship to the high quality representation that is constitutionally required in death penalty cases.

I recommend following the admonitions of the *ABA Guidelines* and moving away from quantitative requirements for counsel. As the Commentary to Guideline 5.1 notes:

> 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 from 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.
>
> There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases. Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice. 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.
>
> In order to make maximum use of the available resources in the legal community overall, the 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 a size and aggregate level of experience as to be able to function effectively.

Under this suggested qualitative rather than quantitative standard, former prosecutors and judges may well qualify to participate as a member of the defense team. However, the reason an individual will qualify is not because he or she observed a capital defense as a judge or prosecutor. Rather it is because that former judge or prosecutor possesses unique qualities satisfying the standard of having the ability and essential will to provide zealous and effective representation.

I recommend the Court set forth requirements that mirror those of Guideline 5.1:

> 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 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 investigatio n, 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.

It is evident that such requirements are not self-effectuating or self-implementing. The creation and operation of such a panel of qualified lawyers meeting these standards requires a body capable of making the evaluations needed to place all qualified attorneys on the panel, monitor the skills and performance of panel members and assign appropriate panel members to cases. Of the current proposals only the creation of the Tennessee Indigent Representation System could operate

such a panel.

As the Post-Conviction Defender whose agency is responsible for reviewing the work of counsel in most of the cases in which a death penalty is returned in Tennessee, I can unequivocally state that many death sentenced inmates did not receive the high quality representation required to meet the standards set out in the *ABA Guidelines*. If Tennessee is going to continue to maintain the death penalty as a possible punishment for murder, it is imperative, that indigent defendants facing the death penalty receive the high quality counsel and services outlined in the *ABA Guidelines*. I implore the Court to reflect and encourage the implementation of the required high standards in its revision to Rule 13.

Respectfully,

Donald E. Dawson

cc: Members of the Court
The Honorable Carroll Ross, Chair, Judicial Rule 13 Committee
William P. Redick, Jr., Esquire
Allan F. Ramsaur, Executive Director, Tennessee Bar Association
James W. Kirby, Executive Director, Tennessee District Attorney General's Conference
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April 23, 2004

VIA HAND DELIVERY

The Honorable Frank F. Drowota, III
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401 7th Avenue N., Ste 318
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RE: IN RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13
M2003-02181-SC-RL1-RL

Dear Chief Justice Drowota:

On behalf of the Joint Commentors in this matter, we appreciate the Court providing us with a copy of the comment filed by the Judicial Rule 13 Committee ("Committee"). We particularly would like to express our gratitude for the careful, inclusive manner in which the Court has proceeded in this important matter.

The Joint Commentors generally concur with comments numbered four and seven made by the Judicial Rule 13 Committee. Comment number four indicates that the Committee favors reasonable caps on fees paid for expert and investigative services. As indicated in our comment and accompanying exhibits, the Joint Commentors believe that reasonable fees could be set consistent with providing adequate expert and investigative services for the accused. The Joint Commentors assert that the Court should not be put into the position of constantly monitoring fees paid and the adequacy of those fees. The best method to be employed to address this task is the establishment of Tennessee Indigent Representation Services ("TIRS"). This office can study and monitor the adequacy of the fees and recommend appropriate action to the commission. The commission will be charged with administering expert and investigative services to be provided.

While the Joint Commentors share the concern the Judicial Rule 13 Committee, expressed in comment number seven, regarding the in-state

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or contiguous state rule for expert and investigative services, we would go further as we do not believe the issue of cost is addressed by establishing a geographic limitation on the selection of defense experts. The Joint Commentors submit that the proper focus must be on providing indigent defendants with the expertise necessary to afford those defendants with a fair trial while remaining cognizant of avoiding unnecessary cost. In our view, geographical location limitations do not serve either purpose. We would observe that there is little logic to a Bristol, Tennessee court rejecting a Bristol, Virginia (or Charleston, West Virginia), expert in favor of a Memphis, Tennessee, expert on the ground that the expert is out-of-state (or not in a contiguous state). Similarly, it is likely to cost more to travel from northern Kentucky to middle or west Tennessee than from California. The Joint Commentors submit that the creation of the proposed Tennessee Indigent Representation Services will best serve both goals of providing effective, expert assistance for the attorneys of indigent defendants and maintaining control of cost.

While it is difficult to discern the exact meaning of some of the other comments filed, the Joint Commentors would make the following points with respect to comments one, two, three, five and six.

If recommendation number one means that the Committee recommends that the Court not require, at this time, that Tennessee Indigent Representation Services ("TIRS") set attorneys fees, the Joint Commentors would concur with that recommendation. The commission as established through Exhibit "A" would not set the fees but would make recommendations in the future with respect to those fees.

On the other hand, if the Committee's recommendation is in opposition to the establishment of TIRS itself, the Joint Commentors would respectfully disagree as we believe that the proposal offers the best chance to create an effective, efficient, uniform, expert and conflict-free systems for the administration of indigent representation in criminal, juvenile, post-conviction and other matters.

Comment number two expresses displeasure with ex parte hearings except as constitutionally mandated. If trial judges are involved in requests for experts and investigators, we believe the requirement for the establishment of particularized need in all requests for experts and investigators necessitates ex parte hearings in order to protect client confidences and attorney work product embodied in the right to the effective assistance of counsel. It continues to be the position of the Joint Commentators that TIRS adequately addresses the concerns of prosecutors, defense counsel and trial judges with ex parte hearings before the trial judge who will ultimately hear the case.

In comment number three, the Committee urges that public defenders be appointed in all cases under Rule 13. The Joint Commentors wish to point out that such a requirement would be inconsistent with the statute establishing the Office of the District Public Defender and the funding provided for these offices by the General Assembly. TCA § 8-14-201 et seq. In addition, Rule 13 addresses representation not only for the indigent criminally accused but also for juveniles who may be charged as unruly, matters involving dependency and neglect, instances which could lead to termination of parental rights and post-conviction matters. The Joint Commentors respectfully submit that it is the responsibility of the Court to provide

guidance for the exercise of sound discretion by the trial bench in appointing counsel under a Tennessee Supreme Court Rule. Such discretion should be guided by provisions like that found in Section 9(c) of Exhibit A or Section (1)(d) and (2)(E) of Exhibit B of the Joint Commentors' submissions.

Comments numbered five and six address the standards for capital case representation. The Joint Commentors dealt extensively and intensely with these standards. The provisions dealing with capital case representation were significantly enhanced by participation both by the prosecutors and defense lawyers involved. Respectfully, the Joint Commentors assert that there are no shortcuts to effective death penalty representation. Proceeding in the manner suggested by the Committee runs the risk of exacerbating the difficulties being encountered in effective capital case administration.

Thank you for the opportunity to be heard on these matters.

Sincerely,

Allan F. Ramsaur
Executive Director
For the Joint Commentors

Cc:
Members of the Court (VIA Hand Delivery and FedEx)
The Honorable Carroll Ross, Chair, Judicial Rule 13 Committee
John R. Tarpley, President, Tennessee Bar Association
Gail Vaughn Ashworth, General Counsel, Tennessee Bar Association
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April 26, 2004

The Honorable Frank F. Drowota, III
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RE: PROPOSED AMENDMENT TO SUPREME COURT RULE 13
M2003-02181-SC-RLRL

Dear Chief Justice Drowota:

As one of the Joint Commentators on Rule 13, the Tennessee District Public Defenders Conference is grateful to the Court for providing the Conference with a copy of the comments filed by the Judicial Rule 13 Committee. While all of the comments impact public defenders as a "stakeholder" in the criminal justice system, items three, five and six have significant impact. In that light the Conference offers the following to the Court as it continues its careful and inclusive consideration of this issue.

Item three apparently recommends a significant expansion of the caseload of the office of the District Public Defenders. Presently under the Tennessee Code, District Public Defenders are appointed by courts to represent indigent persons (adults and delinquent juveniles) in proceedings involving the possible deprivation of liberty and in any habeas corpus or other post-conviction proceeding. Rule 13 is an all encompassing rule concerning the appointment of counsel for all indigent persons, to include matters of dependency and neglect and parental termination. The Judicial Rule 13 Committee Comment would require statutory expansion of the duties of district public defenders and their assistants and surely contemplates significant increases in funding for the additional staff that such expansion would require.

The Conference is also concerned that sufficient guidance be given to appointing courts for the exercise of sound discretion to ensure professional and ethical considerations in representation of multiple defendants, conflicts of interest or attorney-client conflicts.

Item five appears to propose that district public defenders handle all capital cases. Guideline 4.1 of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases state that the defense team

should consist of no fewer than two (2) qualified attorneys, an investigator and a mitigation specialist. The appointing of the district public defender or private attorneys in capital cases should not create an excessive workload that would interfere with the rendering of quality representation or lead to the breach of professional obligations. Concern only that district public defenders are "certified" to handle capital cases does not result in the wide distribution of assignment of capital cases proposed by the guidelines, and thus the appointment of the district public defender in all capital cases only ensures excessive caseloads and does nothing to recognize the indigent person's right to effective assistance of counsel.

Item six creates concern similar to those in the previous paragraph. Expansion of quality training to ensure competent assistant of counsel should be the goal of Rule 13. Such goal is not obtainable by the suggested reconsideration of certification requirements. The Conference is confident that there are numerous attorneys that have participated in the trial of capital cases as a prosecutor or judge who would be qualified as capital case defense attorneys, but only if they have the desire to render zealous representation and have the training contemplated by Guideline 8.1 of the American Bar Association, Guidelines for the Appointment and Performance for Defense Counsel in Death Penalty Cases.

The Conference adopts the comments furnished the Court by the Joint Commentators as to the other items of the Recommendation of the Judicial Rule 13 Committee.

Respectfully submitted,

John W. Henderson

John H. Henderson
President
District Public Defenders Conference